

# PUBLIC PROCUREMENT MARKET IN POLAND

## How to compete for public contracts?

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Dear Sirs,

*Market of public contracts in Poland develops dynamically. It can be noted due to constantly increasing number of notices and value of contracts awarded. Year to year we also note increase of foreign companies entering the Polish public contract market.*

*Stable legal environment and favourable market conditions result in creating opportunities for foreign companies to expand their business operation in our country.*

*The aim of this report is to encourage you to start cooperation with Polish entities within the scope of participating in the contract award procedure.*

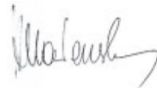
*The first part of this report describes the rules of operation of the public contract sector. Then, the general information on the Polish public contract market has been provided – its current state and further development plans. Also, the practical guidelines on participation in the contract award procedure have been provided.*

*Our general idea was to introduce to you all possibilities and requirements in connection with participation in the contract award procedure according to the Polish law.*

*We hope that these Guidelines would enable you to easily understand the Polish public contract market.*

*We encourage you to participate in the contract award procedure in Poland!*

Faithfully yours,



Agata Kozłowska

President of Investment Support

# 1. Rules of Operation of the Public Contract Market

Currently the general legal instrument regulating the Polish system of public contracts within the scope of procuring services, works or supplies is the **Act of 29 January 2004 Public Procurement Law (Journal of Laws of 2010 No 113, item 759)**, further referred to in this Report as the “**Act PPL**”, together with other executive acts issued pursuant to it.

This Act specifies the rules for awarding contracts through public procurement procedures, rights and obligations of the parties participating in such procedures as well as the rules for procedures of awarding public contracts, measures of legal protection, control of awarding public contracts and respective authorities within the scope of public contracts matters.

## 1.1. Description of Procedure – General Terms

Procedure in case of public contract means **the procedure commenced by means of public contract notice or by sending an invitation to tender or by sending an invitation to negotiations in order to select the tender of an economic operator with whom public contract will be concluded, or- in case of a single-source procurement – to negotiate the terms of that contract;** (art. 2 point 7a of the Act PPL).

Therefore, procedure focus on selecting economic operator, who will be able to execute the given public contract for certain amount of money assigned in advance by awarding entity.

### *The Scope of Objective:*

The scope of objective of procedure in case of public contracts covers all types of purchases, meaning contracts for pecuniary interest concluded in written form

between the awarding entity and the economic operator, the object of which are **works, supplies or services.**

In this sense, the **works have the meaning of executing or designing and executing works<sup>1</sup>**, as well as realization of works<sup>2</sup> by use of any mean, in accordance with the requirements established by awarding entity.

**Supply<sup>3</sup> means acquiring of things, rights and other possessions, in particular on the basis of contract for purchase, supply, rental or lease.**

Within the scope of **services** the Act PPL mentions all services the object of which are not works or supplies and which are services described in the regulations issued pursuant to art. 2a of the Act PPL<sup>4</sup>.

**Detailed catalogue of objective exclusions from the scope of the public contracts award procedure has been included in art. 4 of the Act PPL. Such most significant exclusions are as follows:**

### 1) **Contracts awarded pursuant to:**

- a) special procedure of an international organization other from the one stipulated in the Act;
- b) international contracts, the Republic of Poland being the party to, on stationing of troops, if such contracts provide for contract award procedures other to those provided for in the Act;
- c) international contracts concluded between the Republic of Poland and one or more states not being a Members of the European Union on implementation or execution of a project by the parties to such contract, if this contract provides for contract award procedures other than those provided for in the Act;

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<sup>1</sup> In accordance with the Act of 7 July 1994 Construction Law (Journal of Laws of 2006, No 156, item 1118, with further amendments) .

<sup>2</sup> In accordance with the Act - Construction Law.

<sup>3</sup> In accordance with the Act PPL.

<sup>4</sup> List of services of significant and insignificant character has been included in Regulation of Prime Minister of 28 January 2010 on list of services of priority and non priority character (Journal of Laws of 2010, No 12, item 68).

## 2) Contracts within the following scope:

- a) arbitration and conciliation services;
- b) services of the National Bank of Poland;
- c) services within the scope of research and development as well as provision of research services, which are not wholly paid by the awarding entity or the results of which are not exclusively owned by the awarding entity;
- d) supplies and services as referred to in art. 296 of the Treaty establishing the European Community;
- e) purchase, development, production or co-production of programmes to be broadcasted in radio, television or the Internet;
- f) purchase of broadcasting time;
- g) purchase of property rights and other rights to real estates, in particular rental and lease right;
- h) financial services in connection with issuing, sale, purchase or transfer of securities or other financial instruments, in particular connected with transactions with the aim of obtaining financial resources or capita for the awarding entity;
- i) supplies of rights for emission into the atmosphere of greenhouse gases and other substances, units of certified reduction of emission and units of reduction of emission with the meaning of regulations on trade of rights for emission into the atmosphere of greenhouse gases and other substances;
- j) services of Bank Gospodarstwa Krajowego within the scope of bank services for entities stipulated in art. 3 item 1 point 1 and 2, except for self government bodies;

## 3) Contracts within the scope of labour law;

## 4) Contracts and contests where their value does not exceed the equivalent in PLN of Euro 14.000;

## 5) Contracts with their main purpose of:

- a) permitting awarding entities to put for the public disposal telecommunications network or
- b) exploitation of public telecommunications networks, or
- c) providing of public telecommunications services by use of public telecommunications network;

## 6) Concessions for works and concessions for services in the meaning of the Act of 9 January 2009 on concession for works or services.

### *The Scope of entities*

#### **Participants to the public contract award procedure are:**

- 1) **Awarding entity**, meaning natural person, legal person or organizational units not having legal personality obliged to compete the Act PPL (de facto – public entities directly stipulated in art. 3 item 1 of the Act PPL);
- 2) **Economic operator**, that can be every natural person, legal person or organizational unit not having legal personality, who compete for being awarded public contract, have submitted their tender or have concluded a public procurement contract.

Notice! Economic operators can jointly compete for being awarded public contract. In such case they are required to appoint the representative to represent them in public procedure or to represent and conclude the public procurement contract. Additionally, in this case, one of economic operators or any other entity, economic operator has provided with respective power of attorney, can become such representative.

## *Procedure*

Every contract award procedure is required to be conducted in accordance with the general rules for awarding contracts or omitting any of the rules stipulated in the regulations in Chapter 2 of the Act PPL shall be the validation of the Act and becomes prerequisite of invalidity of public procurement contract.

Fundamental rules of public procurement law result from the Act PPL and they are as follows:

- 1) **Rule of Universality** – applying the Act PPL to all entities there stipulated;
- 2) **Rule of Equality** – equal treatment of all entities competing for being awarded public contract with no privileges or incentives;
- 3) **Rule of Honest Competition** – preparing and conveying procedure in a way assuring maintaining honest competition;
- 4) **Rule of Disclosure** - it means the right to access information in connection with the procedure including the documentation of particular procedure (tenders, protocols, the contract). Exceptions from the rule of disclosure are as follows:
  - Information reserved by the economic operator as being the company's secret with meaning of the regulations on fighting dishonest competition shall not be disclosed;
  - By negotiated procedure with publication, the negotiations are of confidential nature, the parties are not allowed to disclose one to another technical and commercial information in connection with the negotiations;
  - By electronic bidding, until the moment of closing the bidding the information allowing identifying the economic operators shall not be disclosed;
- 5) **Rule of Written Form** – it means that the procedure is of written form and it

particularly involves performing any kind of procedure documentation, the contract, preparation and submitting tender;

- 6) **Rule of Primary Role of Tender Procedure** – it establishes general rules of awarding public contracts, including in accordance with the Act PPL, open and restricted tendering.

## *Notices*

### **Information on initiated public contracts procedures**

**Publishing notices on contracts fulfils the information obligation and by the same means is the mechanism providing equal and common access to public contracts.**

#### Mandatory obligation

Notice on contract is a mandatory phase of procedure on awarding public contracts (with the exception of request-for-quotations and contract of single-source procurement), and performs the aim of providing proper implementation of the rule of equal treatment in the very beginning of the procedure. The obligation of publishing notice also provides non-confidentiality and transparency of the applied public contract systems.

**Awarding entity is obliged, regarding to the estimated value of the object of contract and the procedure of the contract awarded, to publish notices on public contracts in its registered office in place accessible for the public, on web page, to dispatch the notices to the President of UZP with the aim of publishing them in the official gazette (Biuletyn Zamówień Publicznych), to dispatch the notices to the Office for Official Publications of the European Communities in order to publish them in the Official Journal of the European Union and finally to publish the notices in national daily newspaper or magazine.**

**Obligation of placing notices in official gazette (BZP) or placing in Official Journal of the European Union occurs in case of initiating procedure by open tendering,**

## **restricted tendering, and negotiated procedure with publication, competitive dialog and electronic bidding.**

Moreover, the obligation of publishing awarded contract notice occurs in case of concluding the public procurement contract or framework contract.

### Facultative obligation

Facultative right of the awarding entity is to place initial informational notices on planned within the period of the following 12 months contracts or framework contracts, value of which:

- 1) for works – is equal to or exceeds the amount stipulated in regulations issued pursuant to art. 11 item 8, according to which arises the obligation to dispatch notices on contracts on works to the Office for Official Publications of the European Communities;
- 2) summed up for supplies of value equal or exceeding the amount stipulated in regulations issued pursuant to art. 11 item 8, within the scope of the given group of listed in the decree (EC) of the European Parliament and Council no 2195/2002 of 5 November 2002 on Common Procurement Vocabulary CPV (Official Journal EC L 340 of 16.12.2002, page 0001-0562; Official Journal EU Polish special edition chapter 6, vol. 7, page 3, with further amendments<sup>3)</sup>), further referred to as the "Common Procurement Vocabulary" is equal or exceeds the amount expressed in PLN of the value of Euro 750.000;
- 3) summed up for services of value equal or exceeding the amount stipulated in regulations issued pursuant to art. 11 item 8, within the scope of categories from 1 to 16 described in the Appendix no 2 to the Common Procurement Vocabulary, is equal or exceeds the amount expressed in PLN of the value of Euro 750.000.

Economic operators searching for initial informational notices can find them in the purchaser's profile, which is in submit selected for public contracts on the awarding entity's web page.

### *Submit of Publication*

**In Poland the notices are published in the official gazette Biuletyn Zamówień Publicznych (BZP) issued in electronic form by the Public Procurement Office (UZP). Notices in BZP are published free of charge in order of their dispatching to UZP.**

**In European Union the notices are published in the Official Journal of the European Union issued by the Office for Official Publications of the European Communities. (OOPEC).**

### *EU Threshold*

Obligation to publish notices in BZP exists only in case of initiating procedure of awarding public contract, if its value is below the „EU threshold”, which means the amount established pursuant to art. 11 item 8 of the Act PPL.

In case of initiating procedure of awarding public contract, which value is equal or exceeding the „EU threshold”, the notices shall be published in the Official Journal of the European Union.

Pursuant to §1 of the Regulation of the Prime Minister on values of contracts and contests the **obligation of dispatching notices to the Office for Official Publications of the European Communities arises from, the notices on public contracts shall be dispatched to the Office for Official Publications of the European Communities**, in case value of such contracts:

- 1) awarded by the awarding entities from public finance sector, in accordance with the meaning of public finance regulations, excluding public schools, national cultural institutions, national film institutions, local government authorities and their unions, public finance sector authorities funded or supervised by the local government institution as well as awarded by the awarding entities having been other national organizational units not having

legal personality, is equal or exceeds the amount expressed in PLN in value of:

- a) 125.000 Euro – for supplies or services;
  - b) 4.845.000 Euro – for works;
- 2) awarded by other awarding entities than those described in point 1, with exception of the contracts mentioned in point 3, is equal or exceeds the amount expressed in PLN in value of:
- a) 193.000 Euro - for supplies or services;
  - b) 4.845.000 Euro - for works;
- 3) of the sector is equal or exceeds the amount expressed in PLN in value of:
- a) 387.000 Euro - for supplies or services;
  - b) 4.845.000 Euro - for works.

In case of notices on contests the obligation arises to dispatch them to the Office for Official Publications of the European Communities in case their value:

- 1) awarded by the awarding entities from public finance sector, in accordance with the meaning of public finance regulations, excluding public schools, national cultural institutions, national film institutions, local government authorities and their unions, public finance sector authorities funded or supervised by the local government institution as well as awarded by the awarding entities having been other national organizational units not having legal personality, is equal or exceeds the amount expressed in PLN in value of Euro 125.000;
- 2) awarded by other awarding entities than those described in point 1 and 3 is equal or exceeds the amount expressed in PLN in value of Euro 193.000;
- 3) done by awarding entities awarding sector contracts is equal or exceeds the amount expressed in PLN in value of Euro 387.000.

### *Amending Notices*

Awarding entity can amend the notice in any time before the expiry date of submitting tenders or the expiry date of competing for entering the procedure.

Amendment is made by publishing amendment to the notice in BZP or dispatching it to the Office for Official Publications of the European Communities. Immediately after having dispatched the amendment to the notice, awarding entity is obliged to publish information on such amendment at its registered office and on web page where it has published Specification of Essential Terms of Contract.

Amending the notice can result in extending the time of submitting tenders or the expiry date of competing for participating in the procedure according to the statutory guidance.



## 2. Specification of Essential Terms of the Contract

**Specification of Essential Terms of the Contract (SETC) is primary document in tender. It specifies in a way the notice of contract, where awarding entity should clearly and in detail state all data necessary for preparing tenders by economic operators. SETC instructions binds economic operators and awarding entity throughout the duration of the proceedings.**

Pursuant to art. 36 item 1 of the Act PPL, SETC should include at least:

- 1) name of the company and address of awarding entity;
- 2) type of procedure for awarding contract;
- 3) description of the object of contract;
- 4) time limit for contract performance;
- 5) terms for participation in the procedure and description of method applied for evaluation of the fulfilment of such terms;
- 6) list of declarations or documents to be provided to economic operator in order to confirm validity of his participation in the procedure;
- 7) information on the manner of communication between awarding entity and economic operators and providing declarations and documents as well as indication of persons authorised to communicate with economic operators;
- 8) deposit requirements;
- 9) time limit during which economic operator must maintain the tender;
- 10) description of the manner of preparing tender;
- 11) place and date of submitting tenders and their opening;
- 12) description of the manner of price calculation;

- 13) description of criteria applied by the awarding entity for selecting tender together with stating the importance of such criteria and method of evaluating tenders;
- 14) information on all formalities that should be met following the selection of tender in order to conclude the public procurement contract;
- 15) requirements on security on due performance of the contract;
- 16) provisions of essence to the parties to be included in the concluded public procurement contract, general terms of the contract or draft of the contract if awarding entity requires from the economic operator concluding the public procurement contract on such terms;
- 17) Regulation on legal protection measures available to economic operator during the contract award procedure.

