Magdalena Czajkowska

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Magdalena Czajkowska
Jagiellonian University

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PRELIMINARY COMMENTS

For legal standards to be interpreted correctly, the primary principles of law must be known. In the case at issue, these are the principles of the Act of 29 January 2004 – Public Procurement Law [Journal of Polish State Laws of 2010, No. 113, item 759 as amended, hereinafter PPL]. The principles set out the direction for the process of the interpretation of the provisions of the law and they indicate the directions for the application of the law and, in particular, the ways of making use of a variety of the rights that contracting authorities are entitled to [Wronkowska, Ziembiński, 2001: p. 188; Wiśniewski, 2008: p. 37].

The substance and intention of the standardisation (*ratio legis*) of the principles of the law lies in indicating the correct direction for interpretation of legal norms because, in keeping with the rules of systemic interpretation, all provisions of the law must be attributed such a meaning that can be recognised as the most compliant with the principles of the law [Żuławska, 1999: p. 29; Wiśniewski, 2008, p: 37].

The principles for the award of public procurement were laid down in Chapter 2 of the Public Procurement Law and they provide the foundation for the public procurement system. These principles are also present in a number of provisions of the act and they influence almost all actions of for participants in the proceedings. On for one hand, the principles are meant to guarantee tenderers equal treatment and access to public contracts based on fair competition principles while on the other hand they are to guarantee a contracting authority the selection of a tenderer that offers the most advantageous tender conditions for the realisation of the subject-matter of the order. The fundamental principles contained in Articles 7–10 of the PPL are: the principle of fair competition, the principle of equal treatment of tenderers, the principle of transparency, impartiality and objectivism, the principle of written form, the principle of the Polish language, the principle of awarding the contract to the tenderer chosen in accordance with the provisions of the PPL, the primacy of the procedures of an open and restricted tendering as the basic procedures for awarding contracts. That it is not a closed catalogue of the principles of the public procurement law when taking into consideration the fact that, as a rule, the principles of the law are constructed from provisions [Wiśniewski, 2008, p: 37–38]. The same authors point to the principles not specifically indicated in the Public Procurement Law – the principle of the instigation of

the proceedings solely with the view of the award of the procurement, the principle of the protection of economic operators and the principle of compliance of the proceedings with the provisions of the law [Olszewska, Rokicki, 2010: p. 15–16; Szostak, 2010].

The contracting authority is obligated to adhere to the principles at issue – because a violation thereof causes grave consequences, including the invalidity of public procurement contracts [Verdict of the Regional Court in Krakow of 8 April 2009, XII Ga 59/09].

THE PRINCIPLE OF FAIR COMPETITION

Fair competition features among the fundamental principles that define the public procurement system and it is addressed to all participants in the proceedings for the award of a public procurement. The principle of fair competition is the source of the conviction that it is precisely a free market of enterprises competing with one another in order to obtain a public procurement that gives the guarantee of reaching the maximum effectiveness of the management of public funds, preventing abuse and promoting solid and honest tenderers [Szczepański, 2010]. The legislature did not define the notion of *fair competition* in the Public Procurement Law [Winiarz, 2009: p. 277] although the law treats the phenomenon of *competition* as belonging, first and foremost, in the area of the interest of economics. In keeping with the classical jurisprudential formula, competition is "rivalry of at least two entities striving to reach the same objective, accompanied by simultaneous actions aimed at gaining the advantage" [Verdict of the Supreme Court of 20 May 1991, II CR 445/90]. In turn, the literature defines competition as a process of rivalry between unrelated entrepreneurs, which serves the purpose of attaining similar economic objectives by means of sales of goods and services thus leading to an increase in production or sales, a decrease in prices, technological progress and meeting consumer needs [Gronowski, 1999: p. 28 et seq.; Szwaja, 2006: p. 6; Kozłowska-Kalisz, 2006: p. 139–146]. The reference to the etymology of the word *competition*, which in Latin (*concurro)* means *to come in contact, to encounter*, *to fight*, *to run together*, is evident here. It is accompanied by a tendency to identify the notion of competition with the very act of competing, which, in the broadest general terms, can be defined as entrepreneurs inter-reacting on the market. The notion of competition, however, does not refer simply to the process of entrepreneurs' rivalry on the market, but also to the very structure of this market, meant to facilitate the competition [Gronowski, 1999: p. 31]. Competition between entrepreneurs takes place on a specific market, on the so-called relevant market. Therefore, competition is always related to the existence of a certain market, i.e. a market with defined limits [Kohutek, M. Sieradzka, 2008]. This aspect of competition, also defined as the degree of market competitiveness depends on numerous factors, such as the economic strength of entrepreneurs, market entry barriers (the threat of new potential competitors entering the market), the intensity of rivalry between the competitors already operating on the market, the degree of concentration, the economic strength of suppliers and the bargaining power of consumers [Gronowski, 1999: p. 31]. However, such a market can function correctly only when the conditions in which competition can arise and develop are ensured. The nature of competition is the competition between entrepreneurs aimed at gaining the market advantage that will allow them to achieve the maximum economic advantage from the sales of products and services and to maximally satisfy

