



PUBLIC PROCUREMENT AND COVID-19 IN POLAND

Polish regulations concerning COVID-19 and public procurement encompass main three groups of legal provisions:

- First there is the special regulation stipulated in Article 6 section 1 of the Act of 2 March 2020 on special arrangements for preventing, counteracting and combating COVID-19 (the “COVID-19 Act”), other Infectious diseases and the crisis situations they cause,
- Second the regulation introduced by the Act of 31 March 2020 on amending COVID-19 Act. There are two legal solutions related to public procurement in this regulation. First is dedicated to contractual changes and has been foreseen in articles 15r., 15s. 15t. Second concerns exclusion of implementation of the Public Procurement Law for contracts awarded by Bank Gospodarstwa Krajowego www.en.bgk.pl, Polski Fundusz Rozwoju Spółka Akcyjna <https://pfr.pl/en/> or the regional development funds under special circumstances and has been regulated in article 6 paragraph 2 of the amended COVID-19 Act. The amended COVID -19 Act comes into force on 1 April 2020,
- The third group of legal provisions is based on the regulation in the Public Procurement Law of 29 January 2004 (Journal of Laws of 2019 item 1843).

Article 6 of Act of 2 March 2020 on special arrangements for preventing, counteracting and combating COVID-19, other infectious diseases and the crisis situations they cause of – Covid-19 Act

1. The COVID-19 Act came into force on 8 March.
<http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20200000374/O/D20200374.pdf>
In accordance with Article 6 section 1, contracts for goods or services necessary for counteracting COVID-19 are not subject to the provisions of the Public Procurement Law of 29 January 2004, if there is high probability of the rapid and uncontrolled spread of the disease, or if it is required in order to protect public health.
2. The Polish legislator decided to exclude the implementation of the entire Polish Public Procurement Law, which can be done under specific circumstances. The interpretation of the provision of Article 6 has been developed by the Polish Public Procurement Office.
<https://www.uzp.gov.pl/aktualnosci/Komunikat-w-sprawie-art.-6-tzw.-ustawy-o-COVID-19>

3. First, it should be noted that the exclusion of the Public Procurement Law concerns only goods or services and can only take place if the contracts are necessary for counteracting COVID-19. These two circumstances are mandatory in every situation when a contracting authority decides to exclude the Public Procurement Law. In addition, the law can only be excluded if one of two additional legal circumstances applies:
 - a) there is a high probability of the rapid and uncontrolled spread of the disease, and
 - b) the purchase of goods and services is required in order to protect public health.
4. Before any decision to exclude the Public Procurement Law, the contracting authority must analyse the circumstances and justify the decision in view of the aim of the COVID-19 Act, as set out in its Article 2 section 2, which gives the aim as being: preventing, counteracting and combating the spread of COVID-19.

Act of 31 March 2020 on amending Act of 2 March 2020 on special arrangements for preventing, counteracting and combating COVID-19, other infectious diseases and the crisis situations they cause of

5. The Act on Amending the COVID-19 Act was adopted on 31 March and comes into force on 1 April. This regulation sets out the entire proposal prepared by the Polish government to act against the effects of the COVID-19 epidemic on the Polish economy, including crucial for public procurement regulation related to contract changes. Also the exclusion of implementation of the Public Procurement Law for contracts awarded by Bank Gospodarstwa Krajowego, Polski Fundusz Rozwoju Spółka Akcyjna or the regional development funds under special circumstances has been stipulated in this act.
6. In accordance with article 6 section 2 of amended COVID-19 Act the Public Procurement Law of 29 January 2004 will not apply to contracts awarded by Bank Gospodarstwa Krajowego, Polski Fundusz Rozwoju Spółka Akcyjna or the regional development funds, referred to in Article 13 Section 1a of the Act on Local Government at Voivodeship Level of 5 June 1998 (Journal of Laws 2019, items 512, 1571 and 1951), relating to the implementation of:
 - 1) tasks concerning the service of funds established, entrusted or transferred on the basis of separate provisions and related to the implementation of government programmes, or other programmes implemented from public funds, or
 - 2) tasks related to the use of funds from such funds- concerning support instruments necessary to counteract the negative economic effects of the COVID-19 outbreak.
7. The main group of the provisions related to public procurement included in the Act of 31 March 2020 on Amending the COVID-19 Act concerns the contract changes. The Polish legislator decided to draft a specific provision concerning the modification of public procurement contracts, previously set out in Article 72 section 1c of 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, which says that "*Contracts and*

