

## Offsets in Polish law

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### Legal status for 12.2.2016

#### **1. Introduction**

Offset is an instrument of governmental economic and national security policy commonly used all around the world. Its aim is to compensate domestic companies (especially armaments industry) and scientific institutions purchase foreign armament or military equipment from public funds. Offset usually assumes the form of obligatory cooperation between foreign supplier of the armament or military equipment and its sub-suppliers and domestic companies, scientific institutions and the government. In case there is a legal obligation of applying offset, the conditions of the proceedings for awarding the public contract for delivery of armament or military equipment shall encompass additional requirements not directly connected to the purchase which constitute the offset. In order to win the tender and apart from offering the equipment which fulfil the requirements of the armed forces, potential foreign supplier must present an offset offer. It has to involve offset obligations regarding executing investments in the country purchasing the military equipment directed to

domestic companies, transfer of technology, know-how and licenses. The offer shall also involve organizing in these companies production, maintenance, repair, overhaul capacities of purchased equipment.

## **2. Fundamental legal documents regulating applying an offset in Poland**

The fundamental legal document which regulates applying offset in Poland is the Act of June 26, 2014 on some contracts concluding in connection with performance the orders for the purposes of defence or security of the State (Dziennik Ustaw/Polish Journal of Laws of 2014, item 932) commonly called “The Offset Act”. The offset is regulated also by implementing regulations to the Offset Act issued in form of regulations of the Polish Council of Ministers and the number of decisions issued by Minister of National Defence. The key importance have also Article 346 section 1 letter b of the Treaty on the Functioning of the European Union and Interpretative Communication of European Commission from 2006 on the application of that Article of the Treaty in the field of defence procurement.

## **3. Characteristics of an offset agreement**

An offset agreement is a civil law agreement. The parties of the agreement are the State Treasury represented by Minister of National Defence and foreign supplier of the armament or military equipment. The offset agreement is concluded under Polish law in connection with fulfilment the orders for the production of or trade in arms, munitions and war material which are measures necessary for the protection of the essential interests of national security. It is the minister controlling the part of the governmental administration, to whom the orderer being the organizational unit is subordinated or supervised (usually it is the Minister of National Defence) who decides whether the order is in connection with protection of such interests, assesses if such interest arises in a case and draws up the written grounds for the necessity of using offset in connection with the purchase of the military equipment. The offset agreement obligatory encompasses the provisions which in particular determine the parties, date and place of its conclusion, the value, subject matter, schedule and conditions of performance of the offset obligations, term of the agreement and specification of the principles of liability for non-performance or misperformance of the offset obligations including contractual penalties. What is

important, foreign supplier has an obligation to conclude the offset agreement based on principles specified in Offset Act and any party cannot terminate the agreement even if there are some changes in the contract for delivery of the armament or military equipment. Then there is an opportunity only to renegotiate the provisions of the offset agreement.

Foreign supplier has to be prepared that offset agreement is public as regards to identification of the offset receivers and offset granters, its value, term of the agreement (not longer than 10 years), subject of the delivery, except for information which disclosure is contrary to essential interests of national security. What is more, in case of non-performance or misperformance of the offset obligations, foreign supplier has an obligation to pay contractual penalty in the amount equivalent to the value of non-performed or misperformed offset obligation. The payment of this stipulated penalty shall be without prejudice to the right of the State Treasury to seek compensation exceeding the value of this stipulated penalty. Then, the liability of the foreign supplier is independent from its fault.

#### **4. The way of concluding an offset agreement**

##### **4.1. Offset offer**

The part of the procurement for delivery of armament or military equipment essential for national security are the guidelines to offset offer and the draft of the offset agreement drawn up by Bureau of Offset Agreements in Ministry of National Defence. The guidelines specify in particular:

- 1) the requirements for maintaining or establishing on the Polish territory the potential in the scope of production, service, maintenance, repair and overhaul capacities and other potentials necessary from the perspective of protection of essential security interests of the state,
- 2) the way and criteria of evaluating the offset offer,
- 3) the estimated period of evaluating the offset offers and conducting the negotiations in order to conclude the offset agreement.

