Control of Public Procurement in the European Union: Selected Problems

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Abstract Public procurement now forms a significant part of the market in economic terms (component of the free market economy). Its importance is increasing continuously due to value of contracts to be awarded, thus, many companies perceive such contracts as the key method for staying afloat on the market. The above brings about a growing competition in the public procurement market, encouraging pathological behavior fully focused at winning contracts, i.e. corruption. Note that the scope and degree of pathological phenomena in the public procurement system is largely influenced by applicable legislation in this field. Admittedly, regularly introduced legal institutions intended to reduce improper behavior proved to be partly ineffective. Curbing the risk of irregularity in the field of public procurement requires a multi-faceted impact, including efficient checks by the special bodies. The paper offers a review of the existing juridical solutions of EU law in respect of the analyzed subject. Relevant regulations of Polish law will be also discussed in this context.

Keywords Public procurement • EU • Polish law • Social market economy • Public procurement directives

1 Introduction

It is believed that the area of public procurement is inextricably linked with some pathologies in the public administration. These pathologies cannot be ignored. Many of them, including corruption, are considered the biggest threat to democracy and to free and fair business competition. They penetrate to each area of life: to the administration, politics, the judiciary and economy. In my opinion, they can be largely counteracted through the function of the public procurement control.

Note that, at present, public procurement represents a significant part of the market in the economic sense (a market economy components). However, its importance is decided by the continuously growing value of contracts awarded in the public procurement processes. Consequently, business and standing of some

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entrepreneurs is predominantly based on winning public contracts. Therefore, public procurement market used to be highly competitive, encouraging pathological behavior aimed at winning public contracts. To minimize the risk of irregularities in the public procurement, a multi-faceted approach is required, including an efficient performance of checks and inspections. The article will present juridical solutions on the subject matter. The question is whether they are appropriate and fulfill their legal function.

2 Pathologies in the Public Procurement System: Description

The key pathological factors are: the value of the public procurement market and, consequently, potential benefits which could be available on the market to entrepreneurs and public officials who decided on awarding contracts. Noteworthy, at present, public procurement represents a significant part of the market in the economic sense (a market economy component). However, its importance is decided by the continuously growing value of contracts awarded in the public procurement processes. Consequently, business and standing of some entrepreneurs is predominantly based on winning public contracts (Schmauch 2016).

The above causes an increasingly heavy competition on the public procurement market, encouraging pathological behavior aimed at winning public contracts. To minimize the risk of irregularities in the public procurement, a multi-faceted approach is required, including an efficient performance of checks and inspections. It is often pointed out that, the most frequently breached public procurement rules and also behaviors which may favor or request from a corruption include: non-application of public procurement legislation in the case when their applicability arising from meeting substance and subject-based assumptions for their applications or attempts to bypass the legislation in some EU member states (praeter legem actions) such as: breaking down contracts into parts to reduce the estimated value of the contract in the effort to reclassify it to a different/lower eligibility category; defective preparation of a public contract awarding procedure; lack of a clearly defined concept or purpose for delivering a public contract; unsound planning of a public contract; defective development/preparation of documents; inappropriately drawn up public procurement contracts; abuse of procedures other than public procurement; manipulating access to the public procurement information, bid assessment/scoring criteria and other contract-awarding criteria, insufficient documentation of proceedings, awarding public contracts to unreliable contractors (Wiśniewski 2006).

Note that intensity and extent of the pathologies in the public procurement system are largely affected by the applicable legislation in the area. While legal institutions operating towards restriction of corruptive practices are introduced on a

regular basis, experience shows that, in many instances, expansion of procedures and regulations is not effective (Panasiuk 2004).

Furthermore, public procurement abuses do not end upon awarding a public contract. One may also encounter pathologies in the performance of a public contract when the contracting authority may use the contracted goods/services for personal purposes and demand to receive for himself some additional benefits from the contractor as a "payment" for assistance in awarding the contract (Mituś 2009).

3 Control: Attempt at Definition

The observations presented in the paper will focus on the ex-ante and ad hoc control in the public procurement system in the public. These institutions have a major impact on preventing corruption in the public administration and their proper operation contributes to a more effective distribution of public funds. There is importantly that control functions are performed in the supervisory process defined as verification (ex-post) or prevention (ex-ante). The supervisory body is equipped with the means of influencing the approach and procedures of supervised bodies and it should draw consequences from their operations by introducing legal measures which are capabilities of an imperious and unilateral impact on the operation of the supervised body (Chmielnicki 2006).