framework agreements may be modified without a new procurement procedure in accordance with this Directive in any of the following cases, where all of the following conditions are fulfilled: (i) the need for the modification has been brought about by circumstances that a diligent contracting authority could not have foreseen; (ii) the modification does not alter the overall nature of the contract; (iii) any increase in price is not more than 50% of the value of the original contract or framework agreement. Where several successive modifications are made, that limitation will apply to the value of each modification. Such consecutive modifications will not be aimed at circumventing this Directive''.

8. Article 72 section 1c of Directive 2014/24/EU was implemented into Polish law through Article 144 section 1 item 3 of the Public Procurement Law. Due to this provision: *„Any amendments to the provisions of a concluded contract or framework agreement, when compared to the content of the tender based on which the economic operator has been selected, shall be prohibited, unless at least one of the following circumstances occur: the following conditions are jointly met: a) necessity to amend the contract or the framework agreement results from the circumstances which could not be predicted by the contracting authority despite acting with due diligence. b) value of the amendment does not exceed 50% of the contract value defined originally in the contract or in the framework agreement''*
9. The provisions concerning modifications to a public procurement contract have been regulated in Article 15r. of amended COVID-19 Act. The aim of this provision is to mitigate the results of the COVID-19 epidemic on the performance of public procurement agreements in Poland.
10. Under Article 15r. section 1 of the amended COVID-19 Act, the parties to a public procurement contract must notify each other immediately about the effect of circumstances connected with COVID-19 on the proper performance of the contract, if any such effect has occurred or may occur.
11. The parties to the public procurement contract will confirm this effect by including declarations or documents that may refer to this occurrence with the notification mentioned in particular:
 - 1) the number and positions of employees or paid contractors not in an employment relationship who participate or could participate in the performance of the contract, and who:
 - a) are subject to obligatory hospital treatment due to counteracting COVID-19,
 - b) are subject to obligatory quarantine or epidemic supervision, due to coming into contact with individuals whose health was at risk due to COVID-19,
 - c) are released from performing work because they must personally take care of a child, as set out in Article 32 paragraph 1 item 1 of the Act on Cash Benefits from Social Insurance in the case of Sickness and Maternity of 25 June 1999, or a child certified as having a major or mild disability to the age of 18, or a child with a

disability certificate if a nursery, children's club, nursery school, school or other organisation attended by the child is closed, or if it is not possible to arrange for supervision or daytime care for the child due to spread of the COVID-19 disease;

- 2) decisions issued by the Chief Sanitary Inspector, or a national sanitary inspector in a certain province, acting under the authority of the Chief Sanitary Inspector, obliging the contractor to perform certain preventive or control activities in connection with counteracting COVID-19;
 - 3) orders issued by provincial governors or decisions issued by the Prime Minister in connection with counteracting COVID-19, as described in Article 11 sections 1 and 2;
 - 4) suspending deliveries of goods, components of goods or materials, problems with access to equipment or problems in executing transport services;
 - 5) the circumstances described in items 1-4, to the extent applicable to a sub-contractor or further sub-contractor.
12. Article 15r. section 2 stipulates that each party to such a contract may demand to be presented with additional declarations or documents confirming the effect of circumstances connected with COVID-19 on the due performance of the contract. Due to article 15r. section 3 within seven days of receiving the declarations and documents, a party to a contract described its position to the other party, along with the justification regarding the effect of the circumstances connected with COVID-19 on the due performance of the contract. If a party to the contract receives subsequent declarations or documents, the time limit is counted from the date of receiving them.
13. Due to article 15r. section 4 upon finding that circumstances connected with COVID-19 affects or may affect the due performance of the contract, the contracting authority may, in agreement with the contractor, amend the contract, as referred to in Article 144 section 1 item 3 of the Public Procurement Law of 29 January 2004, which implemented Article 72 section 1c of the Directive 2014/24/EU, in particular by:
- 1) changing the time limit for performing the contract, or its part, or temporarily suspending the performance of the contract, or its part,
 - 2) changing the method of performing deliveries, services or construction works,
 - 3) changing the scope of the contractor's performance and changing the contractor's remuneration corresponding to the change in the scope of performance
- as long as the increase in price caused by each subsequent change does not exceed 50% of the initial value of the contract.
14. In accordance with article 15r. section 5 if such a contract contains provisions that make the situation of the contractor more favourable than it would be under regulation mentioned above, these provisions will apply after the change to the contract.

