



Chambers Global Practice Guides

Definitive global law guides offering
comparative analysis from top-ranked lawyers

Public Procurement & Government Contracts 2022

Poland: Law & Practice

Anna Specht-Schampera, Witold Sławiński,
Aleksandra Płudowska and Adriana Gostępska
SDZLEGAL SCHINDHELM

practiceguides.chambers.com

Law and Practice

Contributed by:

*Anna Specht-Schampera, Witold Sławiński,
Aleksandra Pludowska and Adriana Gostępska*
SDZLEGAL SCHINDHELM see p.18



CONTENTS

1. General	p.3	4. Review Procedures	p.12
1.1 Legislation Regulating the Procurement of Government Contracts	p.3	4.1 Responsibility for Review of the Awarding Authority's Decisions	p.12
1.2 Entities Subject to Procurement Regulation	p.3	4.2 Remedies Available for Breach of Procurement Legislation	p.12
1.3 Types of Contracts Subject to Procurement Regulation	p.4	4.3 Interim Measures	p.13
1.4 Openness of Regulated Contract Award Procedure	p.5	4.4 Challenging the Awarding Authority's Decisions	p.13
1.5 Key Obligations	p.5	4.5 Time Limits for Challenging Decisions	p.13
2. Contract Award Process	p.7	4.6 Length of Proceedings	p.14
2.1 Prior Advertisement of Regulated Contract Award Procedures	p.7	4.7 Annual Number of Procurement Claims	p.14
2.2 Preliminary Market Consultations by the Awarding Authority	p.7	4.8 Costs Involved in Challenging Decisions	p.15
2.3 Tender Procedure for the Award of a Contract	p.7	5. Miscellaneous	p.15
2.4 Choice/Conditions of a Tender Procedure	p.9	5.1 Modification of Contracts Post-award	p.15
2.5 Timing for Publication of Documents	p.9	5.2 Direct Contract Awards	p.17
2.6 Time Limits for Receipt of Expressions of Interest or Submission of Tenders	p.9	5.3 Recent Important Court Decisions	p.17
2.7 Eligibility for Participation in a Procurement Process	p.9	5.4 Legislative Amendments under Consideration	p.17
2.8 Restriction of Participation in a Procurement Process	p.11		
2.9 Evaluation Criteria	p.11		
3. General Transparency Obligations	p.11		
3.1 Obligation to Disclose Bidder/Tender Evaluation Methodology	p.11		
3.2 Obligation to Notify Interested Parties Who Have Not Been Selected	p.11		
3.3 Obligation to Notify Bidders of a Contract Award Decision	p.12		
3.4 Requirement for a "Standstill Period"	p.12		

1. GENERAL

1.1 Legislation Regulating the Procurement of Government Contracts

The new Act of 11 September 2019 Public Procurement Law (Journal of Laws 2019 number 2019, as amended (PPL)) came into force on 1 January 2021, repealing the Act of 29 January 2004 Public Procurement Law (Journal of Laws 2004 number 19 item 177 (PPL 2004)). Detailed rules during the transition period are regulated by the Act of 11 September 2019 Regulations introducing the Act – Public Procurement Law (Journal of Laws 2019 number 2020, as amended).

Key Rules Applicable during the Transitional Period

The provisions of the PPL 2004 shall apply to:

- public procurement procedures initiated and not completed before 1 January 2021;
- public procurement contracts and framework agreements concluded before 1 January 2021 or after 31 December 2020, as a result of contract award procedures initiated before 1 January 2021; and
- appeal proceedings and proceedings pending as a result of a complaint to a court that was initiated and not concluded before 1 January 2021, and to the jurisdiction of the courts over complaints filed before 1 January 2021.

The provisions of the PPL shall apply to:

- appeal proceedings and proceedings pending as a result of a complaint to the court initiated after 31 December 2020, concerning contract award procedures initiated before 1 January 2021; and
- subsequent contract award proceedings, appeal proceedings and proceedings pending as a result of a complaint to a court.