Foreign supplier has an obligation to submit the offset offer to Minister of National Defence not later than the date of submitting the offer for delivery to the orderer of the armament or military equipment. The orderer makes a choice of the offer for the delivery taking into account the

evaluation of the offset offer made by Minister of National Defence. Foreign supplier has also an obligation to prepare the offset offer in Polish language, otherwise being null and void. It has to contain:

- 1) information about the legal form of activity and the way of legal representation of foreign supplier;
- 2) information about financial results of the foreign supplier from the previous three years of its business activity and, in case foreign supplier has been established in period shorter than three years, information about the financial results for the whole period of business activity;
- 3) information about offset agreements performed or being performed by the foreign supplier;
- 4) specifying the subject of the offset obligations;
- 5) determining the dates of performing the offset obligations;
- 6) letters of intention or other documents confirming the agreement between offset granter and offset receivers about performance of offset obligations.

Letters of intention or other documents confirming the agreement between offset granter and offset receivers about performance of offset obligations play very important role because lack of them results in omitting particular offset obligation in evaluating the offset offer. It leads to the situation the offset offer becomes less attractive. If it does not meet the requirements specified in offset guidelines, then Minister of National Defence appeals the foreign supplier to supplement it and specifies the date and scope of the supplement. If foreign supplier does not supplement the offer in the specified term, then Minister shall leave it without recognition. It results in loss of opportunity to obtain the order from the orderer.

#### **4.2. Offset negotiations and concluding an offset agreement**

The offset agreement is concluded by way of negotiations by State Treasury represented by Minister of National Defence and foreign supplier indicated by the orderer. The orderer also takes part in the negotiations. The negotiations are based on offset offer. The offset agreement cannot be concluded on conditions less beneficial than specified in offset offer. The subject of the negotiations are in particular the subject and dates of offset obligations.

In case of lack of the agreement about the provisions of the offset agreement in term specified in the conditions of the tender by the orderer, due to reasons attributable to foreign supplier, Minister of National Defence informs it that it has been excluded from the tender. The reason attributable to foreign supplier is understood particularly as discrepancy between provisions of offset agreement proposed by foreign supplier and requirements contained in guidelines to offset offer. Further proceedings are continued with participation of foreign supplier which submitted next best offer.

Minister of National Defence concludes the offset agreement upon the receipt of an opinion of the Offset Committee. It is the body issuing the opinions and advice to Minister. It gathers the representatives of President of Republic of Poland, government administration and intelligence services. Not later than on the day of concluding the offset agreement Minister of National Defence appeals, on behalf of the State Treasury, foreign supplier to provide a good performance guarantee in the form of, for instance, notarial deed including declaration of submitting to voluntary enforcement, bank guarantee or provide blank bill with bill of exchange declaration. Foreign supplier also bears costs of issuing the collaterals. The value of collateral cannot be less than the value of the offset agreement.

## **5. Performance of an offset agreement**

During the performance of the offset agreement foreign supplier has an obligation to pass on to Minister of National Defence report for previous year about performing particular offset obligations. It has to fulfil this obligation till 31<sup>st</sup> march every year. Whereas Minister of National Defence has the right to demand from foreign supplier at every time information about the progress of performing the offset obligations. The offset agreement has to be performed within 10 years in maximum since the day of entering into force.

During the performance of the offset agreement it can occur significant change of circumstances which can be the reason to modify the provisions of the agreement. It can consist in changing offset receiver, offset granter, subject, value or deadline of performing particular offset obligations. It can also occur replacement particular offset obligation with another one or ones. Significant change of circumstances is the basis to modify the provision of the offset agreement in written, otherwise being null and void. Usually it is made in a form of annex and has to be performed by using the closed catalogue of provisions of the Offset Act. As a result, the parties cannot terminate the offset

agreement. In case of such modifications leading to the change of the value of the agreement, the parties are obliged to renegotiate it with the participation of the orderer. If the modification consists in changing previous obligation or obligations, negotiations concern in particular the subject of the offset agreement and the deadlines of performing the offset obligation or obligations.

