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Polish public procurement during and after the Covid-19 pandemic

Introduction

The Covid-19 pandemic caused by the SARS-CoV-2 coronavirus has rapidly and unexpectedly changed the way in which the world functions in practically every possible area.¹ Its impact is noticeable in global, national and local economic relations, including the public procurement sector. The impact of the pandemic on the Polish public procurement market can be observed at least on several levels.

First of all, the situation has directly affected the legal regulations on public procurement. Already in the initial regulation concerning threats resulting from the impending pandemic, the Polish legislator referred to the issue of public procurement. This regulation, commonly referred to as the "Coronavirus Special Act",² was included in The Act on Special Arrangements for Preventing, Counteracting and Combating COVID-19, Other Infectious Diseases and the Crisis Situations they Cause of 2 March 2020.³ Subsequent regulations concerning public procurement appeared in successive versions of what are known as "Anti-Crisis Shields". These included: the Act Amending the Act on Special Arrangements for Preventing, Counteracting and Combating COVID-19, Other Infectious Diseases and the Crisis Situations they Cause and Certain Other Acts of 31 March 2020 (the "Anti-Crisis Shield 1.0"),⁴ the Act on Special Support Instruments in Connection with the Spread of the SARS-CoV-2 Virus of 16 April 2020 ("Anti-Crisis Shield 2.0"),⁵ the Act Amending Certain Acts in the Field of Protective Measures in Connection with the Spread of SARS-CoV-2 Virus of 14 May 2020 ("Anti-Crisis Shield 3.0")⁶ and the Act on Subsidies to Interest on Bank Loans Granted to Provide Financial Liquidity to Businesses Affected by Covid-19 of 19 June 2020 ("Anti-Crisis Shield 4.0"). The Polish Public

¹ This article covers the situation as at 22 June 2020

² Further in the article also referred to as the "Special Act"

³ Journal of Laws of 2020 item 374

⁴ Journal of Laws of 2020 item 568

⁵ Journal of Laws of 2020 item 695

⁶ Journal of Laws of 2020 item 875

Procurement Office, in subsequent communications and information, actively referred to issues related to the impact of the pandemic that were subject to the legislative initiatives described above.

Secondly, the Covid-19 pandemic has had an impact on international trade, including those aspects related to public procurement.⁷ This primarily concerns problems related to maintaining the proper functioning of international supply chains, as well as guaranteeing cross-border supplies of medical equipment of appropriate quality and suitability to combat the pandemic. The issue of the numerous abuses and illegal activities by manufacturers of this equipment and their sales intermediaries was particularly worrying. A communication from the Commission Guidance from the European Commission of 1 April on using the public procurement framework in emergency situations related to the COVID-19 crisis⁸ was a noteworthy action at an EU level. Quite importantly, the position presented in the Communication was contrary to the solution provided for in Article 6 paragraph 1 of the Coronavirus Special Act, based on a comprehensive exclusion of the regulation contained in the Public Procurement Law regarding supply and service contracts, and on the basis of Article 46c of the Act on Preventing and Combating Infections and Infectious Diseases in Humans of 5 December 2008, also contracts for construction works related to the Covid-19 epidemic.

Thirdly, the situation related to the pandemic should naturally provoke a discussion on the desired shape of public procurement in the future, namely in the “post-Covid era”. The reflection should cover the existing regulatory loopholes, as well as using the full range of legal structures available *de lege lata* and those provided for in the new Polish Public Procurement Law of 11 September 2019, which is to enter into force on 1 January 2021.

This study outlines comments on the areas where the Covid-19 pandemic has had an impact on public procurement in Poland. First of all, it will indicate the direct impact that the Covid-19 pandemic has had on the legal regulations included in the Public Procurement Law of 29 January 2004 (the “PPL”). It goes on to discuss the main points contained in the Communication from the Commission Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis of 1 April 2020. Finally, it presents the changes to be considered in the area of applying the regulations contained in the PPL in the future. At the end of the paper is a concise summary.