The remainder of the analysis herein is based on the provisions of the PPL currently in force.

Regulations Specific to COVID-19

Due to the circumstances caused by the COVID-19 pandemic, the Act of 2 March 2020 on Special Solutions to Prevent, Counteract and Combat COVID-19, Other Infectious Diseases and Crisis Situations Caused by Them (Journal of Laws 2020 number 374, as amended (Anti-Crisis Shield)) was introduced, which contains regulations concerning amendments to the public procurement agreements and amendments to agreements with subcontractors (see **5.1 Modification of Contracts Post-award**).

Jurisprudence

A distinctive feature of Polish public procurement law is the fact that it is shaped to a large extent by the jurisprudence of the National Appeal Chamber (*Krajowa Izba Odwoławcza* or NAC) and of the courts, including the CJEU, handed down when the PPL 2004 was in force. Therefore, it is crucial to be familiar with established practices and detailed consequences, especially in the context of elements such as self-cleaning, demonstration of experience, misleading, in-house contracts and breach of competition law.

1.2 Entities Subject to Procurement Regulation

The provisions of the PPL apply to the awarding authorities, which are:

- entities of the public finance sector (public authorities, including government administration bodies, state control and law protection bodies as well as courts and tribunals, local government units and their unions, budgetary units, executive agencies and other state or local government legal persons established on the basis of separate acts in order to perform public tasks);

- state organisational units without legal personality other than those specified above;
- legal persons other than those referred to above that are established for the specific purpose of meeting the needs of the general interest, that do not have an industrial or commercial character, if the entities referred to above do the following, either directly or indirectly through another entity:
 - (a) finance them by more than 50%; or
 - (b) hold more than half of the shares; or
 - (c) exercise supervision over the management body; or
 - (d) have the right to appoint more than half of the members of the supervisory or management body; or
- associations of the entities referred to above.

The PPL applies to the widest possible range of entities and subject matters, but it also provides for numerous exemptions, including for the following:

- legal, research and development services;
- the acquisition of ownership or other rights to existing buildings or real estate;
- financial services relating to the issue, sale, purchase or disposal of securities or other financial instruments, loans or credits; and passenger transport by rail or metro.

These provisions are the key to determining whether it is obligatory to apply the PPL.

1.3 Types of Contracts Subject to Procurement Regulation

The PPL applies to:

- classic procurements and the organisation of competitions, the value of which equals or exceeds PLN130,000, by awarding authorities;
- sector procurements and organising competitions, the value of which equals or exceeds the thresholds of the European Union, by sector awarding authorities;
- procurements in the fields of defence and security, whose value is equal to or exceeds the thresholds of the European Union, by awarding authorities; and
- classic contracts and the organisation of competitions, the value of which equals or exceeds the EU thresholds, by subsidised awarding authorities (ie, more than 50% of the value of the contract awarded by this entity is financed from public resources), and the subject matter of the contract is works (eg, the construction of hospitals, sports facilities or school buildings, or services related to such works).

EU Thresholds

The following EU thresholds are applied in accordance with EU law, according to the fixed euro to Polish zloty exchange rate of 4.4536 in 2022:

- EUR5,382,000 for public works contracts;
- EUR140,000 for public supply and service contracts awarded by central government authorities and design contests organised by such authorities; for public supply contracts awarded by awarding authorities operating in the field of defence, this threshold applies only to contracts for products covered by Annex III to Directive 2014/24/EU;
- EUR215,000 for public supply and service contracts awarded by sub-central awarding authorities and design contests organised by such authorities – this threshold shall also apply to public supply contracts awarded by central government authorities operating in the field of defence where such contracts involve products not covered by Annex III to Directive 2014/24/EU; and
- EUR750,000 for public contracts for social and other specific services listed in Annex XIV to Directive 2014/24/EU.

Only certain provisions of the PPL apply to the preparation and conduct by awarding authorities of a classic procurement procedure with a value below the EU thresholds.

