

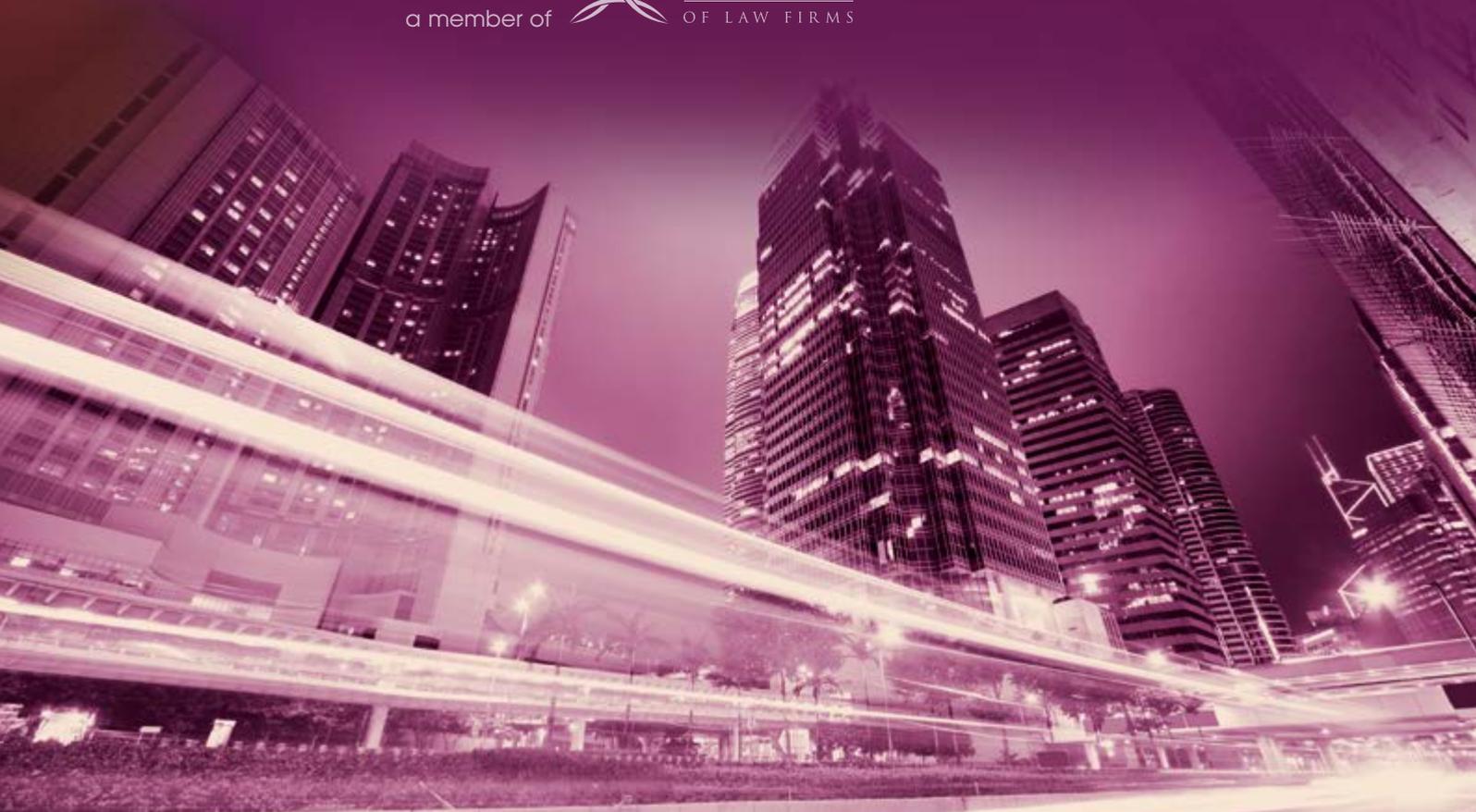
PUBLIC PROCUREMENT AND
PUBLIC-PRIVATE PARTNERSHIP LAW
IN POLAND
FOR FOREIGN INVESTORS