Impact of the Covid-19 pandemic on the legal regulations contained in the Public Procurement Law of 29 January 2004

The legal regulations on preventing and combating the Covid-19 pandemic in Poland have so far covered several key areas concerning public procurement. The first area concerns the total exclusion of applying the provisions of the PPL in specific pandemic situations. The second area is primarily related to the issue of an admissible and possible modification of the content of contracts in public procurement matters, in particular clarifying the content of Article 144 paragraph 1 item 3 of the PPL. The third area is about procedural issues and concerns two fundamental matters: the activities of the National Appeals Chamber

⁷ See, for instance, COVID-19 and Trade Policy: *Why Turning Inward Won't Work* (Ed.) by Richard E. Baldwin and Simon J. Evenett

⁸ 2020/C 108 I/01

both during the pandemic and inspections carried out by the President of the Public Procurement Office before then, as part of contracts co-financed by the European Union. The fourth area concerns a package of solutions provided for in the Act on Subsidised Interest on Bank Loans Granted to Provide Financial Liquidity to Businesses Affected by Covid-19 of 19 June 2020, also known as Anti-Crisis Shield 4.0. The fifth area does not result from the content of the newly adopted legal regulations, but is connected with the occurrence of special circumstances (including force majeure) that can be applied in practice on the basis of the existing *lege iuris* legal solutions. These include, for instance, the possibility of invalidating the public procurement procedure under Article 93 paragraph 1 point 6 of the PPL, or the possibility for the contracting party to withdraw from the public procurement contract under Article 145 of that act.

Exclusion of applying the provisions of the Public Procurement Law of 29 January 2004 pursuant to Article 6 paragraph 1 of the “Coronavirus Special Act” and Article 46c of the Act on Preventing and Combating Infections and Infectious Diseases in Humans of 5 December 2008

The first national legal regulation related to the Covid-19 pandemic was included in The Act on Special Arrangements for Preventing, Counteracting and Combating COVID-19, Other Infectious Diseases and the Crisis Situations they Cause and Certain other Acts of 2 March 2020. At an early stage of the epidemic threat, this legal act was passed to adapt a number of legal regulations in force in Poland to the needs resulting from the approaching danger. Information about the first coronavirus infection appeared in Poland on 4 March; on 11 March 2020, the World Health Organization announced the coronavirus SARS-CoV-2 had become a pandemic. The regulation of the Minister of Health declaring the risk of an epidemic in the Republic of Poland⁹ entered into force on 13 March. This regulation was subsequently repealed and replaced by the Ordinance of the Minister of Health on declaring a state of epidemic in the Republic of Poland of 20 March 2020.¹⁰

From a practical point of view, one of the key areas of the regulation contained in the Coronavirus Act was the issue of waiving the obligation to apply the PPL. This solution was provided for in Article 6 of the act, stipulating that the provisions of the PPL of 29 January 2004 do not apply to contracts where their subject matter is supplies¹¹ or services necessary to counteract Covid-19, if there is a high probability of a rapid and uncontrolled spread of the disease, or if these contracts are required for the protection of public health.

The application of the PPL can be waived under certain conditions that, among other things, were pointed out by the PPO in its Communication of 24 March 2020.¹² First of all, the supplies or services should be necessary to counteract Covid-19. The interpretation of the provision in question should take into account the contents of Article 2 paragraph 2 of that act, according to which counteracting Covid-19 on the grounds of the Special Act means all activities related to combating the infection, preventing the spread, as well as preventing and combating the effects of the infectious disease caused by the SARS-CoV2 virus, including social and economic ones. Therefore, it will cover, among other things, the purchase of medical equipment,

⁹ Journal of Laws of 2020, item 433 as amended.

¹⁰ Journal of Laws of 2020, item 49033

¹¹ The version adopted on 2 March referred to goods.

¹² <https://www.uzp.gov.pl/aktualnosci/Komunikat-w-sprawie-art.-6-tzw.-ustawy-o-COVID-19>

medical products, personal protection equipment and preparations for disinfection. It is worth noting, however, that in the PPO's opinion, Article 6 of the Special Act is not limited only to the items mentioned above. It is also possible to purchase IT equipment or services on its basis. The PPO indicated that the exemption in question may be applied to public contracts aimed at providing equipment for a workstation, namely to purchase laptops, telephones for remote work, or adapting the contracting party's IT infrastructure in order to introduce and perform remote work.

Secondly, the supply or service contracts should take place when there is a high probability of a rapid and uncontrolled spread of the disease. At the same time, the act does not contain any indication about how to examine whether there is a high probability of a rapid and uncontrolled spread of the disease. In the assessment of the PPO, the contracting party should each time assess the possibility of excluding the application of the provisions of the act after considering the circumstances of a specific case, taking into account information provided by the authorities responsible for health protection, in particular the Minister of Health, the Chief Sanitary Inspector, etc.

Thirdly, the indicated supplies or services may be purchased if required for the protection of public health.

