Michał Kania

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Michał Kania
University of Silesia

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I. INTRODUCTION

The provisions of agreements that are made between a procurer and a contractor are of key significance in relation to the diligent performance of a public procurement. It should be noted that the value of the Polish public procurement market, according to the latest data provided by the Public Procurement Office, amounted to 167 billion PLN in 2010[1]. This value constituted approx. 11.8% of the gross domestic product. 195,555 agreements that relate to public procurements were concluded in 2012[2]. Procurements granted to foreign contractors constituted 13.7 billion PLN of the sum mentioned above. One can easily observe that the problem of public procurements constitutes a very socially sensitive matter in Poland. The aforementioned observation arises from the fact that there have been numerous public investments – concluded by way of public procurements – and that these investments were connected with the organization of the European Football Championships 2012 in Poland. These investments, above all, were connected with the construction of the sports infrastructure as well as roads and highways. To be precise, these investments relate to the construction of the National Stadium in Warsaw as well as the A2 highway, which is a fragment of the international E30 route.

The subject matter of the issues described in this article will be the problems that arise from contracts concluded in relation to public procurements on the basis of Polish legal solutions. Firstly, the legal foundations that relate to the regulations of the agreements in question will be discussed. Next, the legal nature as well as special provisions concerning the Public Procurement Act, which refer to these agreements, will be taken into consideration. The article will end with a short summary.

[1] According to the regulation of the Prime Minister dated 16th December 2011 concerning the average exchange rate of the zloty in relation to the euro, which constitutes the basis for calculating the value of public procurements, the average exchange rate of the zloty in relation to the euro, which according to this regulation, amounts to 4,0196.

[2] Report of the President of the Public Procurement Office on the functioning of the system of public procurements in 2010, p. 7.

II. NORMATIVE FOUNDATIONS OF THE REGULATIONS IN MATTERS THAT RELATE TO PUBLIC PROCUREMENTS. THE RELATIONSHIP BETWEEN PUBLIC PROCUREMENT LAW AND THE CIVIL CODE

The legal regulation related to public procurements in Poland is contained in the Public Procurement Act in several regulations issued in relation to the indicated law as well as in directives of the European Union, i.e., in the classic, sectoral as well as the appeal directive. The Public Procurement Act passed in 2004 superseded the act of 10th June 1994, which was related to public procurements. The necessity for the changes in the Polish system of public procurements arose from Poland's accession to the European Union and the necessity of fully adjusting Polish regulations to the *aquis communitaire* that arose from it as well as the necessity to ensure the proper expenditure of European Union funds [M. Stachowiak (in) M. Stachowiak, J. Jerzykowski, W. Dzierżanowski Warsaw 2007: p. 527]. The current form of the aforementioned act regulates: the principles and modes related to the provision of public procurements, the problems of agreements that refer to public procurements, legal remedies and the supervision of granting public procurements and the competent authorities in matters regulated by the law. What is more, criminal provisions were introduced into the law that regulate the liability resulting from breaching its provisions. In the last two sections, one can find provisions that introduce changes in the mandatory provisions of the law as well as transitional and final provisions. In accordance with art. 2 point 13 of the act, public procurements shall refer to contracts against remuneration that are concluded between a procurer and a contractor and the subject matter of which are goods and services and construction works.

The normative regulation of public procurement agreements was described in chapter four of the act in articles 139–147. The regulations of the section indicated constitute the *lex specialis* in relation to the regulations of the Civil Code and in their current form are given a higher priority, in accordance with the conflict of law rules – *lex specialis derogate legi generali*[3]. In compliance with art. 139 sec. 1 of the Public Procurement Act related to the agreements for public procurements, the regulations of the law passed on 23rd April, 1964 shall apply. The civil code shall be applicable unless the regulations of the law state otherwise.