**Information mentioned in points 6, 8 and 15 of the Act PPL can be omitted in case of procedure of value below the “EU threshold”.**

**Unless provisions of the Act PPL state otherwise, SETC also includes the following:**

- 1) description of part of the contract, in case the awarding entity allows submitting tender for lots;
- 2) maximum number of economic operators the awarding entity shall conclude the framework contract with, in case the awarding entity plans to conclude framework contract;
- 3) information on prospective additional contracts mentioned in art. 67 item 1 point 6 and 7 or art. 134 item 6 point 3 and 4, in case the awarding entity plans to award such contracts;
- 4) description of the manner of performing variant tenders and minimum terms required from such variant tenders, in case the awarding entity allows submitting them;

- 5) email address or web page of the awarding entity in case the awarding entity allows communicating via internet means;
- 6) information on foreign currencies, the settlements between the awarding entity and the economic operator may be done in, in case the awarding entity plans such foreign currencies settlements;
- 7) in case the awarding entity plans to perform electronic bidding:
  - a) information on planned selection of the tender via electronic bidding;
  - b) requirements on registration and identification of economic operators, including technical requirements of IT equipment;
  - c) information on criteria to be applied by electronic bidding;
- 8) the value of reimbursement of costs of participation in the procedure, in case the awarding entity plans such reimbursement;
- 9) in case the awarding entity plans to pose requirements mentioned in art. 29 item 4, to establish in particular:
  - a) number of persons mentioned in art. 29 item 4 point 1, as well as employment period of such persons;
  - b) manner of documenting the employment of persons mentioned in art. 29 item 4, point 1 or creating or increasing training fund;
  - c) rights of the awarding entity within the scope of auditing meeting requirements mentioned in art. 29 item 4, by the economic operator, as well as penalties in default of such requirements.

### *Explanations to SETC*

It has to be pointed out that **each of the economic operators has the right to address the awarding entity on providing**

**explanations to SETC.** Each reply to the economic operator's questions should be presented to all economic operators, who have downloaded SETC without disclosing the source of such question, meaning without mentioning the exact entity competing for explanations to the awarding entity.

It is important to notice, that the economic operators can address only for explanations within the scope of SETC, without the right to discuss over its provisions. The economic operators neither can pose questions in connection with the procedure, however not being the scope of SETC.

**Time limit when economic operators can address questions on explanation of SETC expires on the last day of the half of the period of submitting tenders.**

Awarding entity is obliged to provide explanations immediately, however not later than:

- 1) within 6 days prior the closing date of submitting tenders;
- 2) within 4 days prior the closing date of submitting tenders – in restricted tendering and Negotiated procedure with publication, in case the need arises to award contract;
- 3) within 2 days prior the closing date of presenting tenders – in case value of the contract does not exceed the „EU threshold“.

- with reservation that the question for explanation has been posed prior last day of the half of period of presenting tenders. In case the question is posed after the time mentioned above the awarding entity may, although is not obliged to provide any explanations in reprise.

### *Amending SETC*

**In justified cases the awarding entity can prior expiry of the period of submitting tenders amend SETC.** Such amendment should be immediately presented to all economic operators who have received SETC and in case the Specification is available on

web page, the amendments should be published there as well.

Amendments of SETC may result in changing the closing date of submitting tenders (extending such period).

Awarding entity extends the period of mandatory submission of tenders, if this amendment is significant, in particular for the determination of the contract or its scope, evaluation criteria, conditions for participation in the procedure or how to assess their compliance (and hence information included in the notice.)

Once again, the estimated value of the contract and the "EU threshold" condition number of additional days for submission of tenders.

## 2.1. Contract Award Procedure

### General Procedures

#### OPEN TENDERING

Open tendering is one of the two general procedures for awarding public contracts. **It is simple procedure, meaning in case entities familiarize themselves with the information in the notice and in SETC and are interested in submitting tenders in such procedure, they submit tender which then shall be evaluated by ranking best tenders.**

Public procurement contract is being concluded with the economic operator that has submitted the most advantageous tender.

Procedure:

- 1) Publication of notice on contract (invitation for economic operators to submit tenders) initiates the procedure. Such notice includes:
  - a) name of the company and address of awarding entity;
  - b) type of procedure for awarding contract;

- c) web page where SETC will be published;
- d) stating the definition of the object and volume or the scope of contract including information on possibility to submit tender for lots;
- e) information on the possibility to submit variant tender;
- f) date of executing the contract;
- g) terms for participation of the procedure and description of the manner of evaluating meeting such terms;
- h) information on the deposit;
- i) criteria of evaluating tender and their importance;
- j) submit and date of submitting tenders;
- k) bidding date of the tender;
- l) information on planned concluding framework contract;
- m) information on planned creation of dynamic purchase system together with web page where additional information on such system will be published;
- n) information on planned selection of the most advantageous tender by use of electronic bidding together with web page such bidding will take place on;
- o) information on planned additional contracts mentioned in art. 67 item 1 point 6 and 7 or art. 134 item 6 point 3 and 4 of the Act PPL in case the awarding entity plans to award such contracts.

**Anyone who has familiarized himself with the notice can address the awarding entity on documents and information needed for preparing the tender. In particular it means SETC, which the awarding entity publishes for free on web page (from the date of publishing notice) or – in paid form- when it is presented to the economic operators within 5 days. SETC price may cover only the costs of printing and postage.**

- 2) Submitting tenders by economic operators – time limits:
- a) Minimum period for submitting tenders in case of contracts with value below the „EU threshold” shall be:
- **7 days** from the date of publishing notice for supplies or services in BZP;
  - **14 days** from the date of publishing notice on works in BZP.
- b) Minimum period for placing tenders in case of contracts with value equal to or exceeding the „EU threshold” shall be:
- **40 days** – from the date of dispatching the notice to the Office for Official Publications of the European Communities via electronic means, in accordance with form and procedures stipulated in web page listed in the Regulation;
  - **47 days** from dispatching the notice on contract to the Office for Official Publications of the European Communities in other way to the one stipulated in point a) above.
- c) In case value of the contract is equal or exceeds the „EU threshold” and the information on contract has been included in the initial informational notice in case such initial informational notice included all information required in the notice within the scope such information is available in time of publishing the notice and has been dispatched to the Office for Official Publications of the European Communities or published on the purchaser’s profile for at least 52 days and not more than 12 months prior to the date of dispatching the notice on contract, the minimum period of placing tenders is as follows:
- **22 days** from the date of dispatching the notice on contract

to the Office for Official Publications of the European Communities via electronic means, in accordance with form and procedures stipulated in web page listed in the Regulation;

- **29 days** from dispatching the notice on contract to the Office for Official Publications of the European Communities in other way to the one stipulated in point a) above.

**In establishing minimum periods for submitting tenders the hour of submitting tender in the last day of such period is also of certain significance. Therefore breach of the time limit means any delay in submitting tender regardless from the exact number of minutes or hours of such delay.**

Any reason for such delay will not be taken into account.

Economic operator submits tender together with the statement of meeting all requirements mentioned in the notice terms of participation in the procedure and in case the awarding entity requires documents confirming meeting such requirements, these also should be provided.

Request to present the given documents confirming meeting requirements of participation in the procedure shall always take place in case of contracts of value equal or exceeding the „EU threshold”. In procedure of less value the requirement of presenting such documents can arise although it is not obligatory (the awarding entity can make such requirement).

Awarding entity selects the most advantageous tender based on the tender documentation, statements and other document (facultative).

- 3) Evaluation of tender performed by awarding entity and selecting the most advantageous tender;
- 4) Concluding contract.

## RESTRICTED TENDERING

### Restricted tendering is next to open tendering one of the two general procedures of awarding public contracts.

Any economic operator who has familiarized himself with the notice on contract can participate in this proceeding. The actual limitation of participants takes place later on, meaning:

- a) In phase of entering participation in the procedure (phase of competing for participation in the procedure);
- b) In phase of inviting to submit tenders.

#### Procedure:

1) Publication of notice on contract (invitation of economic operators to submit tenders) initiates the procedure. Such notice includes in particular:

- a) name of the company and address of awarding entity;
- b) type of procedure for awarding contract;
- c) stating the object and amount or the scope of contract including information on possibility to submit tender for lots;
- d) information on the possibility to submit variant tender;
- e) date of executing the contract;
- f) terms for participation in the procedure and description of method applied for evaluation of the fulfilment of such terms;
- g) list of declarations or documents to be provided to economic operator in order to confirm validity of his participation in the procedure;
- h) number of economic operators to be invited to submit tenders;
- i) information on the deposit;
- j) criteria of evaluating the tender and their importance;
- k) place and date of competing for participation in the procedure;

- l) web page where SETC will be published in case the awarding entity publishes it there;
- m) information on planed conclusion of framework contract;
- n) information on planed selection of the most advantageous tender by use of electronic bidding together with web page such bidding will take place on;
- o) information on planed additional contracts mentioned in art. 67 item 1 point 6 and 7 or art. 134 item 6 point 3 and 4 of the Act PPL in case the awarding entity plans to award such contracts.

2) Competing for participation in the procedure by the economic operators (initial verification of participants) – time limits:

- a) Minimum period for submitting tenders in case of contracts with value below the „EU threshold” shall be:
  - **7 days** from the date of publishing notice in BZP;
- b) Minimum period for submitting tenders in case of contracts with value equal to or exceeding the „EU threshold” shall be:
  - **30 days** from the date of dispatching the notice to the Office for Official Publications of the European Communities via electronic means, in accordance with form and procedures stipulated in web page listed in the Regulation;
  - **37 days** from dispatching the notice on contract to the Office for Official Publications of the European Communities in other way to the one stipulated in the point above.
- c) In case of an urgent need of awarding contract, minimum periods of competing for participation in restricted tendering mentioned in

point b) above can be shorter, although they cannot be shorter than:

- **10 days** from the date of dispatching the notice to the Office for Official Publications of the European Communities via electronic means, in accordance with form and procedures stipulated in web page listed in the Regulation;
- **15 days** from the date of dispatching the notice to the Office for Official Publications of the European Communities by fax.

Economic operator presents the application together with the statement on meeting the requirements for participation described in the notice and in case the awarding entity requires other documents confirming meeting such requirements, these also should be provided.

Bu use of the applications for participation in the procedure together with statements and (facultative) other documents, awarding entity initially selects economic operators in accordance with the rule of complying/non complying.

3) Awarding entity invites to submit tenders (5 to 20 economic operators) and deliver SETC:

In case the number of economic operators meeting requirements covers the number stipulated in the notice (the awarding entity has the right to establish random number of economic operators to be invited to submit tenders, unless it varies from 5 to 20) the awarding entity invites all economic operators meeting requirements.

In case the number of economic operators meeting requirements for participation in tender exceeds the number stipulated in the notice, next verification takes place (evaluation in points in accordance with the rule - which entity meets requirements the most).

The above means that an economic operator despite meeting requirements for participation

in the procedure may not be invited to submit tender.

4) Submitting tenders by economic operators – time limits:

a) Minimum period for submitting tenders in case of contracts with value below the „EU threshold” shall be:

— **7 days** from the date of inviting to submit tenders for contracts on supplies or services;

— **14 days** from the date of inviting to submit tenders for contracts on works.

b) Minimum period for submitting tenders in case of contracts with value equal to or exceeding the „EU threshold” shall be:

— **40 days** from the date of inviting to submit tenders.

d) In case value of the contract is equal or exceeds the „EU threshold” and the information on contract has been included in the initial informational notice in case such initial informational notice included all information required in the notice within the scope such information is available in time of publishing the notice and has been dispatched to the Office for Official Publications of the European Communities or published on the purchaser’s profile for at least 52 days and not more than 12 months prior to the date of dispatching the notice on contract, the minimum period of submitting tenders is as follows:

— **22 days;**

c) In case of an urgent need of awarding contract, minimum periods of competing for participation in restricted tendering mentioned in point b) above can be shorter, although they cannot be shorter than:

— **10 days;**

d) Minimal period of submitting tenders mentioned in point b) above may be shorter of 5 days in case the awarding entity publisher SETC on his web page not later than from the date of publishing the notice on the contract in the Official Journal of the European Union until the ending date of placing tenders.

5) Evaluation of tender performed by the awarding entity and selecting the most advantageous tender;

6) Concluding contract.

### *Other Procedures*

## **NEGOTIATED PROCEDURE WITH PUBLICATION**

**Negotiated procedure with publication can be applied in case of arising at least one of the following events:**

- in procedure initially carried out by open tendering, restricted tendering or competitive dialog all tenders have been rejected and initial terms of the contract have not been significantly changed;
- in extraordinary situations when the nature of supplies, services or works or the risk in connection with such made impossible performing their previous evaluation;
- in case the specific nature of contracted services may not be established in advance with the aim of selecting the most advantageous tender by restricted or open tendering;
- works carried out exclusively with the aim of research or development and not with the aim of providing profit or covering costs of research or development done are the object of contract;

- value of the contract is less than the "EU threshold".

It has been used **especially in case when the awarding entity cannot establish in advance specific nature of the contracted services in order to select the most advantageous tender or for example in case when the awarding entity is not able to perform evaluation of such services, supplies or works.**

The procedure of negotiations enables to make more precise or fulfil the description of the object of the contract and terms of the public procurement contract by negotiations performed and tenders proposed by the economic operators.

### Procedure:

1) Initiating the procedure by publishing the notice on the contract;

The scope of information included in the notice on negotiations is almost identical to the scope of information included in the notice on restricted tendering (art. 56 item 1 of the Act PPL).

2) Competing by economic operators for participating in the procedure (initial verification of participants);

Minimal periods of competing for participation in the procedure are identical to those stipulated in case of competing for restricted tendering (art. 56 item 2 of the Act PPL).

Similar as in case of restricted and open tendering the economic operators together with the application for participation in the procedure are obliged to present statement on meeting requirements for participation and in case they are required, other documents confirming meeting such requirements.

Next the awarding entity performs evaluation of the submitted documents.

3) Awarding entity invites the economic operators to submit initial tenders (minimum 3 economic operators and in case value of the contract exceeds the "EU threshold" – minimum 5) – time limit of submitting initial tenders:

- a) **not less than 10 days** from the date of invitation to submit initial tenders.

In case the number of economic operators meeting requirements for participation in the procedure covers the number stipulated in the notice (the awarding entity has the right to establish random number of economic operators to be invited to submit initial tenders, however not less than 3 and in case the value of contract is equal or exceeds the "EU thresholds" – not less than 5) the awarding entity can invite all economic operators that meet such requirements.

Notice! SETC shall be received by the economic operators together with the invitation to submit initial tenders.

- 4) Awarding entity performs the evaluation of initial tenders:  
5) Negotiations.

All economic operators submitting initial tenders who have not been rejected are invited to negotiations. Negotiations are confidential and should be based on tenders submitted. Neither of the parties should disclose any technical or commercial information in connection with negotiations.

The aim of the negotiations is to make more precise and/or fulfil the description of the object of the contract and to make more precise and/or fulfil the provisions of the contract.

Having closed negotiations the awarding entity can make more precise and or fulfil SETC within the scope of the description of the object of the contract and draft of the significant provisions of the contract draft.