The decision to apply the exemption referred to in Article 6 paragraph 1 of the Special Act should therefore be preceded each time by an analysis of the specific facts, taking into account the current situation related to preventing or combating the pandemic. As an exception to the rules on awarding public contracts in competitive circumstances, a strict interpretation should apply to this provision. It is also worth noting that the exclusion of the application of the provisions of the PPL does not release the contracting authorities from the obligation to apply other provisions relating to contracting obligations in the public sector. It should be pointed out, for example, that Article 44 paragraph 3 of the Public Finances Act stipulates that public expenditures should be made, among other things, in a purposeful and economical manner, in compliance with the principles of obtaining the best results from a certain expenditure and with the optimal selection of methods and means of achieving the assumed objectives.

The regulation adopted on the basis of Article 6 paragraph 1 of the Special Act concerning the exemption from the obligation to apply the PPL will be in force until 8 September 2020.¹³

An exemption from the obligation to apply the PPL, wider than that provided for in the Special Act, was based on Article 46c of the Act on Preventing and Combating Infections and Infectious Diseases in Humans of 5 December 2008.¹⁴ According to this provision, the public procurement regulations should not apply to contracts for services, supplies or (significantly) construction work awarded in connection with preventing or combating an epidemic in an area with a declared epidemiological threat or a state of epidemic. Significantly, unlike the regulation contained in the Special Act, the regulation contained in Article 46c of the Act on Preventing and Combating Infections and Infectious Diseases in Humans does not expire after a certain time. Nevertheless, its application has been combined with the occurrence of an

¹³ Article 36(1) of the Coronavirus Act

¹⁴ Journal of Laws of 2008 No 234 item 1570.

epidemiological threat or a state of epidemic, which is currently in force in Poland on the basis of the Ordinance of the Minister of Health of 20 March 2020.

Amendment of the content of a public procurement contract under Article 15r of the Act on Special Arrangements for Preventing, Counteracting and Combating COVID-19, Other Infectious Diseases and the Crisis Situations they Cause and Certain Other Acts of 31 March 2020 (Anti-Crisis Shield 1.0.).

Another regulation concerning the public procurement sector is provided for in the Act on Special Arrangements for Preventing, Counteracting and Combating COVID-19, Other Infectious Diseases and the Crisis Situations they Cause and Certain Other Acts of 31 March 2020. The focal point of this act has become the issue of changing the content of a public procurement contract.¹⁵ There can be little doubt that the situation caused by the Covid-19 pandemic affects, or may affect, the proper performance of all economic contracts. The problems involve, among other things, the deadlines for fulfilling the obligations assumed by the parties to the contract, the availability of staff and the disruption of supply chains. Clearly, such situations also apply to public procurement contracts. For this reason, the Polish legislator has decided to clarify the premise for changing the content of a contract concluded *de lege lata* in Article 144 paragraph 1 point 3 of the PPL. In light of this provision, it is prohibited to amend the provisions of a concluded contract or framework contract in relation to the content of a tender on the basis of which the contractor was selected, unless the following conditions are jointly met:

- a) the need to amend the contract or framework contract is due to circumstances that the contracting party, acting with due diligence, could not have foreseen,
- b) the value of the amendment does not exceed 50% of the initial value of the contract, as specified in the contract or framework contract.

As rightly indicated in the explanatory memorandum to the draft act of 31 March 2020, potential infringements of contractual obligations by contractors, for instance with regard to the deadline for performance, may, in light of the applicable regulations, be qualified by the contracting parties as the non-performance or improper performance of the contract. This would then mean that contractors bear liability for damages, entitling the other party to enforce contractual penalties provided for in the contracts, in the situation where the improper performance of the contracts was caused by circumstances directly related to the occurrence of Covid-19. These circumstances are independent and external to contractors. The continued performance of the public procurement contract during the period of a threat of Covid-19 may, therefore, depend on amending the content of the legal relationship between them as appropriate. Such an amendment, after the occurrence of the circumstances triggered by Covid-19, but before any party to the contract violates the original terms of the contract, will help avoid potential disputes over liability for

¹⁵ This act also provides for another exemption from the obligation to apply the PPL. This time it is a subjective exemption pursuant to Article 6.2, under which the provisions of the PPL of 29 January 2004 do not apply to contracts awarded by Bank Gospodarstwa Krajowego or Polski Fundusz Rozwoju Spółka Akcyjna related to the performance of tasks concerning the service of funds established, entrusted or transferred to Bank Gospodarstwa Krajowego or Polski Fundusz Rozwoju Spółka Akcyjna on the basis of separate provisions, or related to the performance of government programmes or other programmes implemented with public funds concerning support instruments necessary to counteract the negative economic effects of COVID-19.

the non-performance or improper performance of the contract.¹⁶ For these reasons, the legislator decided to introduce a new solution contained in Article 15r of the Anti-Crisis Shield 1.0.