October 2015

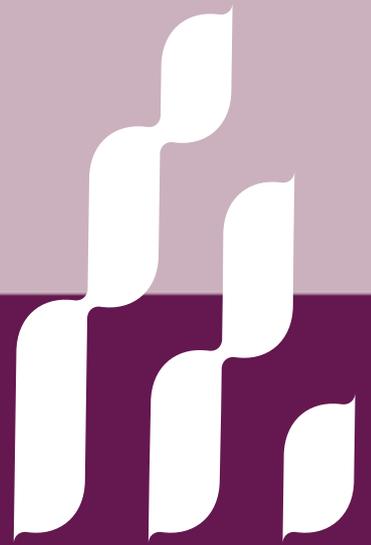


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I. General overview

The primary regulation on public procurement in Poland is the Public Procurement Law Act of January 29, 2004 (hereinafter referred to as "the PPL").

As a rule, public contracts in Poland (as well as contracts awarded by particular private entities) can be awarded only in one of the procedures specified in the PPL. However, there are exceptions from this rule, e.g. the PPL does not apply to contracts worth no more than 30,000 EUR.

The PPL has been frequently and extensively amended since its adoption, particularly in order to ensure compliance with the law of the European Union, as the Member States of the European Union are obliged to implement European regulations to their internal law systems.

The PPL regulates the principles of contract announcement and the allowed contract award procedures. It provides the rules for selecting the best tender, documenting procedures, framework agreements, dynamic purchasing system and design contest. It also contains special provisions on contracts in the field of defense and security as well as utilities contracts (sectoral contracts – zamówienia sektorowe). Moreover, it regulates the form, contents, duration and modifications of public procurement contracts. Furthermore, it specifies the rules for legal protection measures and control of the award of public contracts, liability for breach of provisions of the PPL, as well as the competent authorities with respect to matters addressed in the PPL.

The President of the Public Procurement Office (hereinafter referred to as "the PPO President") is a central government body competent for matters concerning public contracts. The PPO President controls the award of contracts.

The other major acts regulating the Polish public procurement system are the Public-Private Partnership Act of December 19, 2008 and the Concession for Construction Works and Services Act of January 9, 2009.

The Polish public procurement market in 2014 was worth circa 133.2 billion PLN, which constitutes about 7.72% of Poland's gross domestic product (GDP) for the year 2014 (according to the PPO President's annual report on the public procurement system in 2014).



II. Contractors

All natural persons, legal persons and organizational units not having legal personality, regardless of their citizenship or the location of their principal place of business (with the exception of contracts in the field of defense and security – more in section VI of the brochure), may compete for the award of a public contract and submit a tender, thus becoming economical operators (contractors) within the meaning of the PPL. There is no obligation for foreigners to register their business in Poland in order to compete for a contract.

Eligible to compete for a contract are contractors who meet the conditions related to:

- authorizations to perform specific activities or actions, if such authorizations are required by the law;
- knowledge and experience;
- appropriate technical potential and personnel capable of performing a contract;
- economic and financial standing.

The above conditions are specified by the contracting authority that awards a public contract, and so they vary depending on the subject matter of a contract.

It should be noted that the contracting authority may stipulate in the contract notice that only those contractors may compete for a contract whose employed staff is composed of disabled persons in over 50%.

Contractors may join forces and jointly compete for a contract, e.g. by forming a consortium, especially if they are not able to meet the conditions for participation in the contract award procedure on their own. In this case, however, they are obliged to appoint a plenipotentiary to represent them in the contract award procedure and/or in concluding the contract. If contractors compete for a contract together, they are jointly and severally liable for the execution of the contract and provision of security for the due performance of the contract.

What is more, contractors may rely on the knowledge and experience, technical potential, personnel capable of performing the contract or economic and financial abilities of other entities (no matter what is their citizenship or where their principal place of business is located), regardless of the legal nature of their relations with such entities. However, in this case, the contractor is required to prove to the contracting authority that it will have at its disposal the resources necessary to perform the contract, in particular by presenting to this end a written commitment of those entities whereby they undertake to put the necessary resources at the contractor's disposal for the time of their use in performance of the contract.