In pursuance of the model of the legal regulation that was adopted on the basis of the public procurement law, it follows that the intention of the legislature was to regulate the issues that should have a decisive meaning for the diligent performance of the objectives of the public procurement agreement by means of the mandatory provisions. The introduction of the indicated distinctions influences the scope of the freedom of contract principle, which is contained in art. 353^1 of the Civil Code, according to which the parties concluding a contract may establish a suitable legal relationship on the condition that its contents or aims do not contradict the character of the relationship, the law nor any principles of social intercourse.

The regulations contained in the Public Procurement Act and based on public procurements regulate the following issues in detail: the form of a contract, the duty to

[3] See e.g. the verdict of WSA in Warsaw of 3rd July 2007 (V SA/Wa 172/07).

conclude public procurement contracts within a specified period of time with the exception of contracts described in art. 142 sec. 2 and art. 143 sec. 1 of the Public Procurement Act[4], admissibility of changes within the scope of the agreement, extraordinary circumstances in which the procurer may withdraw from the contract or circumstances in which the contract becomes null and void as well as performance bonds.

It should be noted that in matters that pertain to public procurements the following agreements shall be the most applicable: sale deeds, delivery contracts as well as contracts for a specific task and commission contracts. The legal literature includes a division of agreements connected with public procurements with regard to the subject-matter of the procurement. In compliance with the division indicated earlier, one can distinguish the following: transfer of rights agreements (agreements of sale and supply as well as agricultural procurement contracts), agreements pertaining to the use of objects and rights (hire, lease as well as leasing contracts), agreements pertaining to the rendering of services (commission contracts, specific work, carriage, freight forwarding), agreements pertaining to credit relationships (bank accounts, credit and accreditation agreements) and aleatory contracts (personal and property insurance) [E. Norek,Warsaw 2008: p. 260].

III. THE LEGAL NATURE OF PUBLIC PROCUREMENT AGREEMENTS

The legal character of agreements that concern public procurements shall be specified from the perspective of civil law. Incidentally, it should be noted that agreements concerning public procurements are treated as civil law agreements in the Polish legal literature. The view that such agreements should be treated as public agreements is rather rare[5]. Nevertheless, some elements pertaining to agreements regarding public procurements are often mentioned, especially, in a broad sense, those that take into consideration the special position that is occupied in relation to the obligation relationship by the public sector. This position results from the function that should be served by public entities such as that of being the guarantor of the duly executed expenditure of public funds, above all.

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[4] In compliance with art. 142 sec. 2, the procurer may enter into a contract, the subject matter of which is periodic and continual services provided over a span of more than 4 years, if the performance of the contract over a longer period of time leads to cost savings in the realization of the procurement in relation to the 4-year period or if it is justified by the ability of the procurer to pay or by the scope of the future expenditure as well as the period of time needed for settlement.

In accordance with art. 143 sec. 1 and sec. 1a, a contract concluded for an indefinite period of time may refer to supplies of: water by means of a water-sewage system or the process of discharging the sewage into such a system, the supply of gas from the gas system, heat from the district heating system and a license for computer software. What is more, a contract for an indefinite period of time may also refer to the provision of services that cover the transmission and distribution of electric energy and natural gas.

[5] To date, there is a lack of regulations which would directly specify the contract used in the scope of the activities of the public administration, as administrative or public and private contracts. The acceptance of the fact that administrative or public and private contracts exist in Polish law is the result of the specified theoretical and legal conventions.

It has been stressed in the legal literature that agreements concerning public procurements do not constitute a separate type of nominate contract. In the case of this contract, the law does not stipulate the *essentialia negotti* of such an agreement but within the same scope it refers people to different nominate contracts [P. Granecki, Warsaw 2009: p. 374].