1.4 Openness of Regulated Contract Award Procedure

There are no restrictions on the origin of a contractor seeking to conclude a public procurement contract in Poland. However, attention should be paid to proceedings where, in exceptional circumstances, the awarding authority has the right to invite one or more selected entities to conclude a contract or to negotiate. There are no exclusions with respect to contractors from the EU.

Poland is a party to the Government Procurement Agreement (GPA) concluded in Marrakesh in 1994 (Official Journal of the EU L 1994 No 336). These regulations are modelled on the EU regulations and the North American Free Trade Agreement (NAFTA). They cover public procurement for the supply of goods, services and works, and also cover awarding authorities other than governments, including certain entities of central government and regional and local administrations. Article XX of the GPA directs the parties to the agreement to put in place non-discriminatory, timely, transparent and effective procedures to allow contractors to challenge violations of the GPA in the course of awarding a contract in which they had or have an interest.

The revised Government Procurement Agreement was signed in 2012 and came into force on 6 April 2014. It aims to ensure an even higher degree of transparency and equal treatment in international public procurement, including via electronic means – eg, a free database containing central government procurement notices.

Therefore, any entities that are party to the GPA have an open route to apply for Polish public

procurement. There has recently been increased interest in the Polish market from non-EU contractors.

1.5 Key Obligations

Key Responsibilities of Awarding Authorities

Polish law, implementing EU obligations, introduced specific obligations for awarding authorities, giving contractors the right to appeal and question any action of the awarding authority, which frequently allows irregularities to be eliminated and determines the outcome of the procedure.

The most important rules for the awarding authorities are as follows.

Maintaining fair competition

A comprehensive competition law applies throughout the EU, most notably banning the limitation of competition in the procedure by setting excessive conditions or subject-matter requirements, which would narrow the circle of contractors beyond the need to ensure that the contract will be performed by a reliable contractor capable of performing it properly, in a manner that meets the needs of the awarding authority and the law.

Equal treatment of contractors

Comparable situations should be treated the same, and different situations should not be treated in the same way, with an obligation to provide contractors with the same opportunities both at the stage of formulating applications or tenders, and during their examination and evaluation, in accordance with CJEU case law, with particular regard to the equal treatment of foreign contractors.

Proportionality

The measures adopted should not go beyond what is necessary to achieve the objective pursued, so the description of the subject matter

of the contract, the conditions for participation in the procedure or the criteria for evaluating tenders must be related to the subject matter of the contract and proportionate to its value and objectives without imposing excessive requirements; for example, additional, unjustified requirements cannot be imposed merely to limit access to the contract to foreign entities.

Transparency

This obligation guarantees the effectiveness of all other obligations by enabling contractors to acquaint themselves with the actions of the awarding authority, including all terms and conditions of the procurement procedure described in the contract notice or the contract documents in a clear, precise and unequivocal manner, as well as with all subsequent actions of the awarding authority, so that a contractor is able to review them by way of appeal.

Impartiality and objectivity

All activities related to the preparation and conduct of contract award procedures shall be performed by persons ensuring impartiality and objectivity. The obligation imposed on the contracting authority by national legislation also finds its source in EU legislation. According to Article 24 of Directive 2014/24/EU, member states shall ensure that awarding authorities take appropriate measures to effectively prevent, identify and eliminate conflicts of interest when they arise in connection with the conduct of procurement procedures, to prevent possible distortion of competition and to ensure equal treatment of all contractors.

Written form and conducting the proceedings in Polish

Contract award procedures shall be conducted in writing, subject to the exceptions specified in the PPL. Contract award procedures shall be conducted in Polish.