## **6. Supervision under performance of an offset agreement**

### **6.1. Control of performing of an offset agreement**

Minister of National Defence supervises performance of the offset agreements. It carries out audit in offset receivers concerning correctness of performing offset obligations and informs about it the foreign supplier. The control activities are performed by control team after delivering the authorization to offset receivers and foreign supplier. The foreign supplier has the right to take part in the proceedings as an observer. Control team consists of employees of Ministry of National Defence but there is a possibility persons who do not work for the Ministry will be the part of the team. During the carrying out the proceedings control team has the right to:

- 1) access to documentation connected to the offset obligations,
- 2) access to offset receiver's buildings and rooms connected to performing the offset obligation,
- 3) demand from offset receiver oral or written explanations concerning offset obligation,
- 4) draw up necessary write-downs or extracts from the documents, combinations and calculations.

Whereas offset receiver which is under control has an obligation to ensure control team conditions and means necessary do carry out the control efficiently. During the control it has to, in particular, make available to control team the appropriately equipped premises, immediately submit the documents and materials demanded by the team, make explanations and give access to data saved on computers and other devices subject to the provisions of law of legally protected secrets in force.

Control team has an obligation to draw up the protocol from the control. It must include, among others, findings of the control and instructions about the way of submitting the reservations to protocol's findings. Offset receiver and foreign supplier has the right to submit reservations to Minister of National Defence with the written grounds within 14 days from obtaining the protocol.

In case of submitting them, Minister of National Defence may carry out control once again or change or supplement the protocol.

Moreover, Minister of National Defence has the right to demand from foreign supplier at every time information concerning the progress of performing offset obligation. Whereas offset receiver has an obligation to inform Minister, on its demand, about this progress.

## **6.2. Statement of fulfilment of an offset obligation**

Foreign supplier submits the notion to Minister of National Defence for acceptance the offset obligation in lieu of offset agreement not later than 90 days since the day of having the offset obligation performed. The notion includes:

- 1) identification of the offset obligation,
- 2) the subject of the offset obligation,
- 3) the deadlines of performance of the offset obligation,
- 4) scope of the offset obligation,
- 5) the way of performance of the offset obligation in the above scope,
- 6) the declaration of the offset granter about the performance of the offset obligation within the provisions of the offset agreement.

Foreign supplier encloses to the above-mentioned notion the offset receiver's declaration concerning performance of the offset obligation. In case the notion does not meet the requirements, Minister of National Defence, within 14 days from submitting the notion, appeals the foreign supplier to supplement the notion not later than within 30 days. If the notion is submitted after this period or it is not supplemented within it, Minister of National Defence shall leave it without recognition. During the evaluation of the notion Minister has the right, among others, to demand from foreign supplier additional documents and information necessary to evaluate the legitimacy of the notion.

After obtaining from the foreign supplier the complete notion, carrying out the control of performance the offset obligation and obtaining the positive opinion of the Offset Committee

Minister of National Defence accepts performance of the offset obligation in lieu of the value of the offset agreement. In case of negative results of the control or negative opinion of the Offset Committee, Minister of National Defence does not accept the offset obligation. Performance of the offset obligation is accepted in the form of protocol signed by Minister and foreign supplier.

### **6.3. Statement of fulfilment of an offset agreement**

It is the Council of Ministers which declares offset agreement performed. Minister of National Defence submits to Council for this kind of declaration.

### **7. Termination of an offset agreement**

The offset agreement terminates on the day of acceptance by the Minister of National Defence, and next by the Council of Ministers performance by the foreign supplier all the offset obligations or on the day of the payment for the State Treasury contractual penalty or compensation for non-performance or misperformance of the offset obligations.

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