Public procurement agreements constitute contracts against remuneration whose parties are the procurer and the contractor, while the subject-matter of the agreement includes goods and services as well as construction works. The term goods should be understood as referring to the purchase of things, rights and other goods on the basis of sale/purchase contracts, contracts of supply as well as rental, lease and leasing contracts[6]. Construction works shall mean the performance or the performance and design of construction works within the meaning of the law passed on 7th July 1994 – Construction Law[7], as well as the construction of a structure within the meaning of the Construction Law (Act), through any means, in compliance with the requirements specified by the procurer. The term services shall be understood as provisions of services the subject-matter of which is not construction works or services but services specified in the regulations passed on the basis of art. 2a of the Public Procurement Act.

Public procurement agreements have a bilateral nature due to the fact that the obligation to provide services encumbers both parties.

In light of art. 487 § 2 of the Civil Code, agreements constitute mutual contracts due to the fact that both parties to the contract are obliged in the same manner and that the services provided by one of the parties is to be equivalent to the services provided by the other party [Z. Radwański, Wroclaw 1965, p. 371]. The services of the parties should be of the same value and interchangeable within the meaning that the aim of the services provided by each of the parties is to achieve services that are suitable to the parties to the contract [J. Jerzykowski (in) M. Stachowiak, J. Jerzykowski, W. Dzierżanowski, Warsaw 2007: p. 527].

Public procurement agreements are subject to the same interpretation of the rules governing declarations of intent as all other agreements; in other words, according to the provisions of art. 65 § 1and 2 of the Civil Code. In accordance with the aforementioned regulations of the Civil Code, a declaration of intent should be interpreted according to the requirements of the circumstances under which it had been submitted and according to the principles of social intercourse as well the customs adopted, while in the case of contracts, one should examine whether the intent and the aim of the parties is compatible and not base one's conclusions on its literal meaning [J. Jerzykowski (in) M. Stachowiak, J. Jerzykowski, W. Dzierżanowski, Warsaw 2007: p. 527].

Disputes that arise from public procurement contracts are arbitrated by the common courts of law.

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[6] According to the data provided by the Office of Public Procurements, the value of disbursed funds assigned to services amounted to 37% of the total amount of the procurements granted in 2010. Construction works constituted only 43%, while goods accounted for only 20%.

The report of the President of the Public Procurement Office on the functioning of the system of public procurements in 2010.

[7] Dz. U. dated 2006 No. 156, item 1118 with subsequent amendments

IV. DETAILED REGULATIONS RELATED TO PUBLIC PROCUREMENT AGREEMENTS

The most critical consequences arising from detailed regulations of the Public Procurement Act will be described below. These regulations create the specific nature of public procurement agreements.

In compliance with art. 139 sec. 2 of the Public Procurement Act, the agreements in question should be concluded in a written form or they shall be null and void. Concluding public procurement contracts in an electronic form is equivalent to the written form. In such an instance, it is necessary to be in possession of a protected electronic signature, verified by means of a valid and qualified certificate. To ensure that the activities of the entities of the public finance sector are transparent, the legislature introduced the principle of open access to the contents of public procurement contracts. In light of art. 139 sec. 3 of the Public Procurement Act, the said agreements are open and are subject to accessibility based on the principles specified in the law concerning access to public information. This law constitutes an embodiment in relation to agreements concerning the general principle of openness in proceedings that are related to public procurements – referred to in art. 8 of the Public Procurement Act[8]. The provisions of art. 139 sec. 2 of the Public Procurement Act, by implementing the norm contained in art. 8, not only renders the realization phase of the enterprise open to the general public but also the phase that leads to its granting [J. Pieróg, Warsaw 2009: p. 412].

In order to protect the interests of the procurer, the regulations of the aforementioned Act introduce mechanisms that will guarantee the assurance of unity concerning the offer obligation submitted by the procurer with the contractual obligation of the subject. In light of art. 140 sec. 1 of the Public Procurement Act, the scope of services arising from the contract provided by the private partner is identical to his or her obligations as contained in the offer.