Key Obligations for Contractors

The obligations imposed by the PPL on contractors are not overly burdensome compared to other EU countries, but special attention should be paid to the following:

- detailed verification of the conditions of the procedure before submitting an offer – it often turns out that misunderstanding of the wording leads to defeat for the contractor, and in the decisive moment the legal interpretation of statements of intent and provisions of laws based on case law prevails;
- preparation of an offer should be preceded by the collection of documents, especially by foreign contractors. The PPL requires certain documents to be drawn up before the offer is submitted – eg, certificates from the criminal register and courts or administrative authorities, a consortium agreement or an agreement on making one's resources available for the purposes of the contract;
- the submission of the tender itself is currently possible only in electronic form, with different authorities using different platforms that require a qualified electronic signature complying with Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC; and
- the run for the contract is likely to be preceded by a competitive dispute, so an analysis of the competitors' bids will be necessary, but it is crucial to start verifying the experience and reliability of the other contractors even before the bids are submitted.

Merely complying with the formal requirements is not enough to win a contract: what is needed is knowledge of the use of legal remedies and a deep understanding not only of the law, but also of the practice of such proceedings.

2. CONTRACT AWARD PROCESS

2.1 Prior Advertisement of Regulated Contract Award Procedures

Generally, all award procedures at a value above the relevant EU threshold must be advertised by publishing a contract notice within the Official Journal of the European Union and in the EU public procurement database Tenders Electronic Daily. Awarding authorities must ensure that the procurement documents can be accessed directly, without restrictions and in full by electronic means and free of charge.

In proceedings below the EU thresholds, publication takes place in the Public Procurement Bulletin (*Biuletyn Zamówień Publicznych*).

The above-mentioned sources contain announcements on:

- the contract;
- the intention to conclude a contract;
- the result of the procedure (the award); and
- the execution or modification of the contract.

The websites allow for saved searches and email notifications of contracts that are relevant to specific industries, products, etc. It is also worth using publicly available schedules of public procurement procedures published by individual awarding authorities, which will allow for the planning of bid submissions throughout the year.

2.2 Preliminary Market Consultations by the Awarding Authority

Before launching the procurement procedure, the awarding authority may conduct preliminary market consultations to prepare the procedure and inform contractors about its plans and requirements for the contract. The awarding authority shall publish information on its website about its intention to conduct preliminary mar-

ket consultations, and about the subject thereof. The awarding authority may refer to experts, public authorities or contractors, whose advice may be used in the planning, preparing or conducting of the contract award procedure, provided that such advice does not have the effect of distorting competition and does not result in a violation of the principles of transparency and the equal treatment of contractors. The awarding authority shall publish information about completed preliminary market consultations in the contract notice.

The awarding authority is obliged to:

- analyse the needs and requirements before commencing a classic procedure with a value equal to or exceeding the EU thresholds;
- ensure the best quality of supplies, services and works, justified by the nature of the contract, within the limits of resources that the awarding authority may allocate to its execution; and
- achieve the best results of the contract, including social, environmental and economic effects, provided that any of these effects is possible to achieve in a given contract when compared to the incurred expenditures.

Therefore, each procedure will be preceded by market research and the search for alternative means of satisfying the awarding authority's needs. However, in practice, the participation of contractors is often only possible after the publication of a contract notice (eg, in the form of consultations), because officials are afraid of even the suspicion of corruption.

2.3 Tender Procedure for the Award of a Contract

Procedures Above the EU Thresholds

Open tenders (Przetarg nieograniczony)

The most common contract award procedure above the EU thresholds is the open tender,

where tenders may be submitted by all interested contractors in response to a contract notice.

Restricted tender (Przetarg ograniczony)

A contract award procedure where requests to participate may be submitted by all interested contractors in response to a contract notice, and tenders may only be submitted by contractors invited to submit a tender.

Negotiations with publication (Negocjacje z ogłoszeniem)

A contract award procedure in which requests to participate may be submitted by all interested contractors, in response to a contract notice. The awarding authority shall invite those contractors admitted to participate in the procedure to submit initial tenders, and shall conduct negotiations with them in order to improve the content of initial tenders. Tenders are submitted during the negotiation stage, after the completion of which the authority shall invite contractors to submit final tenders.

The awarding authority may award a contract on the basis of preliminary tenders without negotiations, provided that it indicates in the contract notice that it reserves such possibility.