III. Contract award procedures

There are eight procedures for awarding public contracts.

The primary procedures for awarding public contracts are open tendering and restricted tendering. These procedures can be applied in every case. The contracting authority may award contracts by a negotiated procedure with publication, competitive dialogue, negotiated procedure without publication, single-source procurement procedure, request for quotations procedure or by electronic bidding procedure only under the circumstances specified in the PPL.

The most popular procedures are open tendering and single-source procurement. In 2014, 82.19% of all public contracts were awarded by open tendering, while single-source procurement was used in 13.42% cases (according to the PPO President's annual report on the public procurement system in 2014). The other procedures are rarely applied.

1. Open tendering

Open tendering is a procedure where, following a public contract notice by the contracting authority, all interested contractors may submit their tenders.

2. Restricted tendering

Restricted tendering is a procedure where, following a public contract notice by the contracting authority, contractors submit requests to participate in the contract award procedure, and tenders may be submitted only by these contractor that were invited to submit their tenders.

3. Negotiated procedure with publication

Negotiated procedure with prior publication is a procedure where, following a public contract

notice, the contracting authority invites selected contractors admitted to participate in the contract award procedure to submit initial tenders not containing prices, then negotiates the terms of the contract with them, and subsequently invites them to submit the tenders containing prices.

4. Competitive dialogue

Competitive dialogue is a procedure where, following a public contract notice, the contracting authority conducts a dialogue with selected contractors, and then invites them to submit their tenders.

5. Negotiated procedure without publication

Negotiated procedure without publication is a procedure where the contracting authority negotiates the terms of the contract with contractors of its choice and subsequently invites them to submit their tenders.

6. Single-source procurement

Single-source procurement is a procedure where the contracting authority awards a contract after negotiations with only one contractor.

7. Request for quotations

Request for quotations is a procedure where the contracting authority sends a request for quotations to contractors of his choice and invites them to submit their tenders.

8. Electronic bidding

Electronic bidding is a procedure where using a form available on the website that allows entering the necessary data on-line, contractors submit successively more advantageous tenders (bid increments), subject to automatic classification.



IV. The course of contract award proceedings

The course of action depends on the procedure used to award a public contract. As the vast majority of contracts are awarded under open tendering, the course of action described herein refers to that procedure.

Firstly, the contracting authority makes a formal announcement of the tender by placing a contract notice in its seat, on its website and in the Public Procurement Bulletin (in the case of smaller contracts) or in the Official Journal of the European Union (in the case of larger contracts). Moreover, the contracting authority creates the specification of essential terms of the contract (specyfikacja istotnych warunków zamówienia), which is the primary document of the procedure, providing the contractors with information (inter alia) concerning the subject matter of the contract, the manner the tenders should be prepared, conditions for participation in the tender and declarations and documents that are required. The contracting authority places the specification of essential terms of the contract on its website.

If the value of a contract is equal to or exceeds the amounts specified in the Prime Minister's Ordinance on the value thresholds of contracts and design

contests which require the dispatch of a notice to the Publications Office of the European Union, then contractors are required to pay a deposit (max 3% of the contract's value) when submitting their tenders. If the value of a contract is less than the said amounts, then the contracting authority may demand a deposit, but it is not obligatory. The deposit is returned to the contractor if its tender was not selected as the best one.

After the deadline for submitting tenders passes, the contracting authority evaluates the tenders, selects the best one and notifies all the contractors about the result of the tender. The contracting authority must wait 5 or 10 days (depending on the value of the contract) before it can conclude the contract with the selected contractor (this is called "the standstill period").

The concluded public contract can be modified in the course of its execution, provided that modifications are insignificant. Any significant modifications of provisions of the concluded contract are prohibited, unless the contracting authority envisaged the possibility of conducting such modifications in the contract notice or specification of essential terms of the contract and determined the terms of such modifications.

V. Utilities contracts

The PPL provides special regulations for the utilities contracts award procedures. The PPL applies to the awarding of such contract if the contract's value is equal to or exceeds the amounts specified in the Prime Minister's Ordinance on the value thresholds of contracts and design contests which require the dispatch of a notice to the Publications Office of the European Union.

