

Contracts in the fields of defence and security in Polish law

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1. Introduction

1. Wprowadzenie

European Union through directive 2009/81/EC coordinated the procedures for the award of contracts to meet the security requirements of Member States and the obligations arising from the Treaty on the Functioning of the EU. The aim of the regulations is to reduce costs in the defence sector and significantly lower the sector's environmental impact. Moreover, EU aspires to regulate above contracts in compliance with the principles of the Treaty and in particular the free movement of goods, the freedom of establishment and the freedom to provide services, and with the principles deriving therefrom, such as the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

On the other hand pursuant to Article 346 section 1 letter b of the Treaty on the Functioning of the European Union any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material. On the basis of this provision of the Treaty Member States apply legal regulations different from the provisions of the Directive which was implemented to local legal systems.

In Polish law there are special regulations referring to public contracts in the fields of defence and security. They can be found in the Public Procurement Law Act and these regulations refer to the contracts described in the Directive 2009/81/EC. They are also in the Minister of National Defence's Decision No. 367, 14th September 2015 which applies to the contracts based on article 346 TFEU. Specific character of purchased products and services results in conducting proceedings for awarding public contracts on special principles. Security of supplies, the principles of granting sub-contracting, diversity of particular procedures or security of classified information belong to the aspects which differ public procurements in described field.

2. Fundamental Polish legal acts and documents regulating granting public contracts in the fields of defence and security

In Polish law the most important legal act regulating granting public contracts in a fields of defence and security is the Act of 29 January, 2004 - Public Procurement Law (Journal of Laws of 2015, item 2164), especially Chapter 4a – “Contracts in the field of defence and security” (art. 131a – art. 131w). These regulations constitute the implementation of Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (Official Journal of the European Union L 216, 20.8.2009, p. 76-136) colloquially called “defence and security directive”. Directive came into force 21 August, 2009. Member States were obliged to implement it to their legal systems within two years. However, it was modified by Commission Regulation (EC) No 1177/2009 of 30 November 2009 amending Directives

2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts (Official Journal of the European Union L 314/64, 1.12.2009, p. 66-67). In the context of interpretation of above-mentioned EU regulations the important role plays also European Commission's Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement. When Public Procurement Law is not applied because of essential interests of national security, then Minister of National Defence's Decision No. 367, 14th September, 2015 on principles and course of action in granting public contracts essential for interests of national security in Ministry of National Defence (Official Journal of Minister of National Defence, 2015, item 265).

3. Subject of the contracts in the fields of defence and security

Regulations referring to the contracts in the fields of defence and security included in Public Procurement Law apply in particular to the following procurements:

- 1) deliveries of military equipment, including all the parts, components and sub-assemblies;
- 2) deliveries of sensitive equipment, including all parts, components and sub-assemblies;
- 3) works, supplies and services directly connected with the equipment mentioned in point 1 and 2, and all its components and sub-assemblies connected with life-cycle of this product;
- 4) works and services for special military purposes or sensitive works and services.

Regulations from Decision No. 367, 14th September, 2015 apply to public contracts 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.

4. Contractors of the contracts in the fields of defence and security

Solely economic operators having their seat or place of residence in one of the EU Member States, the European Economic Area or in a country with which the European Union or Poland entered into an international agreement concerning these contracts may apply for a contract in the field of

defence and security. The contracting authority may also specify in the contract notice that economic operators from countries other than those specified above may compete for a mentioned contract. If it does not do it, the economic operator from one of those countries which compete for a contract, shall be excluded from the contract award procedures.

In relation to public contracts referring to 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 only economic operators which are not the subject of exclusion on the basis of the regulations of Decision No. 367, 14th September, 2015 and fulfil the following requirements may compete for granting them:

- 1) they have authorization to pursue the particular business activity or acts if the legal regulations require the obligation to have them;
- 2) they have knowledge and experience;
- 3) they have or dispose the appropriate technical potential and staff skilled to perform the contract or they have the capacity to establish in Poland appropriate potential;
- 4) they are in economic and financial situation which ensure the fulfilment the contract.