- 6) Awarding entity invites all economic operators participating in negotiations to submit final tenders – time limit of submitting final tenders:

- a) **not less than 10 days** from the date of invitation to submit final tenders.

In case of amending SETC after carrying out negotiations, SETC shall be received by all economic operators together with the invitation to submit tenders.

- 7) Evaluation of tenders performed by awarding entity and selecting the most advantageous tender;  
8) Concluding contract.

## COMPETITIVE DIALOG

Competitive dialog has been introduced to the Act PPL pursuant to the Regulation 2004/18/EC, where dialog has been provided for contracts of specific nature. Such events pursuant to the Regulation may arise **„especially during implementation of significant, integrated projects within the scope of transport infrastructure, large IT networks or projects covering complex financing processes of complicated structure, the financial or legal structure cannot be defined in advance”.**

Competitive dialog has been regulated in the Act PPL in art. 60a-60e. **Pursuant to such regulations it can be awarded only in case of meeting jointly the following conditions:**

- 1) It is not possible to award the contract by restricted or open tendering due to the fact that extremely complex nature of the object of the contract does not allow to properly describe it in accordance to art. 30 and 31 of the Act PPL or to objectively establish legal or financial requirements for performing the contract;
- 2) Evaluation is not the sole criterion of selecting the most advantageous tender.

Therefore, the procedure of competitive dialog has been provided for contracts of extremely complex nature in implementation of which it has been of vital importance to discuss by the awarding entity all possible aspects in connection with the formula of the contract implementation.

**Characteristic feature of competitive dialog is largely broader scope of object compared to other procedures provided in the Act PPL.** Within this procedure all possible aspects of the implemented contract can be discussed. There is no need for



„making more precise” the object of the contract and its „fulfilling” and it has been possible that the final scope of the contract will be significantly different from the primary one.

### Procedure:

- 1) Initiating procedure has been performed by publishing the notice on the contract:

The scope of information included in the notice on negotiations is the same as the scope of information in the notice on restricted tendering (art. 56 item 1 of the Act PPL), with reservation that the notice on contract by competitive dialog shall also include:

- a) Description of needs and requirements of the awarding entity stipulated in way enabling preparing by the economic operators to participation in dialog or information on the source of acquiring such description;
  - b) Information on the value of prizes for the economic operators, who by dialog presented solutions being basis for submitting tenders, in case the awarding entity plans to award such prizes;
- 2) Competing for participation in the procedure (initial verification of participants);

Minimum periods of competing for participation in the procedure are identical to those stipulated in case of competing for restricted tendering (art. 56 item 2 of the Act PPL).

- 3) Dialog:

In case the number of economic operators meeting requirements for participation in the procedure covers the number stipulated in the notice (the awarding entity has the right to establish random number of economic operators to be invited to submit initial tenders, however not less than 3 and in case the value of contract is equal or exceeds the “EU threshold” – not less than 5) the awarding entity can invite all economic operators that meet such requirements.

In case the number of economic operators meeting the requirements for participation in the procedure exceeds the number stipulated in the notice, then the awarding entity can invite to the dialog only the selected economic operators who meet the requirements in the notice the most.

Dialog is of confidential character and can cover all possible aspects of the contract; however neither of the parties may, as in case of negotiated procedure with publication, disclose without prior consent from the other party any technical and commercial information in connection with the dialog.

Dialog has been carried out until the awarding entity is able to state the final solutions meeting needs and at this point SETC can be prepared.

- 4) Awarding entity invites to submit tenders – time limits of submitting tenders:
  - a) **not less than 10 days** from the date of invitation to submit final tenders.

Awarding entity invites all economic operators participating in dialog to submit tenders and provides them with SETC.

- 9) Evaluation of tenders performed by awarding entity and selecting the most advantageous tender;
- 10) Concluding contract.

## **NEGOTIATED PROCEDURE WITHOUT PUBLICATION**

Negotiated procedure without publication is another type of negotiations, very similar to negotiated procedure with publication and competitive dialog. However, contrary to these two procedures it is of closed character. **It means that the awarding entity does not publish any publication on contract and selects economic operators who will be invited to participate in the procedure. It is carried out on invitation sent by the awarding entity to the selected economic operators.**

Such construction of negotiated procedure without publication limits in major part its competitiveness and results in its application only in extraordinary events provided in the Act PPL, meaning:

- 1) In case when in procedure initially carried out by open or restricted tendering there have been no applications for participation in the procedure, there has been no tender submitted or all tenders have been rejected pursuant to art. 89 item 1 point 2 of the Act PPL due to their default in the description of the object of the contract and the initial requirements of the contract have not been significantly amended;
- 2) Contest mentioned in art. 110 of Act PPL has been carried out where the prize awarded has been an invitation to negotiated procedure without publication for at least two authors of the selected contest works;
- 3) Object of the contract are goods produced exclusively with the scientific research or development activity aim and not with the aim of providing profits or covering costs of research or development activity;
- 4) Due to urgent need of awarding contract not resulting from any cause on the side of the awarding entity, which could not be anticipated in advance, when time limits stipulated for restricted or open tendering or negotiated procedure with publication could be observed.

In case value of the contract awarded by negotiated procedure without publication exceeds the „EU threshold”, the need arises to notify the President of the Public Procurement Office (notification period – 3 days from starting the procedure).

Procedure:

- 1) Awarding entity prepares SETC;
- 2) Awarding entity invites the economic operators selected by himself for negotiations.

The invitation should include at least the following:

name of the company and address of awarding entity;

stating the object of contract including information on possibility to submit

tenders of loss;

information on the possibility to submit variant tender;

date of executing the contract;

requirements for participation in the procedure and description of the manner of

evaluating meeting such requirements;

description of the procedure of the contract and legal basis of its application;

criteria of evaluating the tender and their importance;

time and place of negotiations with the awarding entity.

Awarding entity invites the economic operators in number assuring competitiveness not less than 5. Exceptional are contracts of special character, which can be executed by smaller number of economic operators – in such case the awarding entity is allowed to invite for negotiations less economic operators, however not less than 2.

3) Negotiations:

Negotiations are carried out in the same manner as by negotiated procedure with publication.

4) Awarding entity invites the economic operators to submit tenders – time limits:

- a) **not less than 10 days** from inviting to submit tenders.

Together with the invitation to submit tenders the economic operators receive modified and completed SETC.

- 5) Evaluation of tenders and selecting the most advantageous tender;
- 6) Concluding contract.

## CONTRACT OF SINGLE-SOURCE PROCUREMENT

Contract of single-source procurement is the least competitive type of awarding public contracts. **It means to carry out negotiations with one, selected by the awarding entity, economic operator.**

**This procedure of contract of single-source procurement can be applied only in extraordinary events, when at least one of the following occurs:**

- 1) supplies, services or works can only be provided by one economic operator:
  - a) Due to technical reasons of objective character;
  - b) Due to reasons in connection with exclusive rights protection resulting from separate regulations;
  - c) In case of awarding contract within the scope of creative or artistic activity;
- 2) Contest mentioned in art. 110 of Act PPL has been carried out where the prize awarded has been an invitation to negotiations by contract of single-source procurement for the author of the selected contest work;
- 3) Due to an extraordinary event not resulting from any cause on the side of the awarding entity, which could not be anticipated in advance, and awarding the contract is necessary and when time limits stipulated for other procedure could be observed;
- 4) In case of procedure of awarding the contract initially carried out, when at least one of them has been by open or restricted tendering, and there have been no applications for participation in the procedure, or no tender submitted or all tenders have been rejected

pursuant to art. 89 item 1 point 2 of the Act PPL due to their default in the description of the object of the contract and the initial requirements of the contract have not been significantly amended;

- 5) In case of awarding the existing economic operator of services or works the additional contracts, not covered by the prior contract and not exceeding the value of 50 % of the existing contract, necessary for its proper execution, the execution of which has become indispensable due to an event unable to be anticipated in advance, when:
  - a) Due to technical or commercial reasons separating the additional contract from the prior contract would mean to bear extremely high costs or
  - b) Execution of the prior contract is restricted by performance of the additional contract;
- 6) In case of awarding within the period of 3 years from awarding the prior contract, to the existing economic operator of services or works the additional contracts not exceeding the value of 50 % of the prior contract and meaning repeating the same kind of contracts, in case the prior contract has been awarded by restricted or open tendering and the additional contract has been included in the notice on contract for the prior notice and is in accordance with the object of the prior contract;
- 7) In case of awarding within the period of 3 years from awarding the prior contract, to the existing economic operator of supplies the additional contracts not exceeding the value of 20 % of the prior contract and meaning expanding the supplies if the change of the prior economic operator would result in necessity to purchase goods of other technical parameters, which would result in technical incompatibility or extremely large technical problems in usage and maintenance, in case the prior contract has been awarded by restricted or open tendering and the

additional contract has been included in the notice on contract for the prior notice and is in accordance with the object of the prior contract;

- 8) It is possible to award contract on supplies on extremely beneficial terms as a result of liquidation of activity of other entity, execution procedure or bankruptcy;
- 9) The contract on supplies is executed in goods exchange market in the meaning of the regulations on exchange markets including exchange markets of other member countries of the European Commercial Area;
- 10) The contract is awarded for the foreign unit in the meaning of the regulations on foreign service and its value does not exceed the amounts stipulated in the regulations issued pursuant to art. 11 item 8 of the Act PPL;
- 11) The contract is awarded for the own needs of an army unit in the meaning of the regulations on rules of use or stationing the Armed Forces of the Republic of Poland outside its territory and the value of such contract does not exceed the amounts stipulated in the regulations issued pursuant to art. 11 item 8 of the Act PPL.

#### Procedure:

- 1) Awarding entity invites the economic operator selected by him to negotiations;

Awarding entity provides the economic operator with the invitation for negotiations together with all information for carrying out procedure, including significant provisions of the contract, which then could be incorporated into the concluded public procurement contract (or general terms of the contract or the draft of the contract).

- 2) Negotiations, including negotiations of delivered to the economic operator significant provisions of the contract (or general terms of the contract or draft of the contract);
- 3) Concluding contract.

At latest on the day of concluding the public procurement contract the economic operator is obliged to make statement on meeting the described in the notice requirements for participation in the procedure and in case value of the contract is equal or exceeds the „EU threshold”, also other documents confirming meeting such requirements.

If the value of the contract awarded by single-source procurement exceeds the "EU thresholds, there is a need to report such conduct to the President of the Public Procurement Office (deadline for application - 3 days from starting the procedure).

### REQUEST-FOR-QUOTATIONS

Request-for-quotations is one out of three (next to negotiated procedure without publication and contract of single-source procurement) procedures not followed by any notice on public contract. **In this procedure the economic operators submit tender on the direct invitation of awarding entity with the price which does not undergo any negotiations.** Therefore, one of the criteria of evaluating the tender is the price here.

The procedure of request-for-quotations has been restricted only to the following supplies and services:

- a) Publicly available;
- b) Of established quality standards;
- c) Of contract value not exceeding the „EU threshold”.

To apply to request-for-quotations, all above three conditions must be met.

This procedure is highly simplified and is as follows:

- 1) Awarding entity invites the economic operators selected by him to submit tenders (of minimum 5);

Together with the invitation the economic operators receive simplified version of SETC.

- 2) Evaluation of tenders performed by the awarding entity and selecting the cheapest tender.

## ELECTRONIC BIDDING

**The procedure of an electronic bidding, similarly as request-for-quotations, has been applied only for contracts of value below the “EU threshold”.**

According to the regulatory definition in this procedure by the use of electronic form published in web page allowing entering data online the economic operators submit further, more beneficial tenders which undergo automatic classification. Such bidding differs from other types of procedure on awarding contracts in this way that it has been carried out by use of electronic tools (computer and the Internet), by use of which the economic operators submit and the awarding entity receives in actual time tenders which undergo classification according to their price.

### Procedure:

Procedure starts by publishing the notice in BZP, on web page and on web page the bidding will be carried out.

The notice on contract mentioned above should include at least the following:

- a) name of the company and address of awarding entity;
- b) type of procedure for awarding contract;
- c) description of the object of contract;
- d) requirements on registering and identification of the economic operators including technical requirements of IT equipment;
- e) manner of behaviour within the procedure of bidding, in particular stating minimum values of deeds;
- f) information on number of phases of the bidding and its time limits;
- g) period of competing for participation in electronic bidding;
- h) date of opening and terms of closing the electronic bidding;
- i) requirements for participation in the procedure and description of the

manner of performing evaluation of meeting such requirements;

- j) information on statements and documents to be provided by the economic operators in order to confirm meeting the participation requirements;
  - k) period of tender bidding;
  - l) date of executing the contract;
  - m) requirements on securing the proper execution of the contract;
  - n) significant for the parties provisions to be included in the contract on public contract or general terms of the contract or draft of the contract in case the awarding entity requires from the economic operator to conclude such public procurement contract under such terms;
- o) web page address the electronic bidding shall take place on.
- 1) Submitting applications by economic operators – time limit:
    - a) Minimum period - **7 days** from the date of the notice.
  - 2) Awarding entity invites to submit tenders all economic operators meeting participation conditions of the procedure:

Tenders are submitted by the economic operators via electronic means and undergo automatic classification based on their price. Tender submitted by bidding is no longer in force when another participant submits more advantageous tender.
  - 3) Opening electronic bidding – time limit:
    - a) **not less than 5 days** from invitation of the economic operators to submit tenders.
  - 4) Bidding.

Economic operators by use of further deeds propose lower price.

Bidding can have one phase or more. In case of more phases, the awarding entity (if

previously reserved in the notice), after closing bidding, is able to reject such economic operators who have not made new deeds, informing them of such fact immediately.

By closing phase of the bidding awarding entity informs all economic operators of the position of their tenders, number of economic operators participating in each phase of the bidding and on prices of the tenders submitted. Until closing of the bidding no information disclosing the identity of the economic operators can be disclosed.

Closing of bidding can take place:

- a) In period stipulated in the notice;
  - b) If within the established in the notice period there will be no new deeds or
  - c) After closing of the last phase announced.
- 5) Awarding entity selects tender based to the lowest price;
- 6) Concluding contract.

## 2.2. Deposit and Securing Contract Performance

Deposit can be defined as certain property value which awarding entity can require or requires from entities in contract award procedure in order to secure his interest.

**The aim of paying deposit by economic operators is to secure proper course of the procedure and simultaneously to secure awarding entity that only economic operators interested in concluding contract would participate in the procedure.**

Obligation of establishing deposit results from art. 45 of the Act PPL which provides for both mandatory establishing deposit – in case when value of contract is equal or exceeds the “EU threshold” and facultative, depending on the will of awarding party – in case value of the contract is lower than the “EU threshold”.