consumers' needs at the lowest price. This is decided by the free and unimpeded operation of market mechanisms, along with a guarantee of the possibility to freely adopt decisions at one's discretion [Decision of the Branch Office of the Office of Competition and Consumer Protection in Katowice of 31 December 2008, No. RKT-114/2008].

In Article 7 item 1, the Public Procurement Law imposes an obligation to prepare and conduct contract award procedures in a manner ensuring fair competition as well as equal treatment of tenderers on the contracting authority. Any action or omission of the contracting authority should be determined by the guarantee of fair competition. Both the command to adhere to this principle as well as the ban on any violation thereof pertain to each stage of the proceedings, since the PPL imposes the obligation of observance of fair competition in the course of preparing the proceedings (Articles 22–38 of the PPL), conducting the proceedings (Articles 39–81 of the PPL) as well as selecting the most advantageous tender by the contracting authority (Article 82–95 PPL)[1]. The obligation to adhere to the fair competition principle finds its continuation in a number of provisions of the Public Procurement Law. Among others, in the principles related to the description of the subject-matter of the contract in compliance with which the contracting authority must not specify the subject-matter of the contract in a manner which could impede fair competition (Article 29 item 2 of the PPL). Preferential treatment by the contracting authority that is afforded in the description of the subject-matter of the contract to one manufacturer constitutes an activity that would impede fair competition in a fundamental way [Verdict of the Team of Arbitrators of 21 August 2002, UZP/ZO/0-1005/02]. The description of the subject-matter of the contract must not point to a specific tenderer or product [Verdict of the Team of Arbitrators of 11 February 2005, UZP/ZO/0-225/05]. Nonetheless, the subject-matter of the contract should be described according to the contracting authority's needs while in relation thereto the contracting authority is under no obligation to adapt specifications to technical conditions that are convenient for specific tenderers by lowering technical requirements in relation to their needs. Adoption of a thesis to the contrary would necessitate continuous changes of requirements and, in consequence, admit into the proceedings tenderers offering services or deliveries of an inadequate quality (planned earlier). An attempt at defining the technical requirements contained in the specification by tenderers and not by the contracting authority leads to an imbalance between specific tenderers and, in consequence, to a violation of the Public Procurement Law [Kurowska et alia, 2006: p. 71].

DETAILED REQUIREMENTS OF THE PUBLIC PROCUREMENT LAW IN THE SCOPE OF THE OBSERVANCE OF THE FAIR COMPETITION PRINCIPLE IN THE DESCRIPTION OF THE SUBJECT-MATTER OF THE CONTRACT

Under Article 2 of Directive 2004/18 of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [OJ L 134, 30.4.2004, p. 114], which establishes the principles for the

[1] In this regard, Article 22 item 2 (conditions of participation in the proceedings), Article 29 item 2 and 3 (subject-matter of the contract), Article 89 item 1 point 3–4 (rejection of the offer) are of particular significance.

award of the contract, contracting authorities must guarantee the equal and non-discriminatory treatment of tenderers and they must act in a transparent manner. These principles are of paramount significance in relation to technical specifications and the description of the subject-matter of the contract. Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition. They must be sufficiently precise to allow tenderers to identify the subject-matter of the order while also allowing the contracting authorities to award procurement. Furthermore, they should be clearly defined so that all tenderers know what requirements defined by the contracting authorities must be complied with (Article 23 of Directive 2004/18).