The contracting authority may allow the possibility to compete for the public contract by a few economic operators together if it is not contrary to evaluation of the Minister of National Defence. Then the economic operators are obliged to appoint a plenipotentiary which represents them during the proceedings for awarding the public contract or during the proceedings for awarding the public contract and signing the contract and bearing joint and several liability for the fulfilment of the contract.

The contracting authority may also restrict the participation in the proceedings only to the economic operators which fulfil on their own at least one condition from the following:

- 1) having the knowledge;
- 2) having the experience;
- 3) having the technical potential.

5. The obligations connected to protection of classified information in public contracts in the fields of defence and security

The economic operator competing to get the public contract in the fields of defence and security on the basis of Public Procurement Law Act may obtain it only if it shall bear responsibility under the warranty for guarantee security of classified information transferred by the contracting authority necessary to perform the contract. The contracting authority shall also oblige the economic operator to inform their subcontractors on their obligation to protect classified information which they received in the course of contract award procedure in the fields of defence and security and after its completion. The contracting authority may also determine in description of the subject-matter of contract in particular the right to verify or dismiss employees of the economic operator what are to participate in contract performance, both at the stage of contract award procedure as well as contract performance if this is required by protection of basic national security or is necessary to raise the security level of performed contracts.

Regarding the public contracts ordered on the basis of Decision No. 367 the regulations referring to security of classified information are in principal convergent to regulations from Public Procurement Law Act.

Detailed legal regulations about above issues can be found in Act of 5 August, 2010 Protection of classified information.

6. The participation of subcontractors in performance of public contracts in the fields of defence and security

In the description of subject-matter of contract, the contracting authority may determine the requirements connected with performance of contract in the fields of defence and security on the basis of Public Procurement Law Act connected with subcontracting, which in particular refer to:

1) indication in the tender, the share of the contract to be subcontracted, the names of subcontractors along with the subject-matter of the subcontracts for which they are proposed - in case the economic operator is not obliged by the contracting authority to select subcontractors under the procedure provided for in this chapter;

2) forthwith indication of any change occurring at the level of subcontractors during the execution of the contract.

Moreover, the contracting authority may oblige the economic operator to conclude a subcontract, by specifying in the contract notice the range of values, comprising a minimum and maximum percentage of the value of contract in the fields of defence and security that shall constitute a subcontract. It shall be understood as a written contract for pecuniary interest concluded for the purposes of carrying out the contract in the fields of defence and security between successful economic operator and at least one other entity. The total value of subcontracts that the economic operator is obliged to conclude cannot exceed 30% of the contract awarded to economic operator.

The economic operator, upon request of the contracting authority, shall determine in their tender the part of contract they intend to subcontract in order to meet the subcontracting requirements. What is important, subcontracting the contract does not release the it from their responsibility towards the contracting authority for performance of a contract in the fields of defence and security. Moreover, in the course of this kind of contract award procedure or during the execution of the contract, the contracting authority may refuse to give their consent for concluding a contract with a subcontractor proposed by the economic operator if such a subcontractor fails to meet the criteria for participation in the procedure determined for the economic operator.

It is worth remembering that the economic operator shall not award a subcontract, if none of the subcontractors participating in the procedure for selection of subcontractors meets the participation criteria or none of the tenders submitted by subcontractors participating in the procedure for selection of subcontractors meets the requirements specified in subcontract notice and this may cause that the economic operator will fail to meet the requirements resulting from the contract in the fields of defence and security.

In relation to public contracts referring to the essential interests of national security on the basis of Decision No. 367 the contracting authority may allow for performance the part of the contract by subcontractors, also the foreign ones, provided that every of them has to have on their own knowledge resources, experience resources or technical potential which is essential to perform the awarded part of the contract, if it is not contrary to the evaluation of Minister of National Defence.

When the contracting authority allow above-mentioned performance, then it specifies the conditions of the subcontracting in the invitation to submitting the initial offers, final offers or in an invitation

to negotiations. It is obliged to include the condition in the documentation of awarding the contract concerning that economic operator has to indicate both in initial offer and in final offer the part of the contract the subcontractors shall perform. Mandating the performance of the contract to subcontractors do not release the economic operator from its liability to fulfil the contract.