General information:

- 1) Forms of paying deposit (selecting form is up to awarding entity in one or in several forms);
  - a) cash;
  - b) bank sureties or guarantees of collective savings-loan fund , however the surety of collective savings-loan fund is always a financial surety;
  - c) bank guarantees;
  - d) insurance guarantees;
  - e) sureties granted by entities referred to in art. 6b item 5 point 2 of the Act of 9 November 2000 on the establishment of the Polish Agency for Enterprise Development (Journal of Laws of 2007, No 42, item 275, of 2008, No 116, item 730 and 732 and No 227, item 1505 and of 2010, No 96, item 620);

- and deposit paid in cash shall be issued by transfer to bank account stated by awarding entity.
- 2) Amount of deposit – awarding entity states the amount of deposit in value of 0,5%-3% of the estimated total value of contract.
- 3) Time limit of issuing deposit – before the expiry date of submitting tenders. Validity of deposit includes the time from deadline for submission of tenders to the time limit of maintaining the tender.
- 4) Rules of returning deposit:
  - a) **Deposit is returned to all economic operators after selecting the most advantageous tender or revoking the procedure, except for the economic operator whose tender has been selected the most advantageous;**
  - b) **To economic operator whose tender has been selected the most advantageous awarding entity returns deposit immediately after concluding agreement on public**

**contract and issuing security of proper performance of the contract (in case issuing such security is required). Earlier only at the request of the contractor.**

- c) Deposit paid in cash has been returned together with interests resulting from the bank account agreement, where it has been placed, minus costs of operation of such bank account and bank provision for transferring money to the bank account stated by awarding entity;

**5) Reasons for keeping deposit by awarding entity:**

- a) In case economic operator in response to the request of awarding entity does not provide statements or documents mentioned in art. 25 item 1 of the Act PPL or powers of attorney, unless he proves that such state does not result from events on his side;
- b) In case economic operator whose tender has been selected has refused to sign agreement on awarding public contract on terms stipulated in the tender;
- c) In case economic operator whose tender has been selected did not pay required security of due performance of the contract;
- d) In case when it has become impossible for economic operator whose tender has been selected, to conclude public contract due to reasons on his side.

However, securing contract performance, which may be required regardless of the need to bring deposit, is to act as security to cover claims for non-performance or improper performance of the contract.

Typically, the procedure selected contractor is required to bring the required amount of security at the latest on the day of signing the contract with the awarding entity.

Permissible amount of the security fluctuates from 2 to 10% of the total price specified in

the tender. A security may be made (arbitrarily, the choice of the contractor) in one or several forms:

- 1) cash,
- 2) bank guarantees or guarantees of cooperative savings and credits fund (fund liabilities are treated as a cash liability),
- 3) bank guarantees,
- 4) insurance guarantees,
- 5) guarantees granted by the entities referred to Article. 6b par. 5 item 2 of the Act of 9 November 2000 on the establishment of the Polish Agency for Enterprise Development.

However, the following form to lodge a security, the awarding entity must agree to:

- 1) notes with a guarantee of promissory note, bank or savings and credit
- 2) pledge on securities issued by the Treasury or local government unit,
- 3) to establish a registered pledge on the principles laid down in regulations on registered pledges and the register of pledges.

In the case that the deposit was paid in cash, the contractor may agree to credit the amount towards security deposit.

### **2.3. Tender Evaluation Criteria**

Awarding entity selects the most advantageous tender based on objective tender evaluation criteria stipulated in SETC.

**According to the provisions of the Act PPL tender evaluation criteria are:**

- a) **Price (selection of tender with the cheapest price) or**

**b) Price and other criteria (selection of tender according to the most advantageous commercial conditions).**

According to the above it has to be stated that the price as value expressed in cash amount which the purchaser is obliged to pay to the economic operator for the object of the contract including VAT tax is the mandatory criterion however not the only one. Next to the price the awarding entity can also use other criteria based exclusively on the object of the contract.

Exemplary catalogue of tender evaluation criteria has been included in art. 91 item 2 of the Act PPL. **These are: quality, functionality, use of the best available technologies within the scope of impact on natural environment, exploitation costs or impact of the manner of performing the contract on the labour market in place of performing the contract.**

In this place it has to be stated that the evaluation criteria set out by the awarding entity can refer only to the object of the contract (prohibition of applying subject criteria). It means that applied criteria cannot refer to the nature of the economic operator, in particular to his commercial credibility, or obtaining by him knowledge of certain branch, gained in course of performing similar contracts for entities operating in a given branch.

Exception from the above rule is art. 5 item 1 of the Act PPL, according to which the prohibition of applying tender evaluation criteria based on the nature of the economic operator does not apply for procedures of awarding contracts, the object of which are services of unusual character stipulated in regulations in accordance with art. 2a of the Act PPL.

With the aim of providing equal treatment and fair competition the awarding entity should establish criteria in such way to enable comparing and objective evaluation of tenders. With such awarding entity is obliged to make the criteria precise and describe them carefully (including their importance).

Including importance to each tender evaluation criterion should be done already in notice and precise and carefully describing should be done in SETC.

## 2.4. Selecting the Most Advantageous Tender

### Formal requirements on submitting tenders:

- 1) Each economic operator can submit only one tender;
- 2) Tender, under the pain of nullity, should be submitted in writing or if the awarding entity agrees, in electronic form with secure electronic signature verifiable using a valid qualified certificate;
- 3) Contents of the tender should correspond to the contents of SETC;
- 4) Awarding entity can permit the possibility of submitting tenders:
  - a) Variants (tender providing for other than stipulated by awarding entity in the notice way of performing public contract) – if the price is not the only evaluation criterion;
  - b) For lots, for performing one or more parts of the contract – if the object of the contract is divisible.
  - c) Equivalent, where the contractor proposes to offer its solutions equivalent to those described in the SETC, the fact that the contractor is required to prove that the item offered meets the requirements of the contract relied upon by the customer.

It has to be pointed out that awarding entity can prior to the expiry of time limit of submitting tenders change or withdraw the tender.



### **Time limit of maintaining the tender (art. 85 of the Act PPL)**

**Maintaining the tender means that awarding entity is obliged to perform all provisions resulting from the contents of tender presented to the economic operator within the whole period set up in advance, which cannot be longer than:**

**30 days** – if the contract value is less than the „EU threshold“;

**90 days** – if the contract value for works is equal or exceeds expressed in PLN equivalent of the amount Euro 20.000.000, and for supplies or services - Euro 10.000.000;

**60 days** - if the contract value is other than the one stipulated in points 1) and 2) above.

Time limit in reference to tender starts together with the expiry date of submitting tenders

Awarding entity on his own will or on request of economic operator can extend time limit of maintenance of tender, however awarding entity can only once, at least 3 days before the expiry of the time limit of maintenance of tender address economic operators on granting consent to extend this time limit of established period, not longer however than **60 days**.

Extending the time limit of maintenance of tender is provided only together with extending the period of deposit or in case it is not possible to pay new deposit for the extended time limit. In case extending time limit of maintenance of tender is done after selecting the most advantageous tender the obligation to pay new deposit or its extending applied only to economic operator whose tender has been selected as the most advantageous.

### **Opening tenders (art. 86 of the Act PPL)**

**Opening tender is public and should take place directly following the expiry of the time limit for their submission; however the final date for submitting tenders should be the date on which they are opened.**

The only public meeting of the tender committee (public session of the opening of tenders) begins by stating the amount that the awarding entity intends to use to finance this particular contract.

During the opening of tenders awarding entity should disclose:

- 1) Name of the company and addresses of economic operators and;
- 2) Information on:
  - a) price;
  - b) time limit of performing the contract;
  - c) guarantee period and payment conditions included in tenders.

Public opening of tenders, in practice lies in the fact that all interested parties can be present at the tenders opening (contractors who submitted tenders, representatives of competing companies and other persons concerned).

Economic operators and other persons who have not been present at opening tenders can apply for immediate notifying the on the above information.

### **Examination and evaluation of tenders (art. 87 of the Act PPL)**

In course of examination and evaluation of tenders awarding entity can require from economic operators explanations on contents of tenders submitted.

It has been prohibited to run negotiations between awarding entity and economic operator on submitted tender or to perform any change to its contents with reservation to the below mentioned events:

- 1) In procedure of competitive dialog in course of examination and evaluation of tenders awarding entity can request from economic operators to precise and include more details in contents of tenders; however it is prohibited to make significant changes in the contents of contract and requirements included in SETC;
- 2) Awarding entity can make the following corrections:

- a) obvious writing errors;
- b) obvious errors in calculations including any consequence of correcting such errors;
- c) other errors, meaning inconsistencies between tender and specification of essential term of the contract, not causing significant changes in tender.
  - immediately noticing the economic operator whose tender has been corrected on such changes.

At the stage of examination of tenders, in accordance with Article. 26 Par. 3 of the PPL, awarding entity also ask to complete tenders with missing or incomplete statements or documents required in the proceedings.

### **Rejecting tender**

Pursuant to art. 89 item 1 of Act PPL tender submitted by economic operator will be rejected by awarding entity if:

- 1) it is not in conformity with the Act PPL;
- 2) its content is inconsistent with SETC except for inconsistencies between tender and specification of essential term of the contract, not causing significant changes in tender;
- 3) its submission is an act of unfair competition in the meaning of regulations on fighting against unfair competition;
- 4) contain extremely low price in relation to the object of the contract;
- 5) has been submitted by economic operator excluded from the contract award procedure or one that has not been invited to tender;
- 6) contains errors in price calculation;
- 7) within 3 days from submitting tender economic operator did not agree to any correction of errors mentioned in art. 87 item 2 point 3 of the Act PPL;
- 8) is not valid under separate provisions.

### **Contents of tender is inconsistent with SECT**

Having considered the above, reason for rejecting tender can be its inconsistency with SETC. It refers in particular to practical contents of tender and not its graphic form, which is not the reason for rejecting tender under art. 89 item 1 point 2) of the Act PPL – even despite the contents of SECT that not complying with requested form could be the grounds for rejecting tender.

Therefore, inconsistencies between tender and SECT can refer among others to different stating the object of the contract, its scope or manner of its performance, stating other than included in SETC time limit of performing the contract as obligatory or presenting other contents of significant provisions of the contract.

There are no grounds however to reject tender based on other than practical requirements included in SECT and referring to form, i.e. not inserting page numbers in tender documents, not stapling pages, submitting tender on other than the one enclosed to SECT if such form submitted by economic operator covers the contents required by awarding entity in SECT.

### **Submitting tender is the act of unfair competition**

Next reason of rejecting tender by awarding entity is situation when submitting tender by economic operator is an act of unfair competition in the meaning of the Act of 16 April 1993 on fighting against unfair competition (Journal of Laws of 2003, No 153, item 1503 with further amendments). By the same, the act of unfair completion is an act against the law or good conduct, if it puts in danger or breaches interest of other entrepreneur of client.

Acts of unfair competition are in particular: misleading naming entrepreneurship, false or deceitful naming geographic origin of goods and services, breaching company's secrets, impelling to withdrawing from or not performing the contract, copying products, accusing or unfair recommending, making difficult accessing the market, bribery of public authority and unfair or prohibited advertising

and organizing snowball sales system (art.3 of the Act on fighting against unfair competition).

#### Tender contain extremely low price in relation to the object of the contract

One of common reasons for rejecting tender is stating by economic operators extremely low price in relation to the object of the contract.

Awarding entity in order to establish if tender contains extremely low price in relation to the object of the contract addresses economic operator to provide explanation within certain time limit on elements of tender having impact on price level (art. 90 item 1 of the Act PPL). By the same, awarding entity evaluating explanations, takes into consideration objective factors, in particular:

- economy of performance of contract;
- technical solutions chosen;
- exceptionally favourable conditions available to economic operator for performance of contract;
- originality of economic operator's project and
- impact of public aid awarded under separate regulations.

For assuming that tender contains extremely low price it has been necessary to state that in case of given object of contract it has been impossible to perform the contract without any risk of economic operator's loss.

Moreover, tender containing extreme low price would be such a tender with price extremely different from market prices of similar contracts, indicating possibility of performing the contract below costs of producing service, supply or work as well as tender containing unrealistic price from the point of logic, life experience and rational management.

#### Selecting the most advantageous tender

**Selecting the most advantageous tender has been done based on tender evaluation**

**criteria stipulated in SETC.** (art. 91 item 1 of the Act PPL).

It has to be pointed out that in case awarding entity is not able to select the most advantageous tender due to the fact that two or more tenders show the same balance of price and other tender evaluation criteria, awarding entity selects the cheapest price tender of all.

In case in course of contract award procedure where the only tender evaluation criterion is the price, tender of the same price have been submitted, awarding entity addresses economic operators who submitted such tenders to submit additional tender within certain time limit specified by awarding entity. By the same, economic operators by submission of additional tenders cannot propose higher prices from those included in submitted tenders.

In case of procedure by open or restricted tendering or negotiated procedure with publication under art. 55 item 1 point 1 of the Act PPL awarding entity by performing tender evaluation in order to select the most advantageous tender can perform electronic bidding (except for contracts within the scope of creative or scientific activity) if:

- it has been provided for in contract notice and
- at least 3 non rejectable tenders have been submitted.

**Immediately after selection of the most advantageous tender awarding entity informs all economic operators submitting tenders on:**

- 1) selection of the most advantageous tender stating the name of the company or name and surname, registered office or place of residence and address of economic operator, whose tender has been selected, justification of such selection, as well as company name or name and surname, registered office or place of residence and address of economic operators, whose tenders have been submitted and scoring of tenders in every tender evaluation criterion and the total score;

- 2) economic operators, whose tender have been rejected stating factual and legal grounds;
  - 3) economic operators who have been excluded from contract award procedure stating factual and legal grounds – in case the contracts awarded in open tendering, negotiated procedure without publication or request-for-quotations;
  - 4) time limit after expiry of which public contract agreement can be concluded.
- 4) **not less than 10 days** - if it has been dispatched in other way to the above
    - in case of contract which value is equal or exceeds the „EU threshold“.

**Pursuant to art. 94 item 2 of the Act PPL economic operators can have the possibility of concluding public contract agreement before expiry of time limits mentioned above, in case of:**

- 1) contract award procedure:
  - a) procedure by open tendering if only one tender has been submitted;
  - b) procedure by restricted tendering, negotiated procedure with publication and competitive dialog if only one tender has been submitted and in case of excluding economic operator when the time limit for placing appeal against this action has expired or when as a result of placing such appeal the Chamber has issued a decision or judgement or decision which ended the appeal proceeding, or
- 2) contract referring to contract award procedure by negotiating procedure without publication, by dynamic purchase system or by framework contract, or
- 3) contract award procedure of value below the value stated in regulations issued pursuant to art. 11 item 8 if no tender has been rejected and:
  - a) open tendering or request-for-quotations if no economic operator has been excluded;
  - b) procedure by restricted tendering, negotiated procedure with publication, competitive dialog and electronic bidding in case of excluding economic operator when the time limit for placing appeal against this action has expired or when as a result of placing such appeal the Chamber has issued a decision or judgement or decision which ended the appeal proceeding, or

Immediately after selection of the most advantageous tender, awarding entity is obliged to publish information mentioned in point 1) above on web page and in place publicly available in his registered office.