Anti-Crisis Shield 1.0 obliges the parties to a public procurement contract to inform each other immediately about any impact from circumstances related to Covid-19 on the proper performance of the contract, if such impact has occurred or is likely to occur. The notification of the circumstances and their effect on the proper performance of the contract should be supported by relevant evidence in the form of statements or documents. The open catalogue is indicated in Article 15r paragraph 1 of Anti-Crisis Shield 1.0. According to the content of this provision, statements or documents may, in particular, concern such issues as: the absence of employees or non-employee workers who participate or could participate in the performance of the contract; decisions issued by the Chief Sanitary Inspector, or the state provincial sanitary inspector acting under his authority, in connection with counteracting Covid-19, on imposing an obligation on the contractor to take certain preventive or control measures; orders issued by provincial governors or decisions issued by the Prime Minister in connection with counteracting Covid-19, imposing an obligation to perform a specific task; or the unavailability of supplies of products, product components or materials, difficulties in accessing equipment or difficulties in performing transport services. In addition, the circumstances set out above may also apply to a subcontractor or further subcontractor.

The circumstances presented by one of the parties may not be sufficient in the assessment of the contracting party to the public procurement contract to demonstrate an impact on the proper performance of the contract concluded. For this reason, Article 15r paragraph 2 of Anti-Crisis Shield 1.0 provides for a solution whereby each of the parties to the public procurement contract may request additional statements or documents confirming the impact of the circumstances related to the occurrence of Covid-19 on the proper performance of this contract. Anti-Crisis Shield 1.0 also introduces an obligation to respond to the position presented by one of the parties. Importantly, this obligation is subject to a deadline. Pursuant to Article 15r paragraph 3 of the act, on the basis of the received statements or documents, the party receiving the notification is obliged to present its position to the notifying party – within 14 days from receiving the notification – together with an appropriate statement of reasons. This position should refer to the impact of the circumstances related to the occurrence of Covid-19 on the proper performance of the agreement. If the receiving party is provided with further statements or documents, the 14-day period is counted from the date of their receipt.

Under Article 15r paragraph 4, in the version adopted in Anti-Crisis Shield 1.0., the contracting party, having determined that the circumstances related to the occurrence of Covid-19 may affect or influence the proper performance of the public procurement contract, can, in agreement with the contractor, amend the contract in particular by:

1) changing the deadline for performing the contract, or part thereof, or temporarily suspend the performance of the contract, or a part thereof,

¹⁶ Explanatory Memorandum to the Government Bill amending the Special Arrangements Act for the Prevention, Prevention and Combating of COVID-19, Other Infectious Diseases and Emergencies and Certain Other Acts (DRUK 299), p. 23

- 2) changing the method of performing supplies, services or works,
- 3) changing the scope of the contractor's performance, with a corresponding change in the contractor's remuneration,
 - provided that the price increase caused by each subsequent change does not exceed 50% of the original value of the contract.

The catalogue of possible amendments indicated by the legislator in Article 15r paragraph 4 of Anti-Crisis Shield 1.0 is not a closed list. It is worth noting that the above solution, based on the discretionary right to amend the public procurement contract in a situation where the impact of circumstances related to Covid-19 on the proper performance of the contract is stated, has been replaced by the obligation to introduce such an amendment, which was proposed from the beginning of the pandemic, and was introduced under Article 77 point 20 of Anti-Crisis Shield 4.0.

It is worth pointing out that in Anti-Crisis Shield 1.0., the legislator also provided for solutions intended to protect subcontractors. Pursuant to Article 15r paragraph 7, the contractor and the subcontractor, having determined that the circumstances related to the occurrence of Covid-19 may affect or influence the proper performance of the contract between them, which is related to the performance of a public contract or a part thereof, must agree on an appropriate amendment to that contract. In particular, they may change the date of performing the contract, or a part thereof, they may temporarily suspend the performance of the contract, or a part thereof, or they may change the manner of performing the contract or the scope of mutual performances. As opposed to the right that originally existed in the case of amendments in the content of the contract between the contracting party and the contractor, the legislator introduced the obligation to modify accordingly a contract entered into by a contractor and subcontractor from the very beginning.

In order to ensure consistency of the adopted regulation with other normative acts related to the spending of public funds, in Article 15s of Anti-Crisis Shield 1.0, the legislator indicated that the following situations do not constitute an infringement of the public finance discipline referred to in Article 5 paragraph 1 points 1 and 2 and Article 17 paragraph 6 of the Act on Liability for Infringement of Public Finance Discipline of 17 December 2004:

- 1) a failure to determine or claim from a party to the contract, as referred to in Article 15r paragraph 1, any receivables arising in connection with the non-performance or improper performance of the public procurement contract as a result of circumstances related to the occurrence of Covid -19, referred to in Article 15r paragraph 1;
- 2) an amendment of the public procurement contract in accordance with Article 15r paragraph 4.