What is important, during the proceedings for awarding the public contract or during performing it the contracting authority may refuse to accept the concluding the contract with subcontractor indicated by economic operator when it does not meet the requirements specified by the contracting authority for the economic operator which in particular stem from the security requirements specified in the evaluation of the Minister of National Defence.

7. Security of supply during the performance of the public contracts in the fields of defence and security

In order to guarantee the security of supply, the contracting authority shall determine in description of the subject-matter of contract on the basis of Public Procurement Law Act placed in specification of essential terms of contract or in the contract notice, the requirements connected with performance of the contract in the fields of defence and security. The contracting authority may determine in description of the subject-matter of contract in particular:

- 1) commitment of the economic operator to supply the documentation demonstrating to the satisfaction of obligations regarding the export, transfer and transit of goods associated with the contract in the field of defense and security, including any supporting documentation received from the EU Member State concerned;
- 2) commitment of the economic operator to determine restrictions on the contracting authority regarding disclosure, transfer or use of the products and services or any result of those products and services, which would result from export control or security arrangements;
- 3) commitment of the economic operator to supply the documentation demonstrating that the organization and location of provided supplies allows it to comply with the requirements of the contracting authority concerning security of supply set out in the contract documents, and a commitment to ensure that possible changes in its supply during the execution of the contract will not affect adversely compliance with these requirements;

- 4) commitment of the economic operator to secure the capacity to perform the contract in case of additional needs required by the contracting authority as a result of a crisis, according to agreed terms and conditions;
- 5) commitment of the economic operator to supply the documentation received from the national authorities of the economic operator regarding the fulfilment of additional needs required by the contracting authority as a result of a crisis;
- 6) commitment of the economic operator to carry out the maintenance, modernization or adaptation of the supplies covered by the contract;
- 7) commitment of the economic operator to inform forthwith the contracting authority of any change in its organization, supply performance or industrial strategy that may affect its obligations to that contracting authority;
- 8) commitment of the economic operator to provide the contracting authority, according to agreed terms and conditions, with all specific means necessary for the production of spare parts, components, assemblies and special testing equipment, including technical drawings, licenses and instructions for use, in the event that it is no longer able to provide these supplies.

In relation to public contracts referring to essential interests of national security on the basis of Decision No. 367 the contracting authority following the requirements of security of supply and services specifies in particular:

- 1) what technical potential the economic operator has to dispose on its own and in what scope it may dispose it;
- 2) in what scope economic operator has to have on its own the capacity to establish technical potential when the evaluation made by Minister of National Defence results the necessity of having the capacity to establish in Poland such potential;
- 3) specific characteristics of the entities in which the particular technical potential has to be established.

8. The courses of awarding the public contracts in the fields of defence and security

As a rule the contracting authority may award the contract in the fields of defence and security on the basis of Public Procurement Law Act under restricted tendering or negotiated procedure with prior publication. It may also award such a contract under competitive dialogue, negotiated procedure without publication or single-source procurement in circumstances stipulated in chapter 4a of the Public Procurement Law and, in the case referred to in art. 74 para. 2 of this Act, also under electronic bidding. Pursue to art. 131h every legally allowed course of awarding the public contracts is described in detail and when it may be used.

In relation to public contracts referring to essential interests of national security on the basis of Decision No. 367 the contracting authority may award the contracts under:

- 1) negotiations with a few economic operators;
- 2) negotiations with one economic operator;
- 3) when awarding the contract is not possible under above courses of action because of lack of possibility to indicate the close catalogue of economic operators, the contracting authority publishes the announcement in its seat and on its website.

9. The contract award criteria

The contract award criteria on the basis of Public Procurement Law Act include price or price and other criteria relating to subject-matter of contract, in particular quality, functionality, technical parameters, environmental aspects, social aspects, innovative aspects, service, period of contract performance and operating costs or such criteria as life-cycle costs, cost-effectiveness, after-sales service and technical assistance, security of supply, interoperability and operational characteristics defined in specification of essential terms of contract.

In relation to public contracts referring to essential interests of national security on the basis of Decision No. 367 the contract award criteria include price or price and other criteria, in particular quality, technical parameters, life-cycle costs, service or period of contract performance. Moreover, if the Offset Act applies, the contracting authority shall also take into consideration the evaluation of offset offers.

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