Competitive dialogue (Dialog konkurencyjny)

A contract award procedure in which all interested contractors may submit requests to participate in the procedure in response to a contract notice. The awarding authority conducts a dialogue with the contractors invited to participate therein regarding the solutions proposed by them, after completion of which it invites them to submit tenders.

Innovation partnership (Partnerstwo innowacyjne)

The awarding authority may award a contract under the procedure of innovation partnership if

the demand is for an innovative product, service or works that is not available on the market.

Negotiations without an announcement (Negocjacje bez ogłoszenia)

A contract award procedure where the awarding authority negotiates the terms of a public procurement contract with selected contractors and then invites them to submit tenders is possible in exceptional situations – eg, when no tender was submitted in the previous procedure on the same subject.

Single-source procurement (Zamówienie z wolnej ręki)

A contract award procedure where the awarding authority awards a contract after negotiations with only one contractor is possible in exceptional situations – eg, when supplies, services or works can be provided by only one contractor for objective technical reasons.

Procedures Below the EU Thresholds

The PPL provides for four modes of public procurement procedure below the EU thresholds:

- basic procedure (*Tryb podstawowy*) – without negotiations, with optional negotiations or with mandatory negotiations;
- innovation partnership (*Partnerstwo innowacyjne*);
- negotiations without an announcement (*Negocjacje bez ogłoszenia*); and
- single-source procurement (*Zamówienie z wolnej ręki*).

It is possible to challenge the very initiation of the procedure in a given mode, especially if it is done in a manner that limits competition and makes it impossible for a contractor to submit a tender. The NAC then verifies whether the statutory and factual prerequisites to apply a given mode were properly demonstrated, and may

order the procedure to be cancelled and conducted in a competitive mode.

2.4 Choice/Conditions of a Tender Procedure

The awarding authority may award a contract in open and closed procedures.

In accordance with the rules mentioned in **2.3 Tender Procedure for the Award of a Contract**, the use of a non-competitive procedure is connected with the obligation to publish an announcement, thanks to which a contractor who was interested in the contract, but did not get a chance to submit a tender, can appeal to the NAC and question the initiation of proceedings under a given procedure.

2.5 Timing for Publication of Documents

In competitive procedures, all documents are publicly available at the same time as the announcement itself. It is necessary to verify the completeness of the documents and to ask the awarding authority for other necessary documents or clarifications. Publication deadlines are standard in accordance with EU law.

What is important in this respect is that the contractor has the right to legal protection measures within five days for proceedings below the EU thresholds and within ten days for proceedings above the EU thresholds. An appeal should be lodged during this timeframe, which may consequently lead to the cancellation of the proceedings or changes being imposed in a NAC ruling in favour of the contractor.

2.6 Time Limits for Receipt of Expressions of Interest or Submission of Tenders

The time limit for the receipt of requests to participate or initial tenders may not be shorter than 30 days from the date on which the contract

notice is transmitted to the Publications Office of the EU. Please note that this 30-day period is not counted from the publication of the notice, which normally takes place within a maximum of three days of transmission.

2.7 Eligibility for Participation in a Procurement Process

A contractor may be excluded by the awarding authority at any stage of the procurement procedure, provided that this is for a mandatory reason or for an optional reason that was indicated by the awarding authority in the contract notice.

Obligatory Grounds

A contractor shall be excluded from the contract award procedure if:

- they are a natural person who has been legally sentenced for an offence specified in the PPL or for a respective prohibited act specified in the provisions of foreign law;
- a member of its managing or supervisory body, a partner in a general partnership or similar person has been validly convicted of such an offence;
- a final court verdict or a final administrative decision has been issued against them concerning the payment of taxes, fees or contributions for social or health insurance;
- a ban on participation in public procurement proceedings has been validly declared against them;
- the awarding authority can establish, based on reliable grounds, that a contractor entered into an agreement with another contractor aimed at distorting competition, unless they prove that they prepared those tenders independently of each other;
- there has been a distortion of competition resulting from the prior involvement of that contractor or of an entity that is a member of the same capital group as a contractor, unless the distortion of competition can be

eliminated other than by excluding a contractor from participation in the procurement procedure; or

- a contractor prevents or hinders the establishment of the criminal origin of the money or hides its source due to the impossibility of determining the actual beneficiary, as defined by the provisions on counteracting money laundering and terrorist financing.