Furthermore, in Article 15t of Anti-Crisis Shield 1.0, it is indicated that a failure to establish or claim receivables from a party to the contract referred to in Article 15r paragraph 1, arising from the non-performance or improper performance of the public procurement contract as a result of circumstances related to the occurrence of COVID-19, as referred to in Article 15r paragraph 1, or an amendment to the

public procurement contract in accordance with Article 15r paragraph 4 of Anti-Crisis Shield 1.0, is not considered an offence as described in Article 296 § 1-4 of the Criminal Code of 6 June 1997.

The impact of the pandemic on the functioning of the National Appeals Chamber of (NAC) and prior inspections by the President of the Public Procurement Office on contracts co-financed by the European Union

During the pandemic, the possibility to seek legal remedies is also crucial, as is the way in which the pandemic affects the issue of the President of the Public Procurement Office inspecting contracts co-financed by the European Union. In particular, the matter of the NAC examining submitted legal remedies aroused widespread interest among participants of the public procurement market. Article 15zys paragraph 3 of Anti-Crisis Shield 1.0 was of key importance for both these issues, as it stipulates that the temporary suspension of deadlines referred to in Article 15zys paragraph 1 point 10 of the act did not apply to inspections and proceedings indicated in Section V, Chapter 3, sub-section 3 and in Section VI, Chapter 2 of the PPL. Therefore, this provision referred to the two problems mentioned above, the first one being inspections of prior orders co-financed from the European Union funds carried out by the President of the Public Procurement Office, and the second one being appeal proceedings before the National Appeals Chamber.

It is worth noting that in both these cases, the course of the procedural and judicial deadlines were not suspended for the duration an epidemiological threat or a state of epidemic announced due to Covid-19. At the same time, the way the NAC operated was influenced by Article 15zys paragraph 6 of Anti-Crisis Shield 1.0, whereby no hearings or public meetings were held during the period of an epidemiological threat and state of epidemic declared due to Covid-19. On the basis of this provision, therefore, no hearings or public hearings were held before the National Appeals Chamber. On 16 March 2020, the President of the National Appeals Chamber and the President of the Public Procurement Office announced on their websites that the NAC was suspending operations, initially for a period of two weeks. At the same time, the President of the Public Procurement Office and the President of the National Appeals Chamber were authorised to issue orders setting out detailed conditions for the organisation of the NAC's operations, in order to ensure the proper conduct of its official activities and applying appropriate security measures. According to the information contained on the NAC's website, during the period when appeal cases could not be examined at meetings and hearings with the participation of the parties and participants in appeal proceedings, the NAC issued decisions to discontinue the appeal proceedings as a result of accepting the appeal or withdrawing the appeal, as well as decisions on motions to rescind a ban on entering into a contract, and resolutions on objections to the results of an inspection by the Office of the President of the Public Procurement.¹⁷

The NAC's operations were restored on 16 May as a result of the entry into force of the Act Amending Certain Acts in the Field of Protective Measures in Connection with the Spread of SARS-CoV-2 Virus of 14

¹⁷ <https://www.uzp.gov.pl/kio>

May 2020, i.e. Anti-Crisis Shield 3.0, in particular, under Article 46 point 20 of that act, which repealed Article 15z of Anti-Crisis Shield 1.0.

Impact of the situation caused by the Covid-19 pandemic on other provisions of the PPL

In addition to the regulations indicated *expressis verbis* in acts related to the prevention and combating of the Covid-19 pandemic, the pandemic may also affect the use of other legal structures binding *lege iuris* under the PPL. This is because the Covid-19 pandemic may be treated as “force majeure” affecting legal actions taken as part of the public procurement procedure, as well as the implementation of a public procurement contract itself. The term “force majeure” has no normative definition. Its meaning has been developed on the basis of doctrine and case law. It is assumed that force majeure comprises only events external to the entitled entity that are both extraordinary and inevitable, and impossible to predict in a certain set of relations, namely events with an “overwhelmingly” powerful influence, where no defence was available against the consequences.¹⁸ There is no doubt that the status of epidemic, announced by virtue of the Ordinance of the Minister of Health of 20 March 2020, can be treated as confirmation of the occurrence of an event of force majeure.

The legal constructions contained in the PPL that may be affected by the Covid-19 pandemic include the retention of a security deposit pursuant to Article 46 paragraph 5 points 1-3 of the PPL, the construction of the invalidation of the procedure pursuant to Article 93 paragraph 1 point 6 of that act, and the construction of the withdrawal from the contract referred to in Article 145 of the act.