As to the principle, it is impossible for the contractor to change the scope of the services in relation to his or her obligations as contained in the offer. A detailed specification of the subject-matter of the enterprise, which should include all requirements and circumstances that might influence the preparation of the contract, should be included in the specifications of the terms of reference [J. Pieróg, Warsaw 2009: p. 414].

A contract that partially goes beyond the scope specified in the terms of reference shall be considered null and void. Possible changes in the contents of the contract in relation to the contract could consist of either lessening or broadening the scope of services. In compliance with art. 144 of the Public Procurement Act, changes to the provisions of a concluded contract in relation to the contents of the offer on the basis of which the contractor has been chosen are banned, unless the procurer predicted the possibility of performing such a change in the procurement notice or in the specification of the terms of reference and has specified the circumstances in which such a change could be applied. On the basis of statistical data, in practice, in more than half of the public procurements granted, the indicated solutions have been provided for[9].

[8] In compliance with art. 8 sec. 1, proceedings concerning participation in the procurement are public.

[9] Report of the President of the Public Procurement Office on the functioning of the system of public procurements in 2010, p. 34.

One of the specific solutions – in terms of public procurements – is the institution of the unilateral termination of the contract by the procurer, which has been made possible as a result of a regulation that constitutes a mandatory provision of the law. Such an entitlement has been provided for on the basis of art. 145 sec. 1 of the Public Procurement Act. In light of this regulation, in the case of circumstantial changes that would place the fulfillment of the contract outside the scope of the public interest, which could not have been anticipated at the moment of concluding the contract, the procurer has the right to terminate the contract within 30 days from becoming aware of these circumstances. This solution departs from the adopted regulation, which was introduced on the basis of the Civil Code and constitutes both a limitation on the principle of the freedom of concluding agreements and the equality of the parties to a civil relationship as well the *pacta sunt servanda* principle. As a result, it enables the procurer to terminate the legal relationship that links him or her to the contractor by way of a unilateral legal transaction without the consent of the other party in the event of the occurrence of the hypothetical situations specified in the legal norm [L. Bogacz, M. Łempicka, G. Pyliński, Warsaw 2006: p. 441]. As a result, the view concerning the introduction of asymmetry in the entitlements of the parties by the institution being described has been expressed in the legal literature [J. Pieróg, Warsaw 2007: p. 557]. The aim of the solution in question is to highlight the necessity for the protection of the public interest and its superiority over any private interest in public procurement contracts, as well as the notion of *de lege lata* in the said agreements. In the legal literature, it is suggested that the law of art. 145 concerning the Public Procurement Act should only be applied in extraordinary circumstances [J. Pieróg, Warsaw 2007: p. 556].

In the event of the termination of the contract by a public entity, the contractor is entitled to demand remuneration. Such remuneration is limited to the extent of the enterprise undertaken. In light of the regulation in force, it is impossible to claim damages on the loss of bargain. This comes as a result of the literal meaning of art. 145 sec. 2 of the Public Procurement Act in which the word "only" has been used.

Claims limited only to remuneration occur, however, only if the undertakings of the public entity are legal; this is to say, if the premises specified in art. 145 sec. 1 of Public Procurement Act are in fact fulfilled. Otherwise, the termination of the contract will not entail legal effects and the contractor will be entitled to demand the performance of the contract as a result of the conclusion of the public procurement agreement. Any public entity that terminates a contract without any reason will fall into arrears. In the event that the obligation is not performed because of the fault of the public entity, the contractor will be entitled to claim damages, in accordance with art. 471 of the Civil Code. It should be noted that the Superior Court suggests in its body of rulings that regulations concerning public procurements do not exclude the entitlements of the parties to terminate the contract resulting from the Civil Code[10].

In order to ensure the proper undertaking of the contractor, the Public Procurement Act introduces a special regulation that pertains to the guarantee of the diligent performance of the contract. In light of art. 147. sec. 1 of the aforementioned act, the procurer may demand from the contractor a guarantee of the diligent performance of the contract. According to sec. 2 of the article referred to above, the guarantee serves

[10] See e.g. The verdict of 10^{th} April 2003 (Sygn. {file no.} III CN/320/00).

to cover any claims that could result from the failure to perform or the improper performance of the contract.