In observing the principle of fair competition (as well as the principle of equality), the stage of the formulation of the description of the subject-matter of the contract is of key importance. This was expressed by the Polish legislature, which in a separate provision [Letter of the Public Procurement Office of 7 January 2000, no signature, S. Podat. 2003, No. 12, item 19] highlighted the ban on describing the subject-matter of the order in a manner which could impede fair competition (Article 29 item 2 of the PPL). Such a ban is violated when, in describing the subject-matter of a contract, the contracting authority uses markings or parameters that indicate a specific tenderer or a specific product, thus acting against the principle of objectivism and fair competition. Following this, it is indicated that the subject-matter of the contract should be described by providing its technical and quality characteristics using unambiguous phrases, with reference to commonly available standards and as far as possible with the provision of numerical values characterising the subject-matter of the order with the view of the maximum objectification of the description [Strzelczyk, Chojecka, 2004: p. 21]. On the other hand, rigorous determination of the requirements to be met by the subject-matter of the contract may also constitute a violation of the principle of fair competition. Not always, however, will a detailed description of the subject-matter of the contract lead to a violation of the principle of fair competition as was indicated by the stance of the National Appeal Chamber which said "that it is the contracting authority's duty to determine the subject-matter of the contract in the terms of reference in an objective manner, with the observance of the Public Procurement Law defining the manner of description of the subject-matter of the contract and observance of the principles of fair competition and of equal treatment of tenderers. However, this does not signify the requirement for the determination of the subject-matter of the contract in a manner which would enable all tenderers operating in a given branch to submit their offers. It needs to be emphasised that it is the contracting authority that defines the subject-matter of the contract" [Verdict of the National Appeal Chamber of 13 March 2009, KIO/UZP 239/09]. When conducting the proceedings for the awarding of a public contract in the technical specifications, the contracting authority defines the technical requirements for delivered goods – according to their needs and knowledge [Verdict of the Regional Court in Warsaw of 9 September 2003, V Ca 1477/03]. Defining high requirements pertaining to the subject-matter of the contract which are possible to be met by tenderers and which remain in relation to the contracting authority's intended goal does not thwart the principles of fair competition. This is so because the objective of the standardisation of the subject-matter of the contract is to render satisfaction of the contracting authority's substantiated needs possible under the conditions of competition while not enabling all tenderers operating on the given market segment to take part in the

proceedings [Verdict of the National Appeal Chamber of 29 April 2011, KIO 821/11]. In the context at issue, it is possible to adapt the phrase "that the formalism of the proceedings for the award of a public procurement does not constitute a goal in itself …" [Verdict of the Regional Court in Gliwice of 23 February 2007, X Ga 23/07] and, in particular, it does not exclude proficient and rational purchases within the frames of public procurement [Verdict of the National Appeal Chamber of 3 February 2009, KIO/UZP 91/09 and 92/09]. Hence, the subject-matter of the contract should be precisely 'defined' and 'described'. The description of the subject-matter of the contract not only allows for the identification of this object, but it also plays a normative role as a component of the technical specifications [Verdict of the Regional Court in Katowice z 17 March 2009, XIX Ga 72/08].

The application of the objective technical and quality characteristics of the subject-matter of the contract or, in the situation of, among others, the selection of unconventional solutions aimed at satisfying the individualised needs of the contracting authority, the purpose of the functional requirements (Article 30 of the PPL) is to maintain fair competition [Judgement of the Main Ruling Committee of 25 September 2006, DF/GKO-4900-49/62/RN-26/06/1585]. The technical and quality parameters of the subject-matter of the contract ought to be specified with the adherence to Polish Standards transposing the harmonised European standards or the standards of other Member States of the European Economic Area transposing these standards. Further, the provisions of Article 30 items 1–3 of the PPL require the subject-matter of the contract to be described with adherence to standards, approvals, specifications and other technical systems of reference laid down by standardisation bodies[2], in a specific order of their application.