## 2.5. Concluding Public Contract Agreement

### Time limits

Next phase of selecting the most advantageous tender which be the same is the aim of procedure is concluding the contract with economic operator, who has submitted tender.

Pursuant to art. 94 item 1 of the Act PPL awarding entity concludes the public contract agreement within the following time limits:

- 1) **not less than 10 days** from the day on which the information on selecting tender has been dispatched, if such information has been sent by fax or by electronic mail, or
- 2) **not less than 15 days** – if it has been dispatched in other way to the above
  - in case of contract which value is equal or exceeds the „EU threshold“;
- 3) **not less than 5 days** from the day on which the information on selecting tender has been dispatched, if such information has been sent by fax or by electronic mail, or

- 4) procedure by electronic bidding except for the case of excluding economic operator when the time limit for placing appeal against this action has expired or when as a result of placing such appeal the Chamber has issued a decision or judgement or decision which ended the appeal proceeding.

#### **Rejecting of economic operator to conclude contract**

In case of rejecting by economic operator whose tender has been selected as the most advantageous to conclude public contract agreement or such economic operator does not provide required security of contract performance awarding entity is authorized to select the most advantageous tender from other tenders without their next evaluation and examination unless the circumstances mentioned in art. 93 item 1 of the Act PPL occur.

#### **Information on concluding contract**

Awarding entity is obliged to publish information on awarding contract immediately after concluding such contract in:

- 1) Public Procurement Bulletin (BZP) – in case value of contract is below the „EU threshold“;
- 2) Official Journal of the European Union – in case value of contract is equal or exceeds the „EU threshold“.

## **2.6. Control of the Public Contract Award Procedure**

The President of Public Procurement Office (further referred as to the President of PPO) is responsible for the control of the procedure of awarding public. Such control is with the aim of proving conformity of contract award procedure with the Act PPL and other acts issued pursuant to it. By the same the scope of the control is to assess legal validity of action performer. Control cannot put in question the need of awarding the contract nor assessing if financial means have been spent economically, according to the purpose

and rationally nor whether time limits of performing the contract have been proper.

Currently bidding law of public procurements provider for two types of control:

- 1) **ad hoc control:**
- 2) **ex-ante control of contracts co-financed from the EU funds.**

**Ad hoc control** – may be facultative and can be applied ex officio or on request or mandatory, applied on request of management authority mentioned in regulations on National Development Plan and in regulations on rules of conducting development policy or in regulations on supporting development of rural areas co-financed from the European Agricultural Fund for the benefit of Rural Areas Development.

In all cases to initiate control there has to arise an existence of justified presumption that in course of the contract award procedure a breach of the provisions of the Act appeared, and that such a breach might have affected its results. It means that if the application on initiating control or other documents of the procedure would not state any breach of the Act PPL the President of PPO in order to initiate the control would always have to precede it with explanatory proceedings.

In case of submitting application on initiating control the President of PPO is obliged to inform the awarding entity on the manner of resolving the application, in particular is obliged to present justification in case of refusing to initiate control.

Within the scope of the explanatory proceedings – or control the President of PPO is authorized to:

- 1) request from the head of the awarding entity to submit the contract award procedure documentation which is certified by the head of the awarding entity to be in conformity with the original;
- 2) request from the head of the awarding entity or from its employees and other subjects written explanations in cases concerning the subject of control;

- 3) ask for the expert's opinion if the establishments or the assessment of the actual state of the case or conduct of other control activities requires specific knowledge.

Initiating ad hoc control can take place not later than within 4 years from the date of termination of the procedure of awarding the contract. It means that the President of PPO can initiate control activities in each phase of the procedure, meaning after initiating the contract award procedure, in its course, before and after opening tender and concluding contract. It has to be underlined that control activities cannot cover potential economic operators but solely their tenders submitted in course of the controlled procedure.

Awarding entity has the right to make justified reservations to the President of PPO within 7 days from the submission of information on the result of ad hoc control. In case of not admitting reservations the President of PPO shall dispatch those reservations for an opinion to the National Appeal Chamber.

National Appeal Chamber composed of 3 members shall prepare an opinion on the reservations within 15 days from their submission. This opinion shall be binding for the President of PPO.

In case of disclosing the breach of the Act PPL the President of PPO shall:

- 1) notify to the competent agent for public finance discipline of the breach of public finance discipline or make a request to impose a penalty for the breach of public finance discipline;
- 2) impose financial penalty;
- 3) apply to the court for the annulment of procurement contract in its entirety or in part.

**Ex-ante control** – is mandatory and applied in course of contract award procedure or framework contracts co-financed from the EU funds. It has to be stated that ex-ante control occurs in case contract value or framework contract value of:

- 1) **works – is equal or exceeds the PLN equivalent of Euro 20.000.000;**
- 2) **supplies or services - is equal or exceeds the PLN equivalent of Euro 10.000.000.**

Pursuant to the decision of the Ministry of Regional Development of 15 April 2009 contracts co-financed from the EU funds are:

- 1) Contracts covered by a project, for which contract on co-financing has been concluded;
- 2) Contracts covered by a project registered on the indicative list, even if there has not been any contract on co-financing concluded;
- 3) Contract covered by a project, for which the application on co-financing has been positively assessed in formal and practical terms, even if there has not been any contract on co-financing concluded.

Awarding entity submits to the President of PPO copies of contract award procedure documentation certified by the management authority of the awarding entity with the aim of performing ex-ante control after selecting the most advantageous tender, however after expiry of time limit of submitting appeal and prior to concluding contract.

It has been important for the awarding entity that initiating ex-ante control suspends the period of being bided by tender until the date of termination of the control.

Ex-ante control terminates with notifying the awarding entity on results of the control including in particular:

- 1) Description of procedure which has been the subject of the control;
- 2) Information on confirmation of breaches or their lack;
- 3) Post control recommendations – if in course of the control the cancellation of the procedure or removal of the confirmed breaches was found legitimate.

Control activities of the President of PPO have been executed by Ad hoc Control Department or Department of Control of Contracts co-financed from the EU funds. Ad hoc Control Department is involved into ad hoc controls initiated ex officio or on request and Department of Control of Contracts co-financed from the EU funds deals with mandatory controls ex-ante and ex-ante controls initiated ex officio or on request, in particular on request of institutions managing the EU programs.

## 2.7. Legal Protection Measures

Currently valid regulations stipulated in Act PPL on legal protection measures have been in force since 29 January 2010. They provide for implementation list to the national law of provision of the Directive 2007/66/UC of the European Parliament and the Council of 11 December 2007 amending the Directive of the Council 89/665/EEC and 92/13/EC within the scope of effectiveness of appeal procedures on public contract award procedures (Legal Journal of EU L 335 of 20.12.2007, page 31).

### Who can be granted legal protection measures

Legal protection measures **can be granted to economic operators, participants of contests and other entities of certain interest in being awarded a given contract and have suffered or can suffer damage as a result of breach of provisions of this Act by awarding entity.**

Additionally, legal protection measures against contract notice or SETC are also granted to organisations entered in the list of organisations authorized to issue legal protection measures. Such list has been run by the President of PPO and it includes entities operating pursuant to the regulations on commercial chambers, craftsmanship, professional authorities of certain entrepreneurs, employers' organizations, professional authorities of architects, construction engineers and town-planners.

### Types of appeal measures

Currently valid Act PPL provides for two types of legal protection measures.

**First one is an appeal to the National Appeal Chamber.** Such appeal can only be admissible against actions non-compliant with the Act performed by the awarding entity in course of contract award procedure or against failure to act which awarding entity is bound to perform under this Act. If value of contract is below the "EU threshold" such appeal will be granted only in case of the following actions:

- 1) choice of the negotiated procedure without publication, single-source procurement and request-for-quotations;
- 2) description of the method used for the evaluation of meeting requirements for participation in the contract award procedure;
- 3) excluding the appellant from the contract award procedure;
- 4) rejecting tender appellant.

Appeals should be placed to the President of the National Appeal Chamber within time limits stipulated in the Act PPL. In case value of contract is equal or exceeds the "EU threshold" the appeal should be placed within **10 days** from the date of sending to economic operator by fax or by electronic mail the information on the action of the awarding entity having been the grounds for such appeal, or **15 days** in case of sending such information in other way than the one mentioned above. In case contract value is below the „EU threshold“ – such time limits are respectively of **5 and 10 days**.

Slightly different way of establishing time limits has been provided for appeals against the contents of the notice and SETC. Such appeals are placed within 10 days from the date of publishing notice in Official Journal of the European Union nor publishing SETC on Web page or within 5 days in case value of contract is below the „EU threshold“.

## **Judgements of the Chamber**

The Chamber can dismiss or reject or admit an appeal. By admitting an appeal the Chamber can::

- 1) if public contract agreement has not been concluded – demand performance or repetition of the awarding entity's action or demand cancellation of such action; or
- 2) if public contract agreement has been concluded and one of the following prerequisites mentioned in art. 146 item 1 occur, to:
  - a) invalidate the contract; or
  - b) invalidate the contract within the scope of unfulfilled requirements and impose financial penalty in justified cases in particular when return of benefits provided, under the contract being subject to invalidation is impossible;
  - c) impose financial penalty or rule the shortening of the duration of contract if important public interest requires that the contract is maintained, or
- 3) if the contract was concluded in circumstances permitted by the Act – to state the violation of the provisions of the Act.

**Other appeal measure is complaint to the court, (district court) respective for the registered office or the place of residence of awarding entity.**

Such complaint should be placed through the Chairman of the Chamber within **7 days** from the date of submitting the Chamber's ruling dispatching simultaneously its copy to the complainant's opponent. Submitting the complaint in a post office run by public operator will be considered as its placing.

It has to be pointed out that before amending the Act PPL (meaning up to 28 January 2010) there had been other appeal measure of protest placed directly to awarding entity. Currently remaining of this measure is the possibility for economic operator to be informed by awarding entity or participant of the contest on act performed by him or by him

omitted which he has been required to perform by the law and being inconsistent with the provisions of the Act. In case of admitting justification of the information dispatched awarding entity repeats the action or performs the omitted action, informing all economic operators about this fact in a way provided for such activity in the Act.

## **Charge**

**Both placing appeal and complaint against the decision of the Chamber undergoes issuing payment.**

Entry from appeal depends on type and value of the procedure and varies from PLN 7500 to PLN 20000.

Charge of complaint against the decision of the Chamber is equal to the value of 5x entry issued from appeal in the case relating to the appeal. It has to be added that in case the complaint relates to actions within the contract award procedure performed after opening tenders, charge from such complaint is equal to 5 % of the value of the object of the contract within the procedure relating to the complaint, however not exceeding PLN 5.000.000.

## **IMPORTANT:**

Placing appeal to the Chairman of the Chamber on the notice content does not result in suspension of the procedure, awarding entity may extend the deadline for submission of tenders of applications. Regarding the appeal filed after the expiry of the deadline for submission of tenders, there is a general rule that the time limit of maintaining the tender shall be suspended. However until the date of announcing the judgement or the decision by the Chamber no public contract agreement can be concluded.

In the cases provided by law, the awarding entity may apply to the National Board of Appeal requesting the withdrawal of the prohibition of signing the contract.



## 2.8. Failure to Perform the Contract

It has to be pointed out that performing public contracts is regulated under the Act of 23 April 1964 – Civil Code. It means that responsibility from performance of the contract is examined under the provisions of the public contract agreement, however due to the general provisions of the Civil Code.

It has to be pointed out that **failure to perform public contract by economic operator would result in sanctions stipulated in the agreement by awarding entity** (responsibility ex contractu) and sanctions resulting from prospective tort responsibility (ex delicto).

Additionally, **economic operator who has caused damage by not performing the contract or by its improper performance in case such damage has been stated in binding court decision – will be entered on list, run by the President of PPO, of entrepreneurs who cannot participate in public contract award procedures.** This restriction is binding for 3 years from the date of coming into force the decision on causing damage to awarding entity by economic operator.

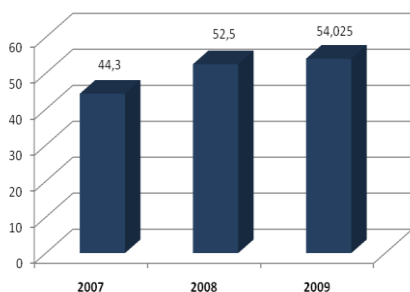
### 3. Market of Public Contracts in Poland

#### 3.1. Development of Market of Public Contracts

Market of public contracts is developing dynamically, which can be noted in increasing value of awarded contracts within last three years and **number of notices published, which in August 2009 was of almost 400.000.**

Last year value of the market of public contracts in Poland was of **54,025 billion PLN.**

**Chart 1 Value of awarded contracts in billions of PLN**



Value of notices in the year 2007: value was calculated based on data included in notices on awarding public contracts published in the Public Procurement Bulletin on procedures:

- initiated prior to the date of coming into force

regulations of the Act of 13 April 2007 on amending the Act – Public Procurement Law and some other acts, meaning prior to 11.06.2007 of value exceeding Euro 60.000 to EU threshold,

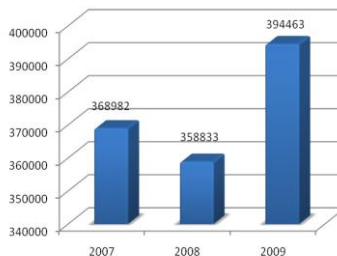
- initiated after coming into force the above mentioned Act, meaning from the date 11.06.2007 of value exceeding Euro 14.000 to EU threshold.

Value of notices in the year 2008: value was calculated based on data included in notices on awarding public contracts published in the Public Procurement Bulletin (on procedures of value from Euro14.000 to EU threshold).

Value of notices in the year 2009: value was calculated based on data included in notices on awarding public contracts published in the Public Procurement Bulletin (on procedures of value from Euro14.000 to EU threshold).

Source: Report by Investment Support based on Information Bulletins of the Public Procurement Office

**Chart 2 Number of notices published in years 2007-2009**

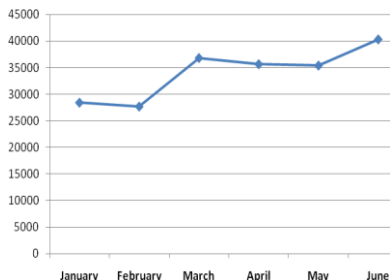


Source: Report by Investment Support based on Information Bulletins of the Public Procurement Office

**In the first half of the year 2010 the number of published notices has been increasing month to month. Value of awarded contracts in the I half of the year 2010 has reached almost 26,772 billion PLN, therefore market of public contracts in Poland, despite global economic crisis has been stable.**

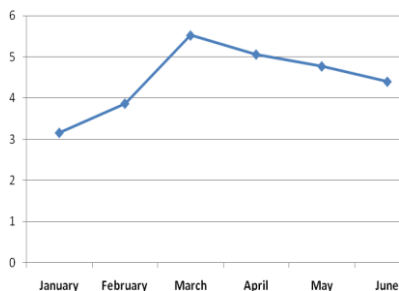
Increasing trend in this market within the I half of this year has been show on the chart below.