Optional Grounds

An awarding authority may exclude a contractor from the procurement procedure if:

- they have violated obligations relating to the payment of taxes, fees or contributions for social or health insurance, unless they have paid them or concluded a binding agreement on the repayment;
- they have breached obligations relating to environmental protection, social or labour law;
- a member of its management or supervisory body, a partner in a general partnership or a proxy has been validly convicted of an offence against employee rights or against the environment;
- liquidation has been opened against them, they have been declared bankrupt, their assets are administered by a liquidator or a court, they have entered into an arrangement with creditors, their business activities are suspended or they are in any other similar situation arising from a procedure provided for in the legislation of the place where that procedure has been initiated;
- they have committed grave professional misconduct calling their honesty into question;
- there is a conflict of interests;
- they are responsible for the termination or withdrawal from a previous procurement contract, involving compensation, substitute performance or exercise of rights under warranty for defects;

- they misled the awarding authority when presenting information in the procurement procedure; or
- they unlawfully influenced or attempted to influence the actions of the awarding authority, or attempted to acquire or obtained confidential information that could give them an advantage in the procurement procedure.

Self-cleaning

A contractor shall not be subject to exclusion in the circumstances set out above if they prove to the awarding authority that they have jointly fulfilled the following conditions:

- they have made good or undertaken to make good the damage caused by the offence, misconduct or irregular conduct, including by way of pecuniary compensation;
- they have fully explained the facts and circumstances of the offence, the misconduct or the wrongdoing and the damage caused by it, actively co-operating with the competent authorities, including law enforcement authorities, or the awarding authority, as appropriate; and/or
- they have taken specific technical, organisational and human resources measures that are appropriate to prevent further offences, misconduct or improper conduct, including:
 - (a) severing all links with the persons or entities responsible for the contractor's irregular conduct;
 - (b) reorganising their staff;
 - (c) implementing a reporting and control system;
 - (d) setting up internal audit structures to monitor compliance with laws, internal regulations or standards; and/or
 - (e) introducing internal regulations on liability and compensation for non-compliance with laws, internal regulations or standards.

The awarding authority shall assess whether the measures are sufficient to demonstrate the contractor's reliability, taking into account the importance and specific circumstances of the act. If the measures taken are not sufficient to demonstrate its reliability, the awarding authority shall exclude that contractor.

2.8 Restriction of Participation in a Procurement Process

The access of contractors to a given public procurement procedure can only be limited by choosing a non-competitive procedure, as described in **2.3 Tender Procedure for the Award of a Contract**.

In some cases, only one contractor may participate in the procedure.

2.9 Evaluation Criteria

The awarding authority shall choose the most advantageous tender on the basis of the tender evaluation criteria laid down in the tender documents. The awarding authority shall describe the tender evaluation criteria in a clear and comprehensible manner, which does not give the awarding authority unlimited freedom to choose the most advantageous tender and allows the level of performance offered to be verified and compared on the basis of the information provided in the tenders.

The most advantageous tender may be selected on the basis of quality criteria and price or cost, and in certain cases solely on the basis of price or cost.

Qualitative criteria may relate to the following in particular:

- quality, including technical performance, aesthetics and functional characteristics such as accessibility for disabled people or consideration of users' needs;

- social aspects, including the vocational and social integration of socially marginalised people;
- environmental aspects, including the energy efficiency of the subject matter of the contract;
- innovative aspects;
- the organisation, professional qualifications and experience of the persons appointed to carry out the contract, where these can have a significant influence on the quality of performance of the contract; and/or
- after-sales service, technical assistance, delivery conditions such as the date, method or time of delivery, and the delivery period.