Taking advantage of the standards mentioned in the Article at issue is useful, first and foremost, in the drawing up of technical specifications since such standards are, by assumption, unambiguous and are non-discriminatory in character. It is worth drawing attention to the fact that the contracting authority is to provide a description of the subject-matter of the contract by observing Polish Standards transposing the European standards and thus in determining the minimum or maximum requirements pertaining to the subject-matter of the contract they are only of auxiliary character. Hence, the subject-matter of the contract does not have to be described strictly with the use of standards; it can have standards higher than those following from Polish standards (Article 30 item 6 of the PPL). In the substantiation of the verdict of 9 November 2005, the Regional Court in Lublin indicated that "it is of relevance for the subject-matter of the contract to be described in a neutral manner that poses no obstacles to fair competition. This means it is necessary to eliminate from the description of the subject-mat-

[2] A frequently encountered error comes about when describing the subject-matter of a contract by indicating specific technical parameters that can be met by only one product/manufacturer. In the resolution of the National Appeal Chamber of 25 May 2010, KIO/KD 36/10, we read that 'the contracting authority in describing the subject-matter of the contract in the terms of reference by pointing to a specific product, i.e. oils they manufacture […], despite the possibility to describe the subject-matter of the contract in an unambiguous and exhaustive manner using sufficiently precise and understandable wording and without allowing for the submission of equivalent tenders, violated the regulation of Article 29 item 2 and 3 of the act and Article 7 item 1 of the act, by limiting the circle of potential economic operators who were able to apply for the granting of the procurement who offer products of other brands". Such a description of the subject is undoubtedly faulty since it favours specific economic operators.

ter of the contract all phrases which could point to a specific tenderer or those which would eliminate specific tenderers by making it impossible for them to submit their tenders or those which would result in a situation where one of the interested tenderers would be more privileged than the others" [Verdict of the Regional Court in Lublin of 9 November 2005, II Ca 587/05]. The National Appeal Chamber developed the thesis above in the verdict of 20 March 2009 in which it remarked that "from the case law of the courts, courts of arbitration and the National Appeal Chamber, it follows that impeding fair competition or having the a possibility to impede fair competition occurs describing the subject-matter of the contract in a manner which eliminates almost all potential producers from the proceedings on the awarding of a public procurement" [Verdict of the National Appeal Chamber of 20 March 2009, KIO/UZP 285/09, 300/09, 303/09].

On the other hand, it is difficult to find that the description of the subject-matter of a contract drawn up using more generally undefined notions such as 'original', 'non-regenerated', 'compliant with the device manufacturer guidelines', 'authentic' or 'non-falsified' meets the requirements of correctness. Despite that, in the actions of the contracting authority that drew such a description, the Team of Arbitrators did not detect any attributes of the act of unfair competition, indicating that this description is 'simply inaccurate and imprecise' [Verdict of the Team of Arbitrators of 19 January 2006, UZP/ZO/0-101/06]. The lack of any specific indication of the size of the order must also be recognised as a failure to comply with the requirements pertaining to the description of the subject-matter of a contract. An imprecise scope of the order may discourage potential tenderers; however, on the other hand, it may cause an increase in the asking prices that are offered. However, it is proper to highlight here that in each case, an examination and assessment of a violation of dispositions of Article 29 item 2 of the PPL must not be analysed separately from a specific factual status and from the contracting authority's substantiation for a rigorous description of the subject-matter of the contract or in order to narrow down the circle of potential tenderers.