The utilities contracts are awarded by the contracting authorities for the purpose of performing one of the following types of activities:

1. exploring, prospecting for or extracting gas, oil and its natural derivatives, brown coal, hard coal and other solid fuels;
2. the management of airports, maritime or inland ports and their provision to air, sea and inland carriers;
3. the creation of networks intended to provide public services connected with production, transmission or distribution of electricity, gas or heat, or supply of electricity, gas or heat to such networks, or management of such networks;

4. the creation of networks intended to provide public services connected with the production or distribution of drinking water or supply of drinking water to such networks or management of such networks;
5. the operation of networks providing public services in the field of transport by railway, tramway, trolley bus, cable or with the use of automatic systems;
6. the operation of networks providing public services in the field of bus transport;
7. the provision of postal services.

The contracting authority may award a utilities contract by open tendering, restricted tendering or by a negotiated procedure with publication.



VI. Contracts in the field of defense and security

The PPL provides special regulations for awarding contracts concerning Polish military forces, that is contracts including:

1. deliveries of military equipment, including all parts, components and subassemblies;
2. deliveries of sensitive equipment, including all parts, components and subassemblies;
3. construction works, supplies and services directly connected with the equipment mentioned in points 1 and 2 above, and all its components and subassemblies connected with the life cycle of that product;
4. construction works and services for special military purposes or sensitive works and services.

Only contractors having their seat or place of residence in one of the Member States of the European Union, the European Economic Area, or in a country which the European Union or Poland entered into an international agreement concerning contracts in the field of defense and security with, may apply for such a contract. However, the awarding entity may specify in the contract notice that contractors from countries

other than those mentioned above may compete for a contract in the field of defense or security (in the case when Poland has military business relations with such a country, but no international agreement has been signed).

As the award procedure may involve information vital to Poland's security, the PPL introduces extensive regulations concerning information safety. The contracting authority presents the contractor competing for a contract all the classified information necessary to perform the contract on condition that the contractor guarantees to keep the classified information secret in a manner determined in the provisions on protection of classified information.

A contract in the field of defense and security may be awarded by restricted tendering or negotiated procedure with prior publication. In cases listed in the PPL, the contracting authority may award the contract also by competitive dialogue, negotiated procedure without publication, single-source procurement or by electronic bidding.

VII. Legal protection measures

Contractors and other persons, provided that they have or had interest in being awarded the contract and suffered or may suffer damages as a result of the violation of the provisions of the PPL by the contracting authority, are entitled to use the legal protection measures specified in the PPL.

1. Appeal to the National Appeal Chamber

The primary legal protection measure is an appeal to the National Appeal Chamber (hereinafter referred to as "the Chamber"). It can be lodged against actions non-compliant with the PPL performed by the contracting authority in the course of the contract award procedure or against failure to act which the contracting authority is bound to perform under the PPL.

However, if the value of a contract is less than the amounts specified in the Prime Minister's Ordinance on the value thresholds of contracts and design contests which require the dispatch of a notice to the Publications Office of the European Union, an appeal can be lodged only against the following actions:

- choice of the negotiated procedure without publication, single-source procurement or request for quotations;
- description of the method used by the contracting authority to evaluate the fulfillment of conditions for participation in the contract award procedure;
- exclusion of the appellant from the contract award procedure;
- rejection of the appellant's tender.

In the case of an appeal being lodged, the contracting authority may not conclude a contract until the Chamber passes its judgment (or other decision which ends the appeal procedure). This ban is called the "standstill

period". However, the contracting authority may put forward a motion to the Chamber in order to revoke the ban. The Chamber may revoke the ban if non conclusion of a contract might cause negative effects for public interest (in particular in the field of defense and security), exceeding the benefits related to the necessity of protecting all interests, with reference to which a possibility of sustaining a loss due to actions conducted by the contracting authority occurs.

Submitting an appeal requires paying a fee ranging from 7,500 to 20,000 PLN, depending on the type (supplies, services or construction works) and value of a contract.