The regulations mentioned above have a dispositive nature, which means that they may be applied by the public entity during the process of constructing the contents of a contract. The aim of these regulations is, above all, to create a guarantee of cover, at least for a partial settlement of the possible claims of the procurer, which may result from the contract he or she entered into with the contractor. The said institution reinforces the position of the public entity as a creditor in relation to the obligations that result from the conclusion of the contract.

The guarantee described in art. 147 of the Public Procurement Act always comes in a pecuniary form and constitutes a certain kind of guarantee deposit transferred by the contractor to the procurer in order to secure against any possible claims that could arise from the contract [J. Jerzykowski, Warsaw 2007: p. 564]. The form of the submission of the guarantee deposit is specified in art. 148 of the same act. In compliance with the law, the security may be submitted according to the choice of the contractor in one of the following forms: monetarily, as a bank guarantee and surety or warranty of a cooperative savings and credit union, bearing in mind that the cooperative savings are always pecuniary, an insurance guarantee or securities provided by entities, as specified in art. 6b sec. 5 item 2 of the act passed on 9th November 2000 concerning the creation of the Polish Agency for Enterprise Development.

With the consent of the procurer, the security may also be provided in the form of bills of exchange along with a bank or cooperative savings and credit union guarantee, by establishing a pledge on securities issued by the State Treasury or the unit of local government or by establishing a registered pledge governed by the regulations specified in the rules concerning registered pledges and the register of pledges.

In compliance with art. 150 sec. 1 and 2 of the Public Procurement Act, the rate of the security is set at a percentage relative to the total price included in the offer or the maximum nominal value of the obligations of the procurer that arises from the contract if the offer included unit prices. The security is fixed at an amount ranging from 2% to 10% of the total price given in the offer or the maximum nominal value of the obligation of the procurer resulting from the offer. In light of art. 151 sec. 1, the procurer is to return the security within 30 days from the date of placing the order and accepting that it was realized with due diligence.

The law provides for situations in which the contract is terminated. In compliance with art. 146 sec. 1, the contract shall be null and void if, among others, the procurer: did not place the procurement notice in the Public Procurement Bulletin, if it was a procurement without a need to call a public tender, if the procurer did not transfer the notice to the Publications Office of the European Union, if he prevented contractors who were not allowed to participate in the dynamic purchase scheme from submitting estimate offers or if he prevented contractors who were allowed to participate in the scheme from submitting offers for carrying out public procurements within the scope of the scheme or if he infringed the law by making price inquiries.

The possibility to take legal action with a petition for the annulment of the law belongs to the scope of competence of the President of the Public Procurement Office. The president may undertake the actions indicated if the procurer performs actions or fails to perform actions along with violating the law, which had or could have had an influence on the outcome of the proceedings. What is more, the President of the Office may petition the court for the annulment of a part of the contract if the contents of the contract exceed the mandatory provisions of the procurement and in the case of applying significant changes to the contract in terms of the contents of the offer on the basis of which the contractor was chosen.

V. CONCLUSION

Contracts concerning public procurements constitute a significant means of guaranteeing the diligent performance of the subject-matter. These agreements, by virtue of the Polish law, feature the nature of civil law, even though the elements arising from the special functions which these contracts should serve in the regime of the public law are visible. These elements include, in particular, the right to terminate the contract by the procurer if its performance goes beyond the scope of the public interest. Moreover, public procurement contracts are subject to stringent supervision by state authorities such as the President of the Public Procurement Office. As a result of inspections performed by the President, the contract may become null and void in the instances specified in the law.

In practice, the necessity of ensuring the guarantee of the proper performance of public procurement contracts in terms of the public interest constitutes a very important issue represented by the procurer.

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