Recapitulating, from the quoted provisions of the Public Procurement Law, it follows that the subject-matter of a contract ought to be described in a neutral manner which does not impede fair competition. The necessity to eliminate from the description of the subject-matter of the contract all phrases which could point to a specific tenderer or which would eliminate specific tenderers by rendering it difficult for them to submit their offers or which would cause a situation where one of the interested tenderers would be more privileged than the others should be adopted as established jurisprudence [Verdict of the Regional Court in Lublin of 9 November 2005, II Ca 587/05; Verdict of the Regional Court in Bydgoszcz of 25 January 2006, II Ca 693/05]. Hence, the contracting authority ought to avoid any phrases or parameters which would point to a specific choice or a specific tenderer. This is confirmed in a verdict of the National Appeal Chamber of 20 January 2009, (KIO/UZP 2/09) in which the Chamber expressly indicated that 'the contracting authority's freedom in providing the description of the subject-matter of the contract must not lead to an unsubstantiated limitation of the circle of potential tenderers. In a situation where the requirements related to the contracting authority's needs it has to be able to limit the circle of potential tenderers, the contracting authority should demonstrate exclusively that the product of the parameters determined thereby enables them to achieve the assumed objective in the proceedings for the award of a public contract. It is prohibited to formulate the terms and

conditions of the proceedings which would render free access to the proceedings with the view of submitting a tender impossible'. However, in another verdict, the Chamber stated that 'the fair competition principle is violated by an excessively rigorous determination of the requirements related to the subject-matter of the contract if it is not substantiated by the contracting authority's needs and, at the same time, it puts limitations on the circle of tenderers able to deliver the order' [Verdict of the National Appeal Chamber of 20 November 2008, KIO/UZP 1273/08]· Moreover, it is proper to add that 'Article 29 item 2 of the PPL can be violated in the situation where there is only a possibility of impending fair competition' [Verdict of the National Appeal Chamber of 18 November 2008, KIO/UZP 1240/08].

DEFINITION OF THE NOTION 'OR EQUIVALENT' IN THE PUBLIC PROCUREMENT LAW

In the PPL, the legislature formulates a ban, which is separate from the ban on describing the subject-matter of the contract in a manner which could impede fair competition (Article 29 item 2 of the PPL), on describing the subject-matter of the contract by any indication of trademarks, patents or origin unless it is substantiated by the specificity of the subject-matter of the contract and the contracting authority is unable to describe this subject using sufficient precision and such an indication is accompanied by words 'or equivalent' (Article 29 item 3 PPL). Using references to exclusive industrial property rights which specific tenderers are entitled to in the description must therefore be treated as describing the order in a manner that would impede fair competition insofar as no specific circumstances mentioned in the provision arise and no additional reservations, which are required by the provision, are made. The stance above was confirmed in the verdict of 3 February 2005 in which the Team of Arbitrators stated that: 'the contracting authority must not define the subject-matter of the contract in a manner able to impede fair competition. This means the need to eliminate from the description of the subject-matter of the contract all phrases which could point to a specific tenderer. Hence, the issue here is the negative premise of the manner of description of the subject-matter of the order. Such a ban is violated if, in the description of subject-matter of the order, the contracting authority uses markings or parameters pointing to a specific tenderer or a specific product' [Verdict of the Team of Arbitrators of 3 February 2005, UZP/ZO/0-153]. Indicating names of specific products without allowing for the possibility of replacing them with equivalent products is an example of such a violation of the act. It was precisely this situation that was the subject of the resolution of the National Appeal Chamber [Resolution of the National Appeal Chamber of 2 February 2010, KIO/KD 8/10]: 'in the description of the subject-matter of the contract, in the bill of quantities of construction works, the contracting authority included a detailed description of the works as well as of the materials which ought to be used by a tenderer, using the names of specific products in doing so. […] The Controlling Body found that it followed from the content of the technical specifications of the execution and commissioning of the construction works that within the scope of the construction sector the contracting authority did not include a clause permitting the use of equivalent products'. Without a doubt, such a description of the subject-matter of the contract violates Article 29 item 3 of the PPL which, as indicated in the beginning, ex-