With regard to the issue of retaining the deposit, the contractor has to demonstrate that the impact of force majeure circumstances made it impossible to conclude a public procurement contract. The existence of a causal link between the two facts is evaluated by the contracting party.

On the other hand, in light of Article 93 paragraph 6 of the PPL, the contracting party will cancel the procedure if there has been a material change of circumstances as a result of which conducting the procedure or executing the contract is no longer in the public interest, which could not have been predicted earlier. The changing needs of the contracting parties in relation to counteracting a pandemic may force them to postpone (block) part of their expenditure in favour of appropriate purchases of medical equipment and services. This situation may mean that part of the proceedings, or the performance of the contract, will no longer be considered in the public interest. In each case, however, it will be necessary for the contracting party to demonstrate, in detail, the impact of the pandemic on the action taken under Article 93 paragraph 1 item 6 of the PPL. As the doctrine states, in order to be able to refer to the premises specified in Article 93 paragraph 1 point 6, the contracting party must prove that it was impossible, despite using due diligence, to foresee that the circumstances would change, and that the continuation of the procedure and the award of the public contract would no longer be in the public interest. The change of circumstances must be significant, and therefore of major importance and not irrelevant.¹⁹

¹⁸ Judgment of the Supreme Court of 20.09.2017, V CSK 642/16

¹⁹ See W. Dzierżanowski: *Public procurement law. Commentary*, W. Dzierżanowski, J. Jerzykowski, M. Stachowiak, LEX Legal Information System

The possibility to withdraw from a public procurement contract is regulated in Article 145 section 1 of the PPL. Pursuant to this provision, in the event of a material change in circumstances resulting in the execution of the contract no longer being in the public interest, which could not have been foreseen at the time of entering into the contract, or where the further execution of the contract may threaten an essential interest of state security or public safety, the contracting party may withdraw from the contract within 30 days of becoming aware of such circumstances. The right of withdrawal under this provision of the PPL is exclusive to the contracting party; however, the right may be exercised in strictly defined situations. It seems that the situation caused by the Covid-19 pandemic may be treated as the occurrence of a significant change in circumstances that may, consequently, lead to the withdrawal from the contract as referred to in Article 145 paragraph 1 of the PPL. In any case, the contracting party will be obliged to indicate, in detail, all the conditions referred to in that article. In this context, it is worth pointing out that the public interest referred to in the provision cannot be identified with the interest of the contracting party itself, which may in certain cases limit the contracting party's decision to withdraw from the agreement under Article 145 paragraph 1 of the PPL.

The Communication from the Commission Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis

On 1 April, the European Commission issued a Communication in which it referred to the issue of applying the provisions contained in Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC in the situation of the Covid-19 pandemic. The European Commission, contrary to the actions of the Polish legislator, indicated the legitimacy and appropriateness of using legal constructions occurring on the basis of solutions in the field of public procurement that are binding *de lege lata*. This is a significant difference in the approach to the treatment of legal structures contained in the regulations on public procurement. The European Commission sees the legitimacy and appropriateness of applying the relevant normative solutions contained in Directive 2014/24/EU in the process aimed at achieving the desired results related to combating the pandemic. In particular, this concerns the application of appropriate public procurement procedures. The Commission, therefore, does not regard public procurement as a mere bureaucratic constraint that, in a situation as special as the Covid-19 pandemic, should be removed as soon as possible. The solutions contained in Directive 2014/24/EU can not only serve the purpose of efficient procurement in a state of urgent need, they are also intended to counteract, among other things, the risk of a loss of reputation for contracting authorities, who are often the central authorities, as a result of cooperation with unreliable and not credible contractors.

Early in the Communication, the Commission drew attention to the fact that the Covid-19 epidemic had triggered a health crisis that requires rapid and intelligent solutions, as well as the flexibility to cope with a huge increase in demand for similar goods and services at a time when certain supply chains have been disrupted. The role of the contracting authorities is to ensure the availability of personal protection equipment, such as masks and protective gloves, medical devices, in particular ventilators, and other medical devices, as well as the functioning of hospital and IT infrastructure. However, the Commission crucially stressed that public purchasers can rely on the EU's public procurement framework, which, in the

Commission's view, provides ways and means to cope even with major emergencies such as the Covid-19 pandemic.

The Commission explicitly pointed to the possibilities available under Directive 2014/24/EU of the European Parliament and of the Council on public supply, service and works contracts necessary to deal with the crisis caused by the coronavirus pandemic. In the Commission's view, public purchasers have at least several options to consider in the fight against the Covid-19 pandemic.