Chełmonski (1966) emphasizes that control over the administration is aimed at analyzing correctness of its operation in terms of delivery of its planned objectives and in terms of choosing the right measures to achieve it. Furthermore, (Chełmoński 1966) observes that the administrative law manifests a trend to organize a control over administration in such a manner so that it could work both in the sake of the common interest and interests of private individuals. Also note that control functions include: an information function, function of correcting decisions, function of promoting model behavior standards, the function of increasing the guarantee of the rule of law and the function of raising the general work culture (Sylwestrzak 2004). Control functions have both a material and technical nature and are not made for the purpose of causing some specific legal consequences but for the purpose of causing or creating a state of facts (Szewczyk 1995).

The importance of the control in an organized activity is high and, in the case of administrative activities, takes particular importance. It is assumed that a broad range of controls existing in many areas are justified by operations of the administration. The largest complexity and complication of administrative actions is, the more expanded and varied verification and control measures should follow. Further to the above, the control sphere for the public administration continues to spread while undergoing a permanent transformation process (Wacinkiewicz 2007). Also note that the legal system of control is aligned to the core purpose of the institution which is assuring compliance.

4 EU Laws on the Public Procurement Control

The EU policy addressing public procurement is to assure transparency, competition and effectiveness of contract awards, while proper operation of the sphere affects the economic growth of its member states. The most important pieces of the EU legislation on public procurement include (Schabesta 2016):

- Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement (the classic directive)
- Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors (the sectoral directive)
- Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts as well as Directive 2007/66/EC of the European Parliament and Council of 11th December 2007 amending Directive 89/665/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.

Analysing provisions of the EU law, one may conclude clearly that, in a democratic state of law, it is not possible to have only a court control system for public procurement. It is in the public interest that, next to the court system, member states should have their public procurement market supervisory bodies (Horubski 2013).

In the above-mentioned directives, there are also some provisions related to the public procurement control. They apply not only to controlling the very public procurement procedures but also to the activity of subcontractors who must have full compliance, including environmental compliance. And so, e.g. according to the classic directive, legal instruments of the public procurement may consist in particular of personnel and organisational measures such as the severance of all links with persons or organisations involved in the misbehaviour, appropriate staff reorganisation measures, the implementation of reporting and control systems, the creation of an internal audit structure to monitor compliance and the adoption of internal liability and compensation rules.

In case of the public control as such, the EU legislator refers to the control by referring to monitoring the public procurement. Member States should remain free to decide how and by whom this monitoring should be carried out in practice; in so doing, they should also remain free to decide whether the monitoring should be based on a sample-based ex-post control or on a systematic, ex ante control of public procurement procedures covered by this Directive. It should be possible to bring potential problems to the attention of the proper bodies; this should not necessarily require that those having performed the monitoring have standing before courts and tribunals.

Provisions of art. 83 of the classic directive should be also analysed thoroughly. Therefore for the purpose of ensuring effectively a competent and effective delivery of the directive, member states ensure that at least the tasks defined in this article are

delivered by at least one body, entity or structure. They also notify the Commission on all bodies, entities or structures competent for delivering the tasks. Such legal solution resolving the issue of control and monitoring in the public procurement area may lead to preventing illicit actions by entities. Importantly, in the view of the objectives of a public procurement proceedings, ex ante and ad hoc controls are accessorial in nature. For this reason, the EU legislator decided about the need to introduce procedures for special controls of bodies in each member state (Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement).

5 Control of a Polish Body in the Public Procurement System

Polish regulations on controlling the public procurement could serve here as an example. It involves examining compliance of a public contract award proceedings with the provisions of the Public Procurement Law Act of 29.01.2004. It may be a subject of explanatory proceeded by explanatory proceedings in order to establish a potential breach of the provisions of the Act where such breach could affect the outcome of the proceedings. Control of a public procurement process is not administrative proceedings and does not end with an administrative decision (Gola 2013). Also in this case, activity of the President of the Public Procurement Office cannot be classified to administrative governance manifesting itself in an unilateral declaration of intent of the body, based on the provisions of administrative law and defining a legal position of a specific addressee (Judgement of the Regional Administrative Court in Warsaw of 28.02.2008 (V SA/Wa 2614/07)).

The President of the Public Procurement Office has the right to demand from the manager/director of the contracting party to hand over copies of any documents related to the public contract award proceedings in copies certified true by the same. Furthermore, he also has the authority to request written explanation in matters related to the subject of the control from the contracting party’s manager and employees involved in the contract awarding proceedings (Resolution of the National Chamber of Appeal dated 19.03.2010 (KIO/KD 18/10)).