pressly requires that equivalent products are allowed. Moreover, if the contracting authority had included only a general clause on admissibility of use of equivalent products in the description, it would have also been insufficient. 'Even in the case where equivalent tenders are allowed, the contracting authority shall be obligated to precisely define the requirements pertaining to such tenders (an accurate definition of technical parameters and quality requirements pertaining to equivalent tenders). In such a case, the description of the subject-matter of the contract should include phrases that make the contracting authority's requirements precise in relation to the scope of the equivalence of the offer they allow for'. The indication of a specific product with an annotation 'or equivalent' continues to favour this product [Verdict of the National Appeal Chamber of 7 April 2008, KIO/UZP 254/08]. For how is the supplier of another product supposed to know whether it is equivalent to the one indicated by the contracting authority. In practice, the charge of the violation of fair competition frequently pertains to a situation where in the documentation of the proceedings, the contracting authority includes clauses that indicate a specific product or a specific tenderer, even though it is not a direct indication [Judgement of the Main Ruling Committee of 2 June 2008, DF/GKO/4900/23/21/08/989; Judgement of the Regional Ruling Committee in Poznan of 19 August 2008, 0965-DB/81/08; Judgement of the Regional Ruling Committee in Warsaw of 28 August 2008, RIO-IV-R-24/07-K-64/07]. It is enough for the analysis of all of the components of the product subject to the order to point to a product of only one tenderer from among many operating on the market or where only one tenderer is able to comply with the conditions set [Winiarz, 2009: p. 27]. It is the established view that 'the contracting authority ought to avoid any phrases and parameters which would point to a specific product or a specific tenderer. One cannot speak of the maintenance of the fair competition principle in a situation where the subject-matter of the contract is defined in a manner that points to a certain product although this product does not have to be named by the contracting authority; it suffices that the requirements and parameters for the subject-matter of contracts are defined in such a manner that in order to comply with them, the tenderer must supply one specific product'.

Any indication of the origin of the products or services ordered at the stage of description of the subject-matter of the contract means that the contracting authority *a priori* selected the type or even (in a case in which only individual products and services of a specific origin are available on the market) goods and services specified in terms of identity and the delivery of which could constitute the realisation of the order. This would be equivalent to a narrowing down of the possibility of other tenderers' to compete only with the price of the commodity or service thus described (and what is more, only the tenderers whose goods and services comply with the boundary conditions) or, in the case of goods and services described in such a manner that are of unique character, the outright exclusion of the competition in the situation where a commodity or a service is available solely from one source of origin [Strzelczyk, Chojecka, 2004: p. 21]. The notion of origin in the case at issue is used as a premise for the standard that serves the purpose of limiting the freedom of contracts and, for this reason, it should be subject to a strict interpretation; nevertheless, it is proper to bear in mind that the issue of the origin of the commodity or service has multiple aspects which, also in the situation in which we are bound by this interpretative directive, ought to be taken into account. Therefore, it is proper to find the use in the order description (barring the exceptional circumstances indicated in Article 29 item 3 of the PPL) of other references to exclu-

sive rights belonging to the normative categories not mentioned in the provision, including the rights from the registration of industrial designs or industrial design protective rights, to be a violation of the principle of fair competition [Resolution of the National Appeal Chamber of 24 February 2009, KIO/KD 2/09]. As regards the principle, the use in the description of identifying markings without the status of a trademark and whose relation to a specific entrepreneur or entrepreneurs is beyond any doubt shall also be recognised an indication of origin. Furthermore, the indication of origin can be of a direct character – such as naming the brand of the product ordered directly – as well as of an indirect character and can consist in such a description of the subject-matter of the order that the total of the characteristics shall point to a specific commodity or service as the only one that is compliant with the terms of order [Verdict of the Team of Arbitrators of 21 September 2006, UZP/ZO/0-2484/06]. For example, the charge of an incorrect description by the contracting authority of the subject-matter of the order by including in the order packages the names of the substances ordered such as erythropoietin alpha and erythropoietin beta, the only manufacturers of which at the date of announcement of the procurement were Janssen-Cilag and Roche, along with the simultaneous lack of the possibility to submit an equivalent offer was recognised as legitimate. Admittedly, the contracting authority did include a provision allowing for submission of equivalent offers in the specifications; however, they understood the equivalent product as a product being an equivalent of the original medicinal product, i.e. a product of an identical chemical composition. In the assessment of the Team of Arbitrators, such an understanding of the equivalent tender was too narrow, and it came down to the requirement to offer an identical product due to which it violated the principle of fair competition [Verdict of the Team of Arbitrators of 7 July 2005, UZP/ZO/0-1656/05]. In other proceedings, the contracting authority described the subject-matter of the contract in a manner that indicated one manufacturer. This consisted in the contracting authority's provision of parameters of the projection of the colour of a main and side lamp (used as components of operating theatre equipment) equalling 97.5% and 96%, respectively. As demonstrated by the complaining tenderer in the specifications drawn up by him, only a lamp from a specific manufacturer could comply with this parameter [Verdict of the Team of Arbitrators of 18 June 2004, UZP/ZO/0-874/04].