15. Article 15r. section 6 concerns contractual penalties or liability for damages. It is of the great importance to the contractors that, if such a contract contains provisions regarding contractual penalties or liability for damages due to the non-performance or improper performance in connection with indicated circumstances, a party to that contract, may present the impact of the circumstances connected with COVID-19 on its proper performance, and the impact of the change to the contract on the legitimacy of establishing and enforcing those penalties or damages, or their amounts.
16. In the Article 15r. sections 7, 8 and 9 Polish legislator decided to establish support of subcontractors and further subcontractors. Due to article 15r. section 7 upon finding that circumstances connected with COVID-19 affects or may affect the due performance of a contract to perform a public procurement order, a contractor and subcontractor will agree on an appropriate amendment to the agreement between them. In particular, they may change the time limit for performing the contract, or its part, or temporarily suspend the performance of the contract, or its part, change the method of performing the contract, or change the scope of mutual benefits.
17. According to article 15r. section 8 where an amendment is made to a contract referred to in section 1, and that amendment covers part of the contract entrusted to a subcontractor, the contractor and subcontractor will agree on an appropriate amendment to the agreement between them, in order to ensure that the conditions for performing that agreement by the subcontractor are no less favourable than those for performing the contract referred to in section 1, as amended in accordance with section 4. Article 15.r section 9 stipulates that the provisions of sections 7 and 8 apply accordingly to an agreement between the subcontractor and a further subcontractor.
18. Article 15s. and Article 15t. provide for the exclusion of the legal liability of contracting authorities due to abandoning claims related to the public procurement contracts. In accordance with article 15s. the following do not constitute a breach of public finance discipline, as referred to in Article 5 section 1 points 1 and 2 and Article 17 section 6 of the Act on Liability for a Breach of Public Finance Discipline of 17 December 2004 (Journal of Laws of 2019, items 1440, 1495, 2020 and 2473, and of 2020, item 284):
 - 1) a failure to determine or not to seek from a party to a contract referred to in Article 15r. section 1, receivables arising in connection with the non-performance or improper performance of a public procurement contract as a result of circumstances related to the occurrence of COVID-19, as referred to in Article 15r. section 1; or
 - 2) an amendment of the public procurement contract in accordance with Article 15r. section 4.
19. Article 15t. stipulates that the offence referred to in Article 296 § 1-4 of the Criminal Code of 6 June 1997 is not committed by anyone who fails to establish or claim from a party to a contract agreement referred to in Article 15r section 1 the amounts due resulting from the non-performance or improper performance of a public procurement contract as a

result of circumstances related to the occurrence of COVID-19, as referred to in Article 15r. section 1, or who amends a public procurement contract in accordance with Article 15r. section 4.

20. The regulation adopted in Articles 15r., 15s. and 15t. of the COVID-19 Act 2020 may be implemented also in PPP projects that are based on the availability payment method. The justification of this approach is based on Article 4 paragraph 1 of the Act on Public-Private Partnerships of 19 December 2008. In accordance with this legal norm „*the provisions of the Act of 29 January 2004 - Public Procurement Law (JoL of 2017, items 1579 and 2018, of 2018, items 1560, 1603, 1669 and 1693) shall apply to the selection procedure of the private partner and the agreement on public-private partnership in any matters not regulated herein*”.

<https://www.ppp.gov.pl/file.php?i=przegladarka-plikow/Ustawa-o-PPP-EN-opublikowana-17-12-2018.pdf>

Regulation foreseen in the Public Procurement Law of 29 January 2004 (Journal of Laws of 2019 item 1843)

21. Aside from the regulation provided in the COVID-19 Act, the provisions of the Public Procurement law and other related acts shall be implemented.
- https://www.uzp.gov.pl/data/assets/pdf_file/0019/40177/Public_Procurement_Law_2018_consolidated.pdf
22. In particular, the negotiation procedure without publication (Articles 61–65) and single source procurement (Articles 66–68) may be used in specific situations arising in connection with the current problems and limitations.