3. GENERAL TRANSPARENCY OBLIGATIONS

3.1 Obligation to Disclose Bidder/ Tender Evaluation Methodology

The tender evaluation criteria detailed in **2.9 Evaluation Criteria** must be described in the contract notice or in the documents published together with the notice, in an open manner and equally accessible to all contractors. As elements of activity in the procedure, the tender evaluation criteria and the evaluation methodology are subject to appeal to the NAC by interested contractors.

3.2 Obligation to Notify Interested Parties Who Have Not Been Selected

The awarding authority shall immediately inform all contractors who submitted requests to participate or initial tenders of the results of such applications, providing the factual and legal reasons for the decisions.

Case law has developed standards under which the justification must include a detailed reasoning that allows a contractor to understand exact-

ly why it was not qualified for the next stage of the procedure, thereby giving it the possibility to lodge an appeal to the NAC, and to have incorrect actions repeated correctly by the awarding authority if successful.

3.3 Obligation to Notify Bidders of a Contract Award Decision

Immediately after selecting the most advantageous tender, the awarding authority shall simultaneously inform all contractors who submitted tenders of the following:

- the selection of the most advantageous tender, indicating the contractor whose tender was selected and the contractors who submitted tenders, as well as the scores awarded to tenders for each tender evaluation criterion and the total score; or
- the contractors whose tenders have been rejected, stating the factual and legal reasons.

The awarding authority shall make this information available immediately on the website of the procedure. It may withhold such information in exceptional cases where the disclosure thereof would be contrary to an important public interest.

3.4 Requirement for a “Standstill Period”

The standstill period complies with EU law. The awarding authority shall conclude a public procurement contract within no less than ten days from the date of sending the notice of selection of the most advantageous tender if the notice was sent by means of electronic communication, or within 15 days if it was sent by other means.

In the case of an appeal, the awarding authority may not conclude an agreement until a judgment or a decision closing the appeal proceedings is announced by the NAC. However, the awarding

authority may apply to the NAC for exceptional consent to conclude a contract before the end of appeal proceedings, in strictly specified situations.

The standstill period does not extend to court proceedings in the event of a complaint against a judgment of the NAC. However, in such cases a request may be filed with the court to grant security in the form of a prohibition to conclude a contract.

4. REVIEW PROCEDURES

4.1 Responsibility for Review of the Awarding Authority’s Decisions

The NAC is competent to hear appeals filed in public procurement proceedings in the first instance. It is a specialised body that meets the requirements of a court within the meaning of EU law but has been incorporated into the administrative structure of the Public Procurement Office.

The parties and participants in the appeal proceedings may appeal against the decision to the court. Such complaints are lodged with the District Court in Warsaw – the Public Procurement Court, which was established in 2021; before then, cases were resolved in local district courts.

4.2 Remedies Available for Breach of Procurement Legislation

In the first instance, an appeal can be lodged against:

- any action taken by the awarding authority in the course of the procedure for the award of a contract that is contrary to the provisions of the PPL, including the draft contractual provisions;

- any failure by the awarding authority to perform an act it was obliged to perform pursuant to the PPL; or
- any failure to carry out a procurement procedure or to organise a competition pursuant to the PPL, in spite of the fact that the awarding authority was obliged to do so.

An appeal must contain, inter alia, a concise presentation of charges, a demand as to the manner of resolving the appeal, an indication of the factual and legal circumstances justifying the appeal and evidence in support of the circumstances cited. Any contractor may join the appeal proceedings, indicating the party it attaches to and its interest in obtaining a ruling in favour of such party. The awarding entity may accept the appeal in part or in its entirety – unless a contractor acceding to the proceedings files an objection. The NAC cannot rule on charges that were not included in the appeal.

In the second instance, the case shall be heard by the Public Procurement Court. The complaint should meet the requirements prescribed for a pleading and should contain a designation of the appealed decision, indicating whether it is appealed against in whole or in part, stating the pleas in law, a brief justification thereof and an indication of evidence, as well as a motion for the reversal or modification of the decision in whole or in part, indicating the scope of the requested modification. In proceedings instituted as a result of an appeal, the form of order sought by the appellant and new forms of order sought may not be extended. The court may not rule on grounds that were not the subject of the appeal.