2. Complaint to the court

The parties and participants of the appeal procedure may submit a complaint against the Chamber's ruling to the regional court competent for the seat or place of residence of the contracting authority.

Submitting a complaint to the court requires paying a court fee, which is five times the fee for lodging the appeal.

It should be noted that the complaint does not result in a "standstill period". Therefore, the contracting authority can execute the public procurement contract and the court's ruling does not have any direct impact on the agreement. However, the contracting authority is obliged to redress any damages suffered by the participant of the contract award procedure as a result of the execution of the agreement with another participant.

The court's ruling is final. However, this does not apply to the PPO President who may lodge a revocation complaint to the Supreme Court.



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VIII. Public-private partnership

As stated in the introduction to this brochure, a public-private partnership is one of the pillars of the public procurement system in Poland.

The public-private partnership market in Poland is growing fast. There is an evident growth in the number of infrastructure projects pursued under the public-private partnership banner. This model is chosen more and more often by local authorities, especially by units of local government. Public-private partnership is frequently used to pursue infrastructure projects in the following sectors: sports, tourism, entertainment, environment and transport. This formula is used to construct sport stadiums, aqua parks, swimming pools, culture and recreation parks, underground parkings, roads, hospitals, schools and social facilities, as well as to render medical services and waste management services.

The PPP formula is expected to be extensively used in the future under the government launched program "Polish Investments", run by the State Treasury. The said program's goal is to encourage private entrepreneurs to provide financing for infrastructure investments in Poland.

The matter of public-private partnership is regulated by the Public-Private Partnership Act of December 19, 2008 (hereinafter referred to as "the PPP").

The idea of the public-private partnership is that a public entity and a private partner join forces together in order to pursue a project based on division of tasks and risks between them.

Any entrepreneur (foreign too) may become a private partner for the purpose of such partnership.

If the remuneration of the private partner is represented by the right to collect benefits from the subject of the public-private partnership, or mainly such a right together with payment of an amount of money, the selection of the private partner is done by applying provisions of the Concession for Construction Works and Services Act of January 9, 2009. In other cases, the private partner is selected under the provisions of the PPL.

Under the PPP, public-private partnership can be used to pursue the following projects:

- construction or refurbishment of a building or structure;
- provision of services;
- performance of a work, in particular equipping an asset with devices increasing its value and use;
- other consideration (service);

provided that the project is combined with maintenance or management of the asset that is used for its implementation or related to it.

In the contract of public-private partnership the private partner commits to implement the project, against remuneration, and to cover in whole or in part the expenditures for the project implementation or to cover them by a third party, while the public entity commits to collaborate for the purpose of achieving the project's goal, in

particular by making its own contribution to the project.

The public entity may contribute to the project in particular by:

- bearing a part of the expenditures involved in the project implementation, including financing of subsidies to services provided by the private partner within the framework of the project;
- contribution of an asset.

The public entity has the right of current control of the project implementation by the private partner.

After the contract of public-private partnership expires, the private partner is obliged to transfer to the public entity the asset that was used for implementation of the project. The asset must be in the state that is not worse than before, considering its normal, appropriate use, unless the contract provides otherwise.

It is forbidden to amend the provisions of the contract of public-private partnership made in

relation to the contents of the offer on the basis of which the private partner was selected, unless the necessity of making such amendments results from circumstances that could not be perceived at the time when the contract was concluded. If the contract's amendment violates this rule, the amendment shall be null and void.

The contract of public-private partnership can provide that the public entity and the private partner shall establish a limited liability company (spółka z ograniczoną odpowiedzialnością), a joint stock company (spółka akcyjna), a limited partnership (spółka komandytowa) or a limited joint stock partnership (spółka komandytowo-akcyjna), in order to pursue the project. The goal and business of such a company may not exceed the scope specified in the contract of public-private partnership.

It should be noted that the private partner is not allowed to freely sell its shares in such a company. The public entity has the right of first refusal concerning shares or stocks belonging to the private partner in the company.





The information herein does not constitute legal advice. Izabella Żyglicka and Partners Attorneys at Law & Legal Counsels Limited Partnership is not responsible for the reliability and accuracy of the information provided.

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