The Court of Justice of the European Union also considered the subject issue and it ruled in the *Dundalk* case (C-45/87) that drawing up technical specifications that indicate products manufactured by a specific manufacturer or that originate from a specific source is non-compliant with the ban on discrimination. The ECJ formulated the doctrine of equivalent standards which prohibits organisers of tenders from entering the brand names of products or their origin which would indicate or eliminate a specific tenderer in the technical specifications unless it is required by the specificity of a given order and on the condition that the contracting authority uses the phrase "or equivalent" in the description of the subject-matter of the order [Bovies, 2002]. In a reply to a query regarding the admissibility of defining the subject-matter of the order by providing domestic technical standards only, without using the phrase "or equivalent" related to tenders, the ECJ stated that such a specification led to discrimination and it could have had a negative impact on the import of the subject-matter of the order. As raised in the doctrine, a ban on any indication of the type, specific region or country of origin (case C-243/89, *Storobealt*) or production is particularly necessary [Górczyńska, 2005: p. 31–32].

Continuing the jurisprudence in the verdict of 10 May 2012 (C-368/10), the Court of Justice stated that in drawing up technical specifications, contracting authorities must allow for the opening of the process of the award of public procurement yo competition. With that in mind, the contracting authority must allow for the submission of tenders that reflect the diversity of technical solutions. As the Court of Justice emphasises, technical specifications ought to be prepared on the basis of characteristics and functional requirements while in the case of a reference to a European standard or, in the event that there is no such standard, to a national standard. Tenders based on equivalent arrangements must be considered by contracting authorities. In the case at issue, the Court of Justice indicated that contracting authorities that wish to define the environmental protection requirements in the frames of the technical specifications of a given order can specify environmental aspects that cover, e.g., methods of production or the specific impact of a group of products or services on the environment. They can also take advantage (however, they are not obligated to do so) of the adequate specifications defined on eco-labels such as the European eco-label, (multi)national eco-labels or any other eco-label, provided that the requirements pertaining to such labels are developed and adopted on the basis of scientific information with the application of a procedure that allows for the participation of interested entities such as government bodies, consumers, manufacturers, distributors, organisations connected with environment protection, etc. Another condition is that the label be available to all interested parties, and that the technical specifications be clearly defined so that all of the tenderers will know which requirements indicated by institutions must be met. In order to demonstrate equivalence, it is necessary to enable tenderers to present the proof in any form. In turn, contracting authorities must be able to substantiate each decision in which they state a lack of equivalence in a given case.

A contrasting stance can be encountered in the doctrine; a stance which was reflected in the proceedings for the purchase of office computers equipped with the *Microsoft* OS without providing the phrase "or equivalent" in the technical specification. In the case at issue, the Public Procurement Office expressed a view in keeping with which 'the Public Procurement Law should not be applied and interpreted only through the prism of rigorously understood fair competition principles and separate from another objective of its provisions, i.e. ensuring rational and purposeful purchases, nor should it be applied in a peculiar legislative void that fails to take into account the principles expressed in other provisions, especially those expressed in the Public Finances Act and pertaining to the rational spending of public funds. Allowing for the application of the provisions of the act leading to a situation where purchases do not correspond with the needs of the contracting authority and that impede the conduct of their statutory operations are imposed on the contracting authority is irreconcilable with the postulate of legislature's rationality'. [Letter of the Public Procurement Office – Ad Hoc Control Department of 18 May 2010]. It is difficult to find the Public Procurement Office's stance as correct in the factual status at issue since *Microsoft's* products can be substituted with other products of "equivalent parameters" and that comply with the contracting authority's requirements as was expressly highlighted by the National Appeal Chamber "for the contracting authority to be able to demonstrate that only *Microsoft's* Office package is fit for use in a given unit, concrete evidence must be presented while referring before the Chamber to the oral information originating from IT specialists must be deemed insufficient". [Verdict of the National Appeal Chamber of 16 July 2010., KIO