First, in urgent cases, contracting authorities may take advantage of the possibility to significantly reduce the time limits in order to speed up the conduct of open or restricted procedures. Indeed, where urgency dictates, the directive provides for the possibility to significantly reduce the time limits. In open procedures, the time limit for receiving tenders may be reduced to 15 days in duly justified cases of urgency; in restricted procedures, the time limit for receiving requests to participate may be reduced to 15 days, and the time limit for receiving tenders to 10 days. In the Commission's view, this allows for a rapid award of the contract. In doing so, the use of the “fast-track” mode for open or restricted procedures complies with the principles of equal treatment and transparency, and ensures competition even in cases of an urgent need. In such cases, where it is not practicable to set time limits that would normally apply, contracting authorities may, in accordance with the directive, reduce the time limits applicable to open or restricted public procurement procedures.

Secondly, if the solution proves inadequate, contracting authorities may use the negotiated procedure without prior publication of a contract announcement. In light of Article 32 paragraph 2 letter c) of Directive 2014/24/EU, contracting authorities may award public contracts through a negotiated procedure without publication where, if strictly necessary, the time limits laid down for open or restricted procedures or for competitive procedures with negotiation cannot be complied with because of extreme urgency brought about by events that the contracting party could not have foreseen. Finally, in the European Commission's view, the direct award of a contract to a preselected economic operator (a direct award) is permissible provided that this operator is the only one able to deliver the required supplies within the technical and time constraints imposed by the urgency. As the contracting authorities in this case depart from the fundamental principle of transparency set out in the Treaty, the Court of Justice of the European Union requires that the use of this procedure remains exceptional. All conditions must be cumulative and must be interpreted restrictively.²⁰ Each contracting party will have to assess whether the conditions for using this type of “negotiated procedure without prior publication” are met. It will also have to justify the choice of the procedure in an individual report.

Thirdly, in the Commission's view, public purchasers should consider finding alternative solutions and cooperating with market players. The Commission stresses that public purchasers can use innovative digital tools to stimulate broad interest among those economic operators that are able to propose alternatives. For example, they may launch so-called hackathons (designing marathons) to develop new concepts for re-using protective masks after disinfection, or methods of effective protection for medical staff, or the

²⁰ E.g. Cases C-275/08 Commission v Germany and C-352/12 Consiglio Nazionale degli Ingegneri

possibility to detect the virus in the environment, etc. Public purchasers can also work more closely with innovation ecosystems and business networks that may be able to propose new solutions.

Reflection on the directions of changes in public procurement in Poland after the end of the Covid-19 pandemic

The Covid-19 pandemic revealed numerous deficits in the public procurement system in Poland. Already the first regulation devoted to preventing and combating the coronavirus of 2 March, and in particular its Article 6, showed that, in an era of a pandemic, public procurement will be treated more as an excessive bureaucratic burden than an effective means of achieving the desired results. Unfortunately, further information concerning irregularities in the purchase of medical equipment, including those related to the central authorities, showed that not applying the PPL does not always favour increasing the quality of orders and the transparency of transactions.

The “post-Covid” reality will require important systemic changes in the sphere of Polish public procurement. In the author’s opinion, these changes should be made primarily with regard to the application of the PPL. The current legal regulations and, above all, the new PPL, which will come into force on 1 January 2021, provide a framework for achieving the postulated procurement effects, including innovative, environmentally friendly and pro-social effects.

One of the consequences of the current economic situation will be that the role of the public sector will increase in the future. This sector may be seen as a source of stimulation for the economy, or for some areas of the economy. This trend is being seen globally. The efficiency of the public sector, also in the area of public procurement, will play a significant role in expanding, supplementing and modernising national healthcare facilities. However, forecasts that the role, not only of public procurement, but also public-private partnerships, will definitely go beyond this sector are justified. In the post-pandemic era, completely new challenges arise for contracting authorities. The pandemic makes it clear that there should no longer be any question of postponing certain solutions “for later”. This observation concerns, for example, the digitisation of public procurement. Other serious issues, such as pro-innovative, pro-environmental or pro-social procurement, should no longer be ignored. Currently, these aspects constitute only a minor aspect of public procurement in Poland.²¹

Changes related to improving the financial liquidity of contractors performing contracts in matters of public procurement, which were provided for in the package introduced by Anti-Crisis Shield 4.0., concerning such issues as compulsory advance payments²² and partial remuneration, will undoubtedly contribute to

²¹ In particular, the share of green or innovative public contracts in the total value of awarded public contracts in 2018 was 4.86%, while the share of green or innovative public contracts in the total number of awarded public contracts was 1.02%. See the Report of the President of the Public Procurement Office on the functioning of the public procurement system in 2018, p. 50.