**Chart 3 Number of notices within the period January- June 2010**



Source: Report by Investment Support based on Information Bulletins of the Public Procurement Office

**Chart 4 Value of notices within the period January- June 2010 in billions of PLN**



Source: Report by Investment Support based on Information Bulletins of the Public Procurement Office

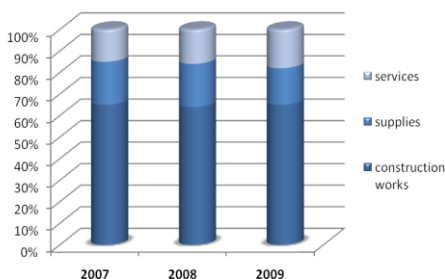
In June the number of notices has increased significantly comparing to the previous month – of almost 14%. In July the development pace has stabilized – number of notices increased during this month of more than 3% comparing to June.

Data estimated based on notices from the Public Procurement Bulletin published on web page [www.przetargi.eGospodarka.pl](http://www.przetargi.eGospodarka.pl), show that increase in number of notices in procedure of awarding public contract in comparison to the same month last year has been significant – of even 30,48%.

### 3.2. Structure of the Market

Structure of contracts in accordance to the type of contract has been similar within the last three years. Share of number of contracts on works slightly varies from 64% to 65%. In the year 2009 decrease in number of contracts on supplies has been noted by simultaneous increase in number of contracts on services. These shares have been shown on the chart 3 below.

**Chart 5 Structure of contracts in accordance to their value**

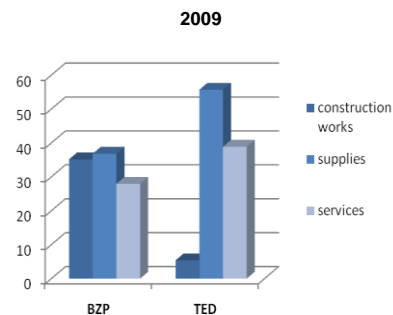
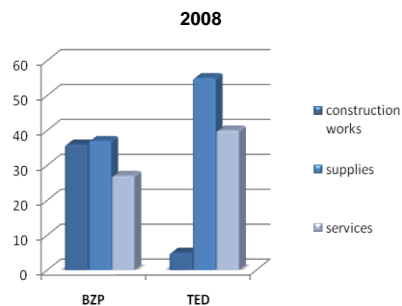
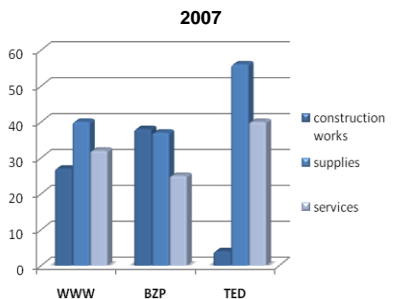


Source: Report by Investment Support based on Information Bulletins of the Public Procurement Office

Charts below showing initiated procedures in accordance to the type of contracts and place of publication reveal stable shares of works, supplies and services in procedures initiated in years 2007-2009.

As it has been known, place of publication results form value of a contract. Thresholds of values of contracts, the obligation of publishing in the Official Journal of the European Union has resulted from have changed within these years, however all the time the publication in the Journal has referred to contracts of higher values. As shown in the charts below supplies and services lead in contracts of higher values whereas works create small part of the total number of contracts (to 5,5%).

**Chart 6 Share in % of initiated procedures according to the type of contract and place of publication**

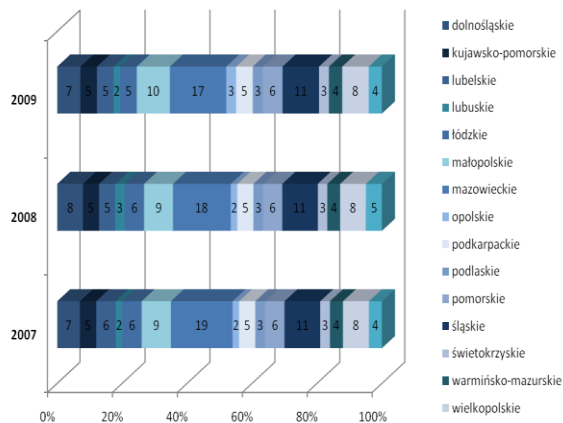


\* indicated number refers to notices published up to 10.06.2007 for the Act of 13 April 2007 on amending the Act – Public Procurement Law and some other acts, with date 11.06.2007 the place of publishing notices on initiating procedure has been changed from web page to the Public Contracts Bulletin.

Source: Report by Investment Support based on Information Bulletins of the Public Procurement Office

Voivodships leading in number of contracts are **mazowieckie, śląskie and małopolskie**. Quite a large share in number of contracts can also be noted in voivodships: wielkopolskie and dolnośląskie.

**Chart 7 Share in % of awarded contracts according to voivodships**

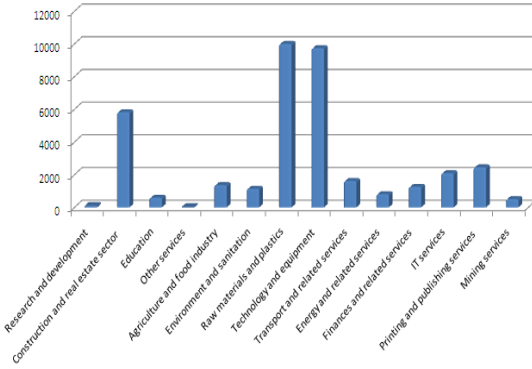


Source: Report by Investment Support based on Information Bulletins of the Public Procurement Office

### 3.3. Division into Branches

In the I half of the year 2010 the largest number of notices in Official Journal of the European Union have come from sectors of: **raw materials, technologies and equipment and construction and real estate**.

**Chart 8 Number of notices in the Official Journal of the European Union divided by sectors from January to June 2010**



Source: Report by Investment Support based on Information Bulletins of the Public Procurement Office

Data estimated based on notices from the Public Procurement Bulletin published on web page [www.przetargi.eGospodarka.pl](http://www.przetargi.eGospodarka.pl), show current market data from the last months of the year 2010.

In July 2010 in Public Procurement Bulletin **contracts on works** have been published the most often - even 1.477 notices, meaning of 13,5% more than in June), **construction and renovation works** - 700 notices, of 2,3% more, **electric installation works** - 629 notices, of 3% less, **road works** - 598 notices, of 27% less, **road surface works** - 586 notices, of 25% more, **works within the scope of preparation for construction and earthworks** - 496 notices, of 35,9% more, **road renovation works** - 482 notices, of 35% more, and **road construction works** - 468 notices, of 23,5% more.

In July, similarly to June, the highest positive monthly relative dynamics has been noted in **works on playground construction** (monthly increase in number of notices o these works has been of 146%) and road transport services (of 136,6% more) as well as **specialized road**

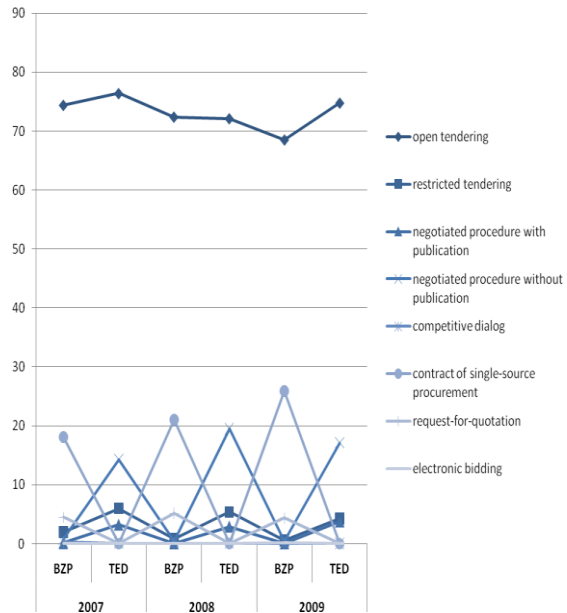
**transport of persons** (of 121% more). Significant increase in furnishing playgrounds, green lands design works or land development works.

### 3.4. Legal Regulations

#### Types of Procedures

In years 2007-2009 most often used type of procedure has been open tendering. Also number of contracts of single-source procurement has increased, however electronic bidding has not been yet applied.

**Chart 9 Share in % of contracts awarded according to type of procedure**

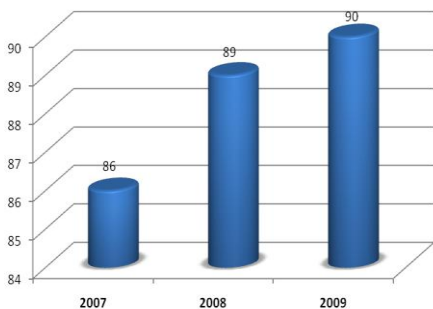


Source: Report by Investment Support based on Information Bulletins of the Public Procurement Office

### Tender Evaluation Criteria

Price has been a criterion most often used in awarding contracts. This criterion becomes even more commonly used in procedures on works, whereas in the year 2009 it has been used as sole criterion in 94 cases.

**Chart 10 Share of contracts with price as sole criterion of awarding contracts**

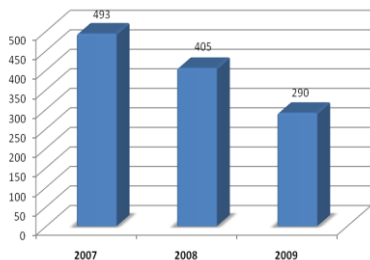


Source: Report by Investment Support based on Information Bulletins of the Public Procurement Office

### Control and Legal Protection Measures

In last years the number of initiated controls has relatively decreased. In the year 2009 over 40% less controls have been initiated comparing to the year 2007.

**Chart 11 Number of controls initiated**



Source: Report by Investment Support based on Information Bulletins of the Public Procurement Office

In case of legal protection measures in period from 29 January 2010 to 31 July 2010 the President of the National Appeal Chamber has received 919 appeals, meaning 62, 64% of all appeals placed within this period. In July appeals placed according to new regulations has been 90,9% of all appeals placed.

Among appeals received by the President of the Chamber 111 (12%) of cases have been pending, 138 (15%) of appeals have been addressed by decision, including 85 due to formal defects and 53 due to lack of entry payment.

In 669 cases of identified appeals the Chamber has issued the following types of decisions:

- 144 appeals have been rejected due to including charges from the appeal by awarding entity (21, 52%);
- 77 appeals have been rejected due to withdrawing appeal (11,51%);
- 87 appeals have been rejected (13%);
- 185 appeals have been dismissed (27, 65%);
- 176 appeals have been approved (26, 3%).

Average time of waiting for establishing the date of meeting from receiving the appeal has been 15 days, and in July this period has decreased comparing to June (10 days) and has been 7 days.

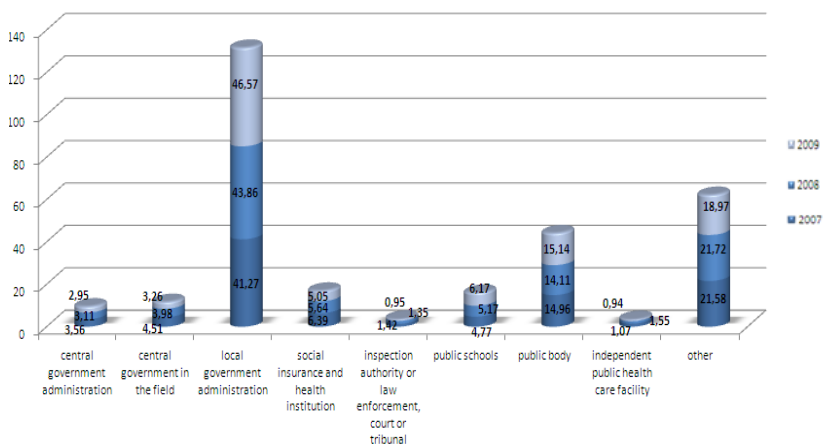
Average time of awaiting issuing the decision has been 19 days, however in July this period has been 12 days (in comparison, in June it has been 14 days).

### 3.5. Participants in the Market

#### Awarding Entities

In Poland the biggest number of contracts has been awarded by local authorities, which is almost 50% of all contracts awarded. Chart below shows categories of awarding entities according to their share in % in total number of contracts awarded.

**Chart 12 Share in % of number of awarded contracts according to the category of awarding**



Source: Report by Investment Support based on Information Bulletins of the Public Procurement Office

#### Share of Foreign and Local Companies

Charts below illustrate share of foreign companies in public contract award procedures in Poland. These tables reveal detailed data of state of origin, number of contracts awarded and value of contract awarded.

**Table 1 Number of contracts awarded by the Polish awarding entities to foreign economic operators in the year 2007**

State	No of contracts	Type of contract	Value	Equal value in EUR
Austria	2	supplies	203 269 EUR	203 269 EUR
Belgium	8	7 x services 1 x supplies	8 894 630* EUR	8 894 630 EUR
Czech	9	8 x supplies 1 x services	443 035 661 CZK 675 000 EUR	14 822 081 EUR
Denmark	2	1 x supplies 1 x services	No data 1 400 000 EUR	1 400 000 EUR
Estonia	3	supplies	204 697 424 EEK	13 082 393 EUR
France	3	1 x supplies 1 x services 1 x works	10 387 256 EUR	10 387 256 EUR
Spain	1	services	2 849 200 EUR	2 849 200 EUR
Ireland	1	services	192 000 EUR	192 000 EUR
Lithuania	5	supplies	18 677 076 LTL	5 409 255 EUR
Latvia	3	1 x services 2 x supplies	9 238 715,27 LVL 965 000 EUR	14 696 741 EUR
Germany	7	5 x supplies 2 x services	16 061 231 EUR	16 061 231 EUR
Rumania	1	services	1 598 321 RON	436 343 EUR
Slovakia	1	services	2 455 618* EUR	2 455 618 EUR
Switzerland	1	services	274 803 EUR	274 803 EUR
Hungary	4	supplies	10 858 090 822 HUF	43 214 115 EUR
Great Britain	3	supplies	289 475* GBP	423 085 EUR
<b>Total</b>	<b>54</b>	<b>35 - supplies 18 - services 1 - works</b>	<b>-</b>	<b>134 802 020 EUR</b>