1383/10]. It is also proper to note that should one adopt the interpretation of the specification sought by the contracting authority – namely that the technical specification did not allow for equivalent solutions within the scope of software – then in the face of the contracting authority's failure to prove that only the software of this one manufacturer complies with their requirements, due to the contradiction with Article 29 in conjunction with Article 7 of the PPL, such proceedings would be flawed and the flaw would render the conclusion of a valid contract impossible.

RECAPITULATION

The principle of the non-discriminative (and thus equal and, *eo ipso*, competitive) treatment of tenderers is the foundation of the public procurement on both the national and EU level [Niedziela, 1995: p. 4; Sołtysińska, 2006: p. 106 et seq.; Bovis, 2006: p. 137 et seq]. The objective of the principles *verba legis* expressed in Article 7 item 1 of the PPL is to protect tenderers against abuse on the part of a contracting authority – the exclusion of the possibility on the part of the contracting authority to discriminate tenderers [Verdict of the National Appeal Chamber of 26 November 2009, KIO/UZP 1547/09]. This principle imposes an obligation of non-discriminative treatment of all potential tenderers applying for the procurement on the contracting authority. On the one hand, the Public Procurement Law imposes an obligation to define the technical specifications in a manner guaranteeing tenderers equal access to the order while on the contracting authority, while on the other hand, it prohibits the creation of unsubstantiated obstacles in the opening of a procurement to the competition [Verdict of the National Appeal Chamber of 17 June 2009, KIO/UZP 636/09; Verdict of the National Appeal Chamber of 2 December 2008, KIO/UZP 1303/08]. Providing a detailed description of the subject-matter of the contract is an obligation and at the same time a right of the contracting authority who, in observing the principles specified in the provisions of the Public Procurement Law Act, describe the subject-matter of a contract in a manner taking into account their objective and substantiated needs.

One must find, as established in the case law of the National Appeal Chamber, the view that a contracting authority has the right to describe the subject-matter of the contract in a manner that substantiates their rational and objective needs, whereby these do not have to be the needs defined at the minimum level. Thus, it is proper to find the fact that some tenderers find it easier to comply with contracting authorities' requirements than others obvious while a part of tenderers cannot participate in the proceedings at all, and that this will not be a manifestation of a violation of the fair competition principles in the proceedings [Verdict of the National Appeal Chamber of 13 June 2011, KIO 1152/11]. When allowing for an equivalent product, the contracting authority ought to define the criteria of equivalence in order to make it possible for tenderers to submit a valid offer and in order to maintain the principles of the equal treatment of tenderers and of fair competition. Taking advantage of the disposition of Article 29 item 3 of the PPL, the contracting authority ought to specify the scope of the minimum parameters of the equivalence of products on the basis of which they shall carry out the assessment of compliance with the requirements defined in the technical specifications. Requirements regarding the equivalence of products ought to be provided in a precise, transparent and clear manner so that on the one hand the contracting author-

ity was able to unambiguously settle the question of equivalence when carrying out the assessment of the offers while, on the other hand, tenderers participating in the proceedings were certain as regards the contracting authority's expectations in the scope of the characteristics and relevant features characterising the subject-matter of the contract. A precise definition of the requirements regarding the equivalence of products allows the tenders submitted to be correctly assesses and compared [Verdict of the National Appeal Chamber of 17 May 2011r, KIO 949/11]. It needs to be emphasised that Article 29 item 3 of the PPL is of an exceptional character; it can only be applied in particular situations and it must be subject to rigorous interpretation: when the specificity of the subject-matter of the contract substantiates it or when the contracting authority is unable to describe the subject-matter of the contract using sufficiently precise phrases and the description is accompanied by such words as: 'or equivalent' or something similar which gives the specifically listed products the character of an example.

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