For the purpose of clarifying the matter, he may also request opinions of experts with specialist knowledge, in particular in the area of the subject of the contract. Note that, in this case, requesting such opinion is aimed at determining the facts of the case, its assessment as well as other activities to be performed by the expert who has special knowledge in the field and who is entitled to a fee for his work to the extent as it is applicable to witnesses, court experts and parties in court proceedings (Granecki 2009). The President of the PPO is obligated to establish the facts of a case on the basis of documents collected in the explanatory or control proceedings. In case of a breach of these obligations, the controlled could raise it when supporting his objections addressed to the President of the PPO and, if they are

not taken into account, they shall be forwarded to the National Chamber of Appeal to issue its opinion thereon (Granecki 2009). After a control, report on the control must be drawn up to document all the activities taken during the control.

The control procedures vary in terms of a potential revision of the proceedings. However, the ex-ante control may lead to correction of any oversights in pending proceedings for awarding a public contract. On the other hand, the ad hoc control, performed within 4 years after closing the proceedings, is clearly repressive in nature. The ad hoc control may be initiated upon a justified presumption of a breach of the provisions of the Public Procurement law in the proceedings for awarding the public contract, which could have affected the outcome of the proceedings (Judgement of the Regional Administrative Court in Poznań of 07.02.2012 (ISA/Po 861/11)).

Important role is played by the ex-ante control of contracts or master/general contracts co-financed from the EU funds (Szostak 2011). According to the provisions of art. 169 of the Public Procurement Law, it is conducted before (ex ante) awarding a contract if the value of a contract or a master contract for construction works is equal or higher than PLN (polish zloty) equivalent of EUR 20,000,000 (two million) and for goods and services—when it is equal or higher than PLN equivalent of EUR 10,000,000 (ten million). The ex-ante control is initiated upon serving the President of the Public Procurement Office of a copy of documentation of the proceedings on awarding a contract for the purpose of controlling it (Judgement of the National Chamber of Appeal of 30.05.2012 (KIO 1000/12)). On request of the Managing Authority, the President of the Public Procurement Office may withdraw from conducting the ex-ante control if, according to the institution, the proceedings were compliant with the provisions of the same Act. Information on withdrawing from the control is notified promptly by the President to the contracting party and the applicant.

The control involves assessment of compliance of the procedure followed in the procurement proceedings after examining, scoring and selection of the most favorable bid with the public procurement law act and it is carried out on the basis of the contract documentation forwarded by the contracting party. The contracting party should provide the documentation of the proceedings only after the date for appealing. In case of any appeal from the decision on choosing the most favorable offer, the documentation should be forwarded after a decision is issued by the National Chamber of Appeal (Pieróg 2007). What is more, initiation of the ex-ante control postpones the final date of the bid validity until the control is completed.

6 Conclusion

The public procurement control function has a material impact on preventing pathologies. For this reason, it is also important to introduce respective procedures and legislation governing these issues at the EU level. Conducting a control and reporting on its outcomes may have a "domino effect" which potentially could work as a deterrent for an organization before it even begins considering taking some revision steps. Some institutions may assume that the control may result in a critical

assessment of their operation resulting in taking actions intended at removing the irregularities. The impact intensifies in potential subjects of the control, in particular once negative analysis of other institutions is disclosed (Sierpowska 2003).

Legal instruments of an ex ante control undoubtedly affect reduction of pathologies in the operation of the public administration bodies. They introduce a certain degree of stability for contractors and certainty as to actions taken by the contracting parties (Panasiuk 2005). However, even the best instruments introduced in the public procurement system will not be able to eliminate fully some negative phenomena unless an appropriate model of education and upbringing is introduced, preventing pathological links and connections between the public administration and the private business sector and would make the society more sensitive to the consequences of corruptive actions in the public procurement area (Panasiuk 2005).

Here it's worthwhile to quote Panasiuk (2005), who believed that through ethical behavior of those who operate in the public procurement system, we influence creation of an image of good law instead of taking some legislative measures consisting in creating newer and newer legal structures aimed at enforcement of ethical behavior of individuals. We cannot move away from the need to improve legal standards, even if in connection with ever-changing social and economic conditions of the environment in which participants of the public procurement process participate. However, the entire legislative process must be carefully prepared and thought-over, informed and set creation of a coherent public procurement system as its key objective (Panasiuk 2005).

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