²² According to the Report of the President of the Public Procurement Office on the functioning of the public procurement system, in 2018 the number of proceedings in which advance payments for the execution of the contract were provided for amounted to 804, which accounted for 0.62% of all proceedings announced in the BZP. See the Report of the President of the Public Procurement Office on the functioning of the public procurement system in 2018, p. 68.

improving the attractiveness of the public procurement market for contractors. The national public procurement market is currently characterised by extremely low competitiveness. According to the Report of the President of the Public Procurement Office on the functioning of the public procurement system in 2018, in the case of contracts below the EU thresholds announced in the Public Procurement Bulletin in 2018, the average number of submitted bids was 2.19. In the case of contracts above the thresholds, on average 2.09 bids were received by the contracting party in one procedure. Therefore, it is worth ensuring that the public procurement market looks more attractive to bidders, especially for the SME sector, including innovative companies. The attractiveness of the public procurement market may be the axis of activities that can bring about an increase in its effectiveness, as referred to in Article 17 paragraph 1 point 2 of the new PPL.

It is also worth noting the need to switch Polish public procurement to purchase of innovative solutions based on the achievements of the Fourth Industrial Revolution, and supporting this revolution as soon as possible. This applies to supplies, services and construction work. In particular, public utility infrastructure should follow the latest achievements of the private sector. This is no longer simply about increasing the comfort of beneficiaries of public services within the *Smart City* concept. Issues related to preventing and combating possible threats, including epidemiological threats, are becoming crucial. We are talking primarily about all those devices that allow the benefits of the Internet of Things, Blockchain, or automation and robotics to be used to the fullest. In the public sphere, such tools can be used for monitoring, warning, and even for saving lives, as well as – which is particularly important in the context of several dozen consecutive months – reducing direct human contact.

As a result of the situation triggered by the Covid-19 pandemic, for at least the next few years it will become necessary to focus on developing, improving and adapting to the new needs and challenges of the healthcare sector. This concerns infrastructure (healthcare facilities), equipment and medicines, as well as the services provided by the medical sector. It seems, however, that the development of the healthcare sector will require much wider and more effective use of the PPP institution than has been managed so far.

It is also worth remembering that there are new threats on the horizon of contemporary challenges, including those related to climate change. In contrast to the Covid-19 pandemic, which sprung up relatively without warning, a lot has already been said about climate change, pointing out specific data and the consequences of not taking appropriate action. The obligations imposed on countries under the Paris Agreement of 2015 require extensive action also in the area of public procurement. Similar actions become necessary in light of the New European Deal. This time, it is desirable for all participants in society, including contracting parties, to act more quickly and decisively.

In the context of the signalled directions of changes, it is worth noting that the new PPL of 11 September 2019, which will enter into force on 1 January 2021, is a modern law adapted to new conditions. The provisions contained therein are an expression of a coherent thought with an important axiological basis, namely the principle of effectiveness contained in Article 17 paragraph 1 point 2. The new provisions enable the implementation of most of the necessary and postulated changes.

Summary

The Covid-19 pandemic has had a major impact on the functioning of the public procurement market in Poland. Subsequent legal regulations contained in normative acts referred to as Anti-Crisis Shields provide for solutions to prevent and mitigate the effects of the pandemic. The actions provided for in the Anti-Crisis Shields are aimed primarily at improving the situation of contractors affected by the effects of the pandemic, as well as guaranteeing the possibility of continuing the contracts concluded in public procurement matters. Their additional effect may be to make the public procurement market more attractive.

The first of the legal regulations for preventing and combating the effects of the Covid-19 pandemic, known as the “Coronavirus Special Act”, provides for a comprehensive exemption from the application of the provisions of the PPL of 29 January 2004 in situations related to the pandemic. The solution adopted by the Polish legislator at the beginning of March 2020 goes against the Communication of the European Commission of 1 April. In its communication, the Commission clearly indicated the possibility of performing contracts directly related to the Covid-19 pandemic by using the legal structures provided for in Directive 2014/24/EU.

The expected significant role of public procurement in the “post-Covid” era requires a much wider use of the legal structures already in force by market participants, as well the structures already provided for under the new PPL of 11 September 2019. Modern public procurement should first of all strengthen the attractiveness of the market in the eyes of contractors. At the same time, it should also aim towards using and supporting new technologies, i.e. promoting innovative public procurement. The next steps should be directed at implementing the remaining pro-social and pro-environmental objectives, which are of key importance from the point of view of the contemporary challenges.

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