Source: Information Bulletin of the Public Procurement Office No 10 of 2007



**Table 2 Number of contracts awarded by the Polish awarding entities to foreign economic operators in the year 2008**

State	Type of contract – number of contracts, value of contracts [in PLN]								Total	
	works		supplies		services		contest			
Austria	3	68 365 598	15	113 737 681	6	45 295 537	1	15 000	25	227 413 815
Belgium			2	10 515 599	2	11 217 956			4	21 733 555
China			1	4 998 340					1	4 998 340
Czech	3	387 997 896	7	16 133 537	7	3 105 075			17	407 236 508
Cyprus			1	7 587 650					1	7 587 650
Denmark			3	769 509	3	4 495 954			6	5 265 463
Estonia			1	942 135					1	942 135
Finland			4	15 143 496	2	95 008 402			6	110 151 898
France	4	641 771 184	13	516 430 939	8	81 718 666			25	1 239 920 789
Greece					1	1 741 546			1	1 741 546
Spain	2	714 013 838	1	31 714 678	6	112 062 472	4	181 967	13	857 972 955
Holland			16	19 741 515	7	55 685 539	1	10 000	24	75 437 054
Iran					1	5 816			1	5 816
Ireland			5	16 542 554	1	1 059 906			6	17 602 460
Israel					1	24 406			1	24 406
Canada	1	1 704 340 000	1	265 603			1	50 000	3	1 704 655 603
Colombia					1	49 685			1	49 685
Lithuania					3	7 046 703			3	7 046 703
Macedonia			1	423 752					1	423 752

Germany	6	1 746 461 931	51	172 426 085	33	443 632 221	4	215 984	94	2 362 736 221
Portugal					1	17 103 497			1	17 103 497
Russia			1	13 673 660					1	13 673 660
Slovakia			7	13 637 294	3	923 853			10	14 561 147
Switzerland			20	55 982 377	2	22 746 851	1	38 771	23	78 767 999
Swiss					2	8 868 242			2	8 868 242
Ukraine	2	161 139 379	1	2 950 000	1	4 252 326			4	168 341 705
USA			4	9 127 790	8	36 686 093			12	45 813 883
Hungary					2	3 304 000			2	3 304 000
Great Britain			101	41 452 610	26	183 015 784	1	30 000	128	224 498 394
Italy	2	246 787 337	21	18 547 263	5	6 097 417	3	332 626	31	271 764 643
<b>Total</b>	<b>23</b>	<b>5 670 877 161</b>	<b>277</b>	<b>1 082 744 067</b>	<b>132</b>	<b>1 145 147 948</b>	<b>16</b>	<b>874 348</b>	<b>448</b>	<b>7 899 643 523</b>

Source: Information Bulletin of the Public Procurement Office No 12 of 2008

**Table 3 Number of contracts awarded by the Polish awarding entities to foreign economic operators in the year 2009**

State	Type of contract – number of contracts, value of contracts [in PLN]								Total	
	works		supplies		services		contest			
Australia					1	4 500 000			1	4 500 000
Austria	1	920 460 073	6	10 004 312	4	358 249			11	930 822 634
Belgium			5	6 251 450	1	15 795 187			6	22 046 637
China	2	1 153 063 430							2	1 153 063 430
Croatia					1	2 746 045			1	2 746 045
Czech			14	344 385 927	12	22 072 054			26	366 457 981
Cyprus			7	31 619 894					7	31 619 894

Denmark				5	814 917			5	814 917	
Estonia			1	24 888 000				1	24 888 000	
Finland			3	239 142 284	2	12 206 795		5	251 349 079	
France	1	233 328 710	11	53 418 294	16	37 289 369		28	324 036 373	
Greece	2	1 687 469 516						2	1 687 469 516	
Spain	6	3 103 277 109			8	89 612 312		14	3 192 889 421	
Holland			19	39 947 353	6	35 963 472		25	75 910 825	
India					1	16 370 000		1	16 370 000	
Ireland			2	5 132 200	5	43 256 794		7	48 388 994	
Israel			1	812 000				1	812 000	
Lithuania			1	616 800	1	303 185		2	919 985	
Germany	5	567 972 341	52	259 377 257	20	591 835 294	1	15 890	78	1 419 200 782
Norway			1	4 210 000	1	1 000 000		2	5 210 000	
Portugal	3	1 645 951 747			1	1 003 801		4	1 646 955 549	
Russia			1	23 780 100				1	23 780 100	
Slovakia			2	13 085 213				2	13 085 213	
Switzerland			21	18813 689	3	38 132016		24	56 945 705	
Swiss			5	5 778 649			1	0	6	5 778 649
Ukraine			1	2 880 000				1	2 880 000	
USA			8	8 623 366	4	221 131 967		12	229 755 333	
Hungary					1	2 904 000		1	2 904 000	
Great Britain			113	33 276 361	24	91 040 970	1	5 000	138	124 322 331
Italy	2	5 528 262 062	31	32 561 336	3	14 351 174		36	5 575 174 572	
<b>Total</b>	<b>22</b>	<b>14 839 784 988</b>	<b>305</b>	<b>1 158 604 485</b>	<b>120</b>	<b>1 242 687 602</b>	<b>3</b>	<b>20890</b>	<b>450</b>	<b>17 241 097 964</b>

Source: Information Bulletin of the Public Procurement Office No 12 of 2008

## 4. Practical Guidelines

### 4.1. Where to find notices

General condition of participating in public contract award procedure is to know about the procedure in course. There are two general categories of sources of information on procedures, meaning public and commercial sources.

**Public sources are in first place:**

- **Public Procurement Bulletin/Biuletyn Zamówień Publicznych – available at the address: <http://bzp1.portal.uzp.gov.pl/?ogloszenie=browser>**
- **Attachment to the Official Journal of the European Union – available at the address: <http://ted.europa.eu/>**

Basic source of information on public contracts in Poland is the Public Procurement Bulletin (Biuletyn Zamówień Publicznych) available on web page of the Public Procurement Office (Urząd Zamówień Publicznych). **In Public Procurement Bulletin the information on contracts which value does not exceed the “EU Threshold” is published.** Such threshold has been stipulated in the Regulation of the Prime Minister of 23 December 2009 on values of contracts and contests the obligation of dispatching notices to the Office of Official Publications of the European Communities (Journal of Laws of 2009, No 224, item 1795) results from.

**Information on contracts of value equal or exceeding the amounts of the „EU threshold” is published in the Attachment to the Official Journal of the European Union.**

Other significant sources of information on procedures of awarding public contracts are web pages of awarding entities as well as information on the procedure of awarding public contracts included on web page of

Public Information Bulletin of the awarding entity.

Second category of sources of information on public contracts is commercial sources. Currently there have been several commercial internet portals involved in preparing information on public contracts realized in Poland and publishing notices. The largest free of charge portals are among others:

- [www.komunikaty.pl](http://www.komunikaty.pl)
- [www.przetargi.egospodarka.pl](http://www.przetargi.egospodarka.pl)

The most popular paid portals enabling searching information are among others:

- [www.przetargi.pl](http://www.przetargi.pl)
- [www.przetargi.net](http://www.przetargi.net)
- [www.eprzetargi.net.pl](http://www.eprzetargi.net.pl)

There are also other portals – search engines in English containing information on public contracts. Unfortunately these portals are in most part paid and texts of notices usually are not translated into English, only their headings are translated together with the category of notice. In the same means these portals tend not to provide updated information on tenders which in light of extremely dynamically conducted procedures on awarding public contracts significantly limits their efficiency.

### 4.2. Requirements from Foreign Entities

Act PPL does not establish any division of requirements for participation in procedure of local and foreign entities. Such division would be against the EU law. **By the same, entities applying for awarding such a public contract are obliged to meet the same requirements of participation in the procedure as those required from local entities.** These requirements have been divided into the following categories:

- Corporate requirements;

- Requirements within the scope of knowledge and experience;
- Commercial-financial requirements;
- Technical and personnel requirements.

Within the scope of corporate requirements it has been required that **economic operator obtained authorisations for performing given business operations or activity (i.e. concessions, permits or licenses)**, in case legal regulations oblige to obtain such documents (i.e. insurance activity (permit), communal waste (permit), tax advisory, security of persons and possession (concession)).

Requirements within the scope of knowledge and experience are in connection with described by the awarding entity **minimum level of knowledge and experience of economic operator described by the awarding entity as necessary for performance of the contract** and refer to i.e. obligation to obtain experience in performing given number of works (i.e. constructing number of kilometres of sewage network) or services (i.e. designing projects of roads) or their value (i.e. performing works of given net value).

Other category of commercial-financial requirements means verifying **financial state of economic operator and his financial capacity to perform the contract**. By the same, it has not been necessarily required to disclose awarding entity profit from business operation of economic operator, however in most cases financial means or possibility to acquire such means by economic operator has to be stated.

Last category of requirements concerns **being at disposal of technical potential and personnel capable of performing the contract** (regulations previously in force assumed „being in possession of” technical potential). Awarding entity in some cases can require from economic operator a statement that in performance of the contract persons possessing certain authorisations and work experience would take part (if acts pose obligation to have

such authorizations). This requirement in most cases relates to being at disposal of designer or construction manager having authorisations of certain specialization. Awarding entity can also be interested in participating in performance of the contract by persons having certain experience (i.e. in project management, preparing analyses and reports). In this sense requirement to be at disposal of technical potential (meaning certain machines, equipment or tools) has also been understandable – being at disposal of the above could obviously be necessary to perform the contract.

Act PPL provides also for excluding from the procedure of awarding the contract the following:

- 1) Economic operators who caused damage by failing to perform contract or by performing contract improperly if such damage has been stated by valid court decision in the past 3 years prior to the launch of the procedure;
- 2) Economic operators against whom the winding up procedure has been started or whose bankruptcy has been declared except from economic operators who upon bankruptcy declaration entered into a composition approved by valid court decision unless such a composition provides for payment to the creditors by a liquidation of the assets of the bankrupt entity;
- 3) Economic operators in arrears with payment of taxes, charges or social insurance of health insurance premiums except for cases where they have been legally exempted, their out standing payments have been deferred or divided into instalments or the execution of decision of a competent authority has been stopped in its entirety;
- 4) Natural persons who have been validly sentenced for an offence committed in connection with a contract award procedure, offence against rights of people performing paid work, offence against

environment, for bribery, for an offence against economic turnover or for any other offence committed with aim of gaining financial profits, as well as for treasury offence or an offence of participation in organized crime group or in a union aimed at committing an offence of treasury offence;

- 5) Registered partnership whose partner has been validly sentenced for an offence committed in connection with a contract award procedure, offence against the rights of people performing paid work, offence against environment, for bribery, for an offence against economic turnover or for any other offence committed with aim of gaining financial profits, as well as for treasury offence or an offence of participation in organized crime group or in a union aimed at committing an offence of treasury offence;
- 6) Professional partnership, whose partner or member of the management board has been validly sentenced for an offence committed in connection with a contract award procedure, offence against the rights of people performing paid work, offence against environment, for bribery, for an offence against economic turnover or for any other offence committed with aim of gaining financial profits, as well as for treasury offence or an offence of participation in organized crime group or in a union aimed at committing an offence of treasury offence;
- 7) Limited partnership and limited joint-stock partnership, whose general partner has been validly sentenced for an offence committed in connection with a contract award procedure, offence against the rights of people performing paid work, offence against environment, for bribery, for an offence against economic turnover or for any other offence committed with aim of gaining financial profits, as well as for treasury offence or an offence of

participation in organized crime group or in a union aimed at committing an offence of treasury offence;

- 8) Legal persons, whose active member of the managing body has been validly sentenced for an offence committed in connection with a contract award procedure, offence against the rights of people performing paid work, offence against environment, for bribery, for an offence against economic turnover or for any other offence committed with aim of gaining financial profits, as well as for treasury offence or an offence of participation in organized crime group or in a union aimed at committing an offence of treasury offence;
- 9) Collective entities, with respect to whom court has issued a decision prohibiting them from competing for contracts under provisions concerning the liability of collective entities for tort under the liability to penalty.

It has to be underlined that the aim of establishing requirements of participating in the procedure is to verify credibility and ability of prospective economic operator to diligent performance of the contract. It means that by making more precise the terms of participation in the procedure awarding entity should base on objective evidence, in order to provide that each economic operator admitted to the procedure would be capable of performing the contract.

By the same, awarding entity should establish requirements for participation in the procedure on awarding the contract on level in relation with the object of the contract and in proportion with it and in the same time, would not restrain from participating in the procedure in way limiting fair competition.

If, on the basis of documents submitted, the economic operator will be excluded, consequently its offer will be rejected.

### 4.3. Documents Required in the Procedure

Act PPL does not stipulate which documents are required from entities competing in contract award procedure. It refers the question to the implementing act which is the Regulations of the Prime Minister of 30 December 2009 on the types of documents that may be requested by the awarding entity from the economic operator and forms in which these documents may be submitted (Journal of Laws of 2009, No 226, item 1817). **It means that there has been closed catalogue of documents, which may be required by the awarding entity. Also the form of the documents submitted has been strictly established.**

With the aim of confirming meeting by economic operator corporate requirements, knowledge and experience commercial-financial requirements as well as technical and personnel requirements, **the awarding entity requires (and in procedures not exceeding the “EU threshold” can require), the following documents:**

- 1) concessions, permits or licences;
- 2) list of works necessary to certify that the requirement of knowledge and experience is met, completed within the period of the past five years prior to the expiry of the time limit for submitting tenders or applications for participation in the procedure, and if the duration of business activity is shorter – during that period, indicating their type and value, date and place of execution and enclosing documents attesting that these works were concluded in accordance with the good practice and executed properly;
- 3) list of supplies or services provided and in case of periodic or ongoing supplies or services - those which are subject of provision, necessary to certify that the requirement of knowledge and experience is met, provided within the period of past three years prior to the expiry of the time limit for submission of tenders or requests to participate in the procedure, and if the duration of business activity is shorter – during that period, indicating their type and value, date and place of execution and enclosing documents attesting that these supplies or services were concluded in accordance with the good practice and executed properly;
- 4) list of tools, equipment and machines at the disposal of economic operator of services or works in order to perform the contract, necessary to execute the contract along with the information on the basis for their disposal;
- 5) statement on the average, annual size of employment on the part of economic operator of services or works and size of managerial personnel within the period of past three years prior to the expiry of the time limit for submitting tenders or applications to participate in the procedure, and if the duration of business activity is shorter – during that period;
- 6) list of persons who will participate in performance of the contract in particular responsible for service provision, quality control, management of works including information on their professional qualifications, experience and education necessary to perform the contract as well as the scope of activities carried out by them and information on the grounds for dispose of those persons;
- 7) statement attesting that persons who will participate in the performance of the contract have the required qualifications, if legal regulations require such qualifications;
- 8) financial report or its part, and if it is a subject of examination by auditor in compliance with accountancy provisions, also the opinion on financial report or its part respectively, and in case of economic operators not required to prepare financial report, other documents defining their

turnover as well as their liabilities and receivables – for a period not longer than three last years, and if the duration of business activity is shorter- for that period;

- 9) information from bank or credit union where the economic operator holds an account confirming the amount of financial means of the economic operator's credibility, issued not earlier than three months before the expiry of the time limit for submitting application of participation in the contract awarding procedure or submitting tenders;
- 10) paid insurance policy, and in case of lack of such, other document confirming that the economic operator is insured against personal liability within the scope of the economic operator's activity with reference to the object of the contract.

