



DZP

more than law

CHANGES IN PUBLIC PROCUREMENT IN POLAND FROM THE PERSPECTIVE OF FOREIGN CONTRACTORS

On 28 July 2016, amendments to the Public Procurement Law (PPL) entered into force. Due to the intensive pace of the legislative work to adopt the law and also the quantity and importance of the amendments, the legal solutions adopted may in some cases give rise to interpretation doubts. This does not change the fact that the amendments are particularly important for the participants of the Polish public procurement market worth more than 30 billion euro.

AMENDMENTS TO PPL

Foreign entities interested in the Polish public procurement market may be particularly interested in amendments related to:

- **key principles of conducting procedures** – the principles of transparency (predictability) and proportionality (adequacy) prevailing in EU case law were affirmed,
- **conditions for participation in the procedure** – maximum values for conditions related to economic capacity were fixed, it is possible to establish different criteria for the conditions for participation in the procedure to be met by a contractor bidding for a contract independently and by a consortium, etc.,
- **exclusion criteria** – a distinction between mandatory and optional criteria for exclusion of contractors from participation in a procedure were introduced and new criteria were added. Some exclusion criteria are potentially very wide and there may be doubts about their applicability. The list of persons whose clear criminal record may be examined during the procedure was extended (to include e.g. commercial proxy holders and supervisory board members). Meanwhile, contractors are able to use a “self-cleaning” procedure to a much greater extent than before, and it may prevent exclusion in specific cases. Risk management (compliance) procedures will play an even greater role in this area,
- **tender assessment criteria** – as a rule, it is possible to assign no more than 60% of all scores to the price as part of the tender assessment criteria; the concept of “cost”, including “life-cycle costing”, was introduced for all types of contracts, and the significance of non-price tender assessment criteria was emphasized; their sample list included in the PPL is very extensive,



- **participation of third parties** – a third party providing its experience to a contractor bidding for a contract is expressly required to directly take part in the subsequent performance of the contract; all third parties have to be verified in terms of exclusion criteria,
- **subcontractors** – the contracting authority's requirements that personnel performing a contract (for services or construction works) be employed under employment contracts apply to them, the obligation to specify business names of subcontractors during the procedure were introduced, and contracting authorities are able to verify subcontractors (and sub-subcontractors) in procedures above the EU thresholds in terms of exclusion criteria,
- **amendments to contracts executed under the Public Procurement Law** – contract amendment options are much more flexible than under the current laws. This has caused many practical problems so far, so contracting authorities were often unwilling to modify the executed contracts in any way. The new laws should help dispel many doubts about whether public contracts may be amended,
- considerably **extended list of actions that may be a basis for challenging** contracting authorities' actions by filing an appeal with the National Appeal Chamber in procedures below EU thresholds,
- **submitted documents** – for instance, it is necessary to submit the European single procurement document (ESPD) for contracts above the EU thresholds, and contracting authorities are required to use the online repository of certificates (e-Certis) for foreign contractors from the European Union.

The amendments will directly affect foreign contractors bidding for public contracts in Poland, so they should prepare for the new procurement reality.

DZP RECOMMENDATIONS

DZP Public Procurement Team recommends:

- analyse how the amendments affect your strategy and scheme of participating in contract award procedures as soon as possible,
- examine possible grounds for exclusion of consortium members, (sub-)subcontractors and third parties; renegotiate contracts and agreements with particular business partners, if needed,
- introduce risk management (compliance) procedures related to public procurement; learn the consequences of potential violations of law by employees or business partners of a contractor, consortium member, subcontractor, etc.,
- prepare public procurement departments for the new developments by holding internal workshops and training courses; take special care when drawing up tenders / requests for participation in public procurement procedures when the first procedures are announced after 28 July 2016.

DZP will be pleased to assist and support you in preparing for the new procurement reality within the scope of these recommendations.

DZP PUBLIC PROCUREMENT TEAM

- renowned experts with many years' experience in both Polish and EU public procurement, concessions and PPP law
- authors of a commentary on Directive 2014/24/EU
- leaders in Public Procurement in Chambers Europe ranking

PLEASE CONTACT US



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