**In order to show that there have been no grounds for exclusion awarding entity requires (and in cases not exceeding the „EU threshold” can request) the following documents:**

- 1) statement that the have been no grounds for exclusion;
- 2) current excerpt from relevant register, if separate legal regulations require entry in the register in order to show lack of grounds for exclusions under art. 24 item 1 point 2 of the Act issued not earlier than 6 months prior expiry of the time limit for submitting the application for participation in the contract awarding or submitting tenders and with reference to natural persons – statement within the scope of art. 24 item 1 point 2 of the Act;
- 3) current certificate of the head of the competent tax office confirming respectively that the economic operator is not in arrears with payments of taxes, fees and contributions payable towards health and social insurance, or certificate stating that economic operator has been legally entitled to exemption, deferment or spread of payment into

instalments with reference to out standing payments or stating that the execution of a decision for a competent authority has been stopped in its entirety – issued not later than 3 months prior to the expiry of the time limit for submitting the application of participation in the contract awarding procedure or submitting tenders;

- 4) current certificate of the relevant branch of the Social Insurance Institution (ZUS) or Agricultural Social Fund (KRUS) confirming respectively that economic operator is not in arrears with payments of taxes, fees and contributions payable towards health and social insurance, or certificate stating that economic operator has been legally entitled to exemption, deferment or spread of payment into instalments with reference to out standing payments or stating that the execution of a decision for a competent authority has been stopped in its entirety – issued not later than 3 months prior to the expiry of the time limit for submitting the application of participation in the contract awarding procedure or submitting tenders;
- 5) current information from the National Register of Criminal Records within the scope specified in art. 24 item 1 points 4-8 of the Act, issued not later than 6 months prior to the expiry of the time limit for submitting the application of participation in the contract awarding procedure or submitting tenders;
- 6) current information from the National Register of Criminal Records within the scope specified in art. 24 item 1 point 9 of the Act issued not later than 6 months prior to the expiry of the time limit for submitting the application of participation in the contract awarding procedure or submitting tenders.



**Due to the fact that foreign entity is not able to submit all required documents mentioned above as necessary to certify the lack of grounds for exclusion, such entity can submit:**

- 1) document or documents issued in the country in which economic operator has the registered office or place of residence confirming respectively that:
  - a) neither winding up procedure has been commenced nor bankruptcy declared with respect to economic operator (issued not later than 6 months prior to the expiry of the time limit for submitting the application of participation in the contract awarding procedure or submitting tenders);
  - b) economic operator is not in arrears with payments of taxes, fees and contributions payable towards health and social insurance, or certificate stating that economic operator has been legally entitled to exemption, deferment or spread of payment into instalments with reference to outstanding payments or stating that the execution of a decision for a competent authority has been stopped in its entirety (issued not later than 3 months prior to the expiry of the time limit for submitting the application of participation in the contract awarding procedure or submitting tenders);
  - c) economic operator has not been prohibited from competing for contract (issued not later than 6 months prior to the expiry of the time limit for submitting the application of participation in the contract awarding procedure or submitting tenders);

and

- 2) certificate of competent judicial or administrative authority for the place of residence stating that person referred to has not been validly sentenced within the scope of the Act for any offence against rights of people performing paid work, offence

against environment, for bribery, for an offence against economic turnover or for any other offence committed with aim of gaining financial profits, as well as for treasury offence or an offence of participation in organized crime group or in a union aimed at committing an offence of treasury offence (issued not later than 6 months prior to the expiry of the time limit for submitting the application of participation in the contract awarding procedure or submitting tenders).

**In case when in place of residence of a person or in the country in which economic operator has the registered office or place of residence these documents cannot be issued, then the documents containing declaration made before a notary public, a competent judicial or administrative authority or a competent professional or commercial authority in the place of residence of a person or the country in which economic operator has the registered office or place of residence.**

It has to be noted that in case of doubts as to the document submitted by economic operator whose registered office or place of residence is outside the territory of the Republic of Poland, awarding entity can ask the competent authority in the place of residence of a person or in the country in which economic operator has the registered office or place of residence respectively, to provide necessary information referring to the submitted document.

**Form**

Documents are submitted in form of an original or a copy certified by economic operator. In case of submitting electronic documents these should be signed by economic operator by use of electronic signature verifiable by means of valid qualified certificate.

In case of economic operators competing jointly for contract awarding and in case of entities economic operator counts on, copies of documents referring respectively to economic operators or such entities are

certified by economic operators or such entities.

Awarding entity can request presenting the original or notarized copy only if such copy submitted by economic operator is illegible or causes doubts as to its authenticity.

**Documents prepared in foreign languages should be submitted together with their translation in the Polish language. Translation is not required in case awarding entity has provided consent referred to in art. 9 item 3 of the Act.**

It has to be stated that not submitting documents or statements confirming meeting requirements of participating in the procedure can be the grounds for exclusion of economic operator from the contract awarding procedure. Such exclusion can arise after prior calling up economic operator to submit missing documents within respective time limit (pursuant to art. 26 item. 3 of the Act PPL).

Awarding entity has also been authorised to ask to provide explanations in reference to the documents or statements submitted.

It has been significant that economic operator can make reservations that documents submitted by such economic operator include information being the company's secrets in accordance with regulations on lighting against unfair competition and by the same, such information cannot be disclosed to other participants to the procedure.

### **Being at disposal of potential**

Information of great significance for entities competing for public contract is the **information on economic operator's being at disposal of knowledge and experience, technical and personnel potential for performance of contract as well as on financial potential of other entities.**

It has been of vital importance that the capacity to rely on other entities has not resulted from the nature of legal relations between economic operator and such entities. Economic operator has only been obliged to prove to awarding party his being

at disposal of resources necessary to performance of the contract in particular by presenting written statement of such entities on transferring at his disposal all necessary resources for the period of using them in course of performing the contract.

**It means that economic operator in order to prove meeting requirements on knowledge and experience, commercial-financial, technical and within the scope of personnel requirements – can use potential of other entities and does not have to create any consortium with this aim, remaining the one and only fully responsible for performing the contract.**

In case economic operator counts on knowledge and experience, technical potential, persons capable of performing the contract or financial potential of other entities regardless from the nature of legal relations between economic operator and such entities and such entities would participate in performing part of the contract:

- economic operator is obliged to present:
  - written obligation of such entities to transfer at his disposal of all necessary resources for the period of using them within the time limit of the contract (art. 26 item 2b of the Act PPL);
  - (Optionally, if the awarding entity posts such a request) information from bank or credit union where economic operator holds an account confirming meeting the requirements within the scope of financial and commercial potential of such economic operator (§ 1 item 3 of the Resolution on such documents); such information can be issued not earlier than 3 months prior to the expiry of the time limit for submitting the application of participation in the contract awarding procedure or submitting tenders.

- economic operator can be obliged to present documents conforming lack of grounds for exclusion from the contract awarding procedure of such entities. Obligation of economic operator to present the above documents has been conditioned by stating will of awarding entity in the notice on contract and specification of essential terms of the contract.

#### 4.4. Most Common Errors

In course of public contract award procedure economic operators applying for contract while submitting documents make various types of errors.

**Most common errors made in documents submitted by economic operators have been as follows:**

- Spelling errors and errors in writing, meaning wrong wording, unintentional spelling errors, language error or omitting word, So called “Czech mistakes”.
- Calculation errors, meaning arithmetic errors:
  - errors in project estimate;
  - errors in calculating gross price;
  - other errors, meaning inconsistencies between tender and specification of essential term of the contract, not causing significant changes in tender;
  - other inconsistencies in tender, meaning declaring apart from the period in accordance with the awarding entity's request other period of performance of contract.

**Most often errors however concern submitted in procedure by economic operators (or consortiums) powers of attorney. Most common errors regarding these are as follows:**

- not submitting power of attorney together with application on participation in tender and
- submitting together with tender a defective power of attorney, meaning:
  - in wrong form (i.e. in form of xero copy – instead of original document or copy certified by notary public);
  - signed by unauthorised representative of members of the management board or against the rules of representation disclosed in the register of entrepreneurs (i.e. power of attorney signed by one member of the management board when signatures of two members are required);
  - lack of signature of any of economic operators applying for awarding public contract in case of applying for contract by consortium.

**Large number of errors is in forms of submission of materials prepared by economic operators.** In case of public contract, specific form (in most cases – of closed envelope) has to be kept, as well as proper addressing and signing applications on participation in procedure or tenders in accordance with guidelines from awarding entity (addressee, title of the envelope and i.e. numbering and signing each written page). Formal errors do not result in any sanctions, however, such as rejection of the offer. It has to be underlined that as to the essence most part of errors made by economic operators can be corrected either by economic operator on motion of awarding entity in course of procedure or by awarding entity. Nevertheless, it has to be pointed out that it has been extremely important to read carefully tender documentation – in particular notice on contract and its prospective changes, SETC, modification of SETC and explanation of its content – so as to the documentation prepared by economic operator has been in accordance with it “from a to z”.

## 5. Legal Compendium – Polish Public Procurement Law

Currently, basic legal instrument regulating operation of the Polish system of public contracts within the scope of awarding contracts for services, works or supplies is the Act of 29 January 2004 Polish Public Procurement Law (Journal of Laws of 2010, No 113, item 759 – unified text), further referred to in this Report as the “Act PPL”, together with executive acts issued pursuant to it, which are as follows:

- 1) Regulation of the Prime Minister of 28 January 2010 on list of services of priority and non priority character (Journal of Laws of 2010, No 12, item 68);
- 2) Regulation of the Prime Minister of 28 January 2010 on drafts of notices published in the Public Procurement Bulletin (Biuletyn Zamówień Publicznych) (Journal of Laws of 2010, No 12 item 69);
- 3) Regulation of the Prime Minister of 23 December 2009 on values of contracts and contests conditioning the obligation to dispatch notices to the Office for Official Publications of the European (Journal of Laws of 2009, No 224, item 1795);
- 4) Regulation of the Council of Ministers of 1 August 2006 on organs respective for applying to the European Committee for stating operation in competitive market, access to which is not restricted (Journal of Laws of 2006, No 147, item 1063);
- 5) Regulation of the Prime Minister of 25 August 2008 on the scope of information included in annual report on contracts awarded, its draft and manner of dispatching (Journal of Laws of 2006, No 155, item 1110 with further amendments);
- 6) Regulation of the Prime Minister of 30 December 2009 on types of documents that may be requested by the awarding entity from the economic operator and forms in which these documents may be submitted (Journal of Laws of 2009, No 226, item 1817);
- 7) Regulation of the Minister of Infrastructure of 18 May 2004 establishing methods and grounds for preparation of the investor’s estimate, establishing planed costs of project works and planed costs of construction works stipulated in the functional program (Journal of Laws of 2004, No 130, item 1389);
- 8) Regulation of the Minister of Infrastructure of 2 September 2004 on the specific scope and form of project documentation, technical specifications of performance and receipt of construction works and the functional program (Journal of Laws of 2004, No 202, item 2072 with further amendments);
- 9) Regulation of the Prime Minister of 16 October 2008 on the protocol of public contract award procedure (Journal of Laws of 2008, No 188, item 1154);
- 10) Regulation of the Prime Minister of 22 March 2010 on the rules of conduct in examination of appeals (Journal of Laws of 2010, No 48, item 280);
- 11) Regulation of the Prime Minister of 15 March 2010 on the amount and manner of issuing the entry from appeal and types of costs in the appeal procedure and manner settling such costs (Journal of Laws of 2010, No 41, item 238);
- 12) Regulation of the Prime Minister of 2 July 2007 on course of performing qualification procedure for Members of the National Appeal Chamber, manner of appointing qualification committee and specific scope of qualification procedure (Journal of Laws of 2007, N 120, g)

- 13) Regulation of the Prime Minister of 9 July 2007 on multiple of base quote having been grounds for establishing base remuneration of the president, vice president and other members of the National Appeal Chamber (Journal of Laws of 2007, No 128, item 885);
- 14) Regulation of the Prime Minister of 23 December 2009 on average exchange rate of the Polish zloty to Euro having been the grounds for calculating values of public contracts (Journal of Laws of 2009, No 224, item 1796).

In addition, next to the Act PPL of vital importance within the scope of the public contract award system are as well provisions of the following regulations:

- 1) Act of 23 April 1964 Civil Code (Journal of Laws of 1964, No 16, item 93 with further amendments);
- 2) Act of 17 November 1964 Civil Procedure Code (Journal of Laws of 1964, No 43, item 296 with further amendments);
- 3) Act of 14 June 1960 Administrative Procedure Code (Journal of Laws of 2000, No 98, item 1071 with further amendments);
- 4) Act of 16 April 1993 on Fighting Against Unfair Competition (Journal of Laws of 2003, No 153, item 1503 with further amendments);
- 5) Act of 7 July 1994 Construction Law (Journal of Laws of 2006, No 156, item 1118 with further amendments);
- 6) Act of 5 July 2001 on Prices (Journal of Laws No 97, item 1050 with further amendments);
- 7) Act of 6 September 2001 on Access to Public Information (Journal of Laws of 2001, No 112, item 1198, with further amendments);
- 8) Act of 22 January 1999 on Protection of Confidential Information (Journal of Laws of 2005, No 196, item 1631, with further amendments);

- 9) Act of 27 August 2009 on Public Finance (Journal of Laws of 2009, No 157, item 1240 with further amendments);
- 10) Act of 17 December 2004 on Responsibility for Violation of Public Finance Discipline (Journal of Laws of 2005, No 14, item 114 with further amendments).

Additionally to the mentioned above, public contracts system is also created by regulations of the European Union law (EU)<sup>5</sup>, meaning:

- 1) Treaty on European Union (Journal of Laws of EU C115/47, 9.5.2008), further referred to as "TEU" stipulating rules significant for all economic operators competing for public contract award, including among others:
  - a) Prohibition of discrimination due to state origin (art. 18 TEU);
  - b) Free transfer of goods and services (art. 28-32 EUT and art. 56-62 TEU);
  - c) Economic freedom (art. 49-54 TEU),
  - d) Prohibition of overuse of dominant position (art. 102 TEU);
- 2) Classic directive: Directive 2004/18/EC of the European Parliament and the Council of 31 March 2004 on coordination of procedures for awarding public contracts for works, supplies and services (Journal of Laws L134 of 30.4.2004 with further amendments), further referred to as the „Directive 2004/18/EC“;
- 3) Sector directive: Directive 2004/17/EC of the European Parliament of 31 March 2004 correcting contract award procedures by entities operating within sectors of water management, power industry,

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<sup>5</sup> Provisions of the directives mentioned will be applied directly within such scope as they have not been implemented yet to the Polish law or in case of their ill implementation.

transport and post services (Journal of Laws L 134 of 30.4.2004 with further amendments), further referred to as the „Directive 2004/17/EC”.

It has to be underlined that the provisions of TEU have direct application in contracts awarded in course of the Act PPL, in example, due to value of the contract below given amounts.

Provisions of the directives mentioned will have direct application within such scope as they have not been implemented yet to the Polish law or in case of their ill implementation.

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## INVESTMENT SUPPORT

**Investment Support is a Polish consulting company that supports local authorities and private companies in the preparation and execution of public-private investment projects.** We specialize in public-private investment projects, development and revitalization projects as well as in undertakings in the health care sector.

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