A court judgment or a decision ending the proceedings in a case may be appealed in cassation to the Supreme Court. A cassation may be filed by a party and by the President of the Public Procurement Office in exceptional cases speci-

fied in the Act of 17 November 1964 – Code of Civil Procedure.

4.3 Interim Measures

In the case of an appeal, the awarding authority cannot conclude a contract until the NAC announces a judgment or a decision ending the appeal proceedings. The awarding authority may submit a request to the NAC to waive the prohibition to conclude a contract, exclusively on the grounds specified in the PPL. However, apart from concluding the contract, the Awarding Authority has the right to perform any other actions in the public procurement procedure, which often affects the appeal proceedings themselves.

The standstill period does not extend to court proceedings in the event of a complaint against a verdict of the NAC. In such a case, however, a request may be filed with the court to provide security in the form of a ban on entering into the agreement.

4.4 Challenging the Awarding Authority's Decisions

The legal remedies are available to the contractor and other entities if they have or have had an interest in obtaining a contract or an award in a competition, and have suffered or may suffer a loss as a result of an infringement of the PPL by the awarding authority.

The concept of “interest” is crucial and is understood as broadly as possible in order to ensure that interested parties can verify the actions taken by the awarding authority and eliminate possible violations of the PPL.

4.5 Time Limits for Challenging Decisions

In contracts with values exceeding the EU thresholds, appeals shall be lodged within ten days of the date of the communication of information

on the awarding authority's actions constituting grounds for lodging an appeal if such information was transmitted by means of electronic communication, or within 15 days if the information was transmitted in a different manner.

For contracts where the value is lower than the EU thresholds, an appeal shall be lodged within five days of the date of the communication of information on the awarding authority's actions constituting grounds for lodging an appeal if such information was transmitted by means of electronic communication, or within ten days if the information was transmitted in a different manner.

If the deadline for filing an appeal falls on a Saturday or a statutory holiday, the deadline shall expire on the day following the holiday.

The complaint to the court shall be lodged within 14 days of the day of delivery of the NAC's verdict.

4.6 Length of Proceedings

Pursuant to the PPL, the NAC examines the appeal within 15 days from the day of its delivery, and the hearing is set within that period. In complicated cases, it is sometimes necessary to set further hearings – eg, in connection with obtaining an expert opinion, for example. The NAC announces the ruling after the hearing is closed; in complicated cases, it may postpone the announcement of the ruling for no longer than five days. Although these are only instructional deadlines, appeals are usually heard within those deadlines.

It is worth noting that, due to the COVID-19 pandemic, the hearing of cases by the NAC was suspended for a period of time in 2020, but all backlogs have now been caught up and there are currently no delays.

In summary, the typical duration of appeal proceedings from the filing of the appeal to the pronouncement of the judgment usually does not exceed one month.

According to the PPL, the court shall hear the case promptly, but no later than within one month from the date of receipt of the complaint in court. In practice, due to the creation of a single court for all complaint proceedings, a time limit of at least four to six months should be expected.

4.7 Annual Number of Procurement Claims

In 2020, 3,545 appeals were submitted to the President of the NAC, and the NAC heard 3,415 appeals (including 150 appeals that were filed in 2019). Of the appeals lodged in 2020, 266 appeals were forwarded for consideration in 2021.

2020 saw a marked increase in the number of appeals filed electronically, to 2,244 (including 2,172 via the Electronic Platform of Public Administration Services, or ePUAP), accounting for 63.3% of all appeals, compared to 46% in 2019. There were 1,301 (36.7%) appeals filed in paper form.

The trend of appeals being filed in electronic form continues to increase, as follows:

- 4.5% in 2010;
- 11% in 2011;
- 15% in 2012;
- 16% in 2013;
- 18% in 2014;
- 9% in 2015;
- 19% in 2016;
- 22% in 2017; and
- 28% in 2018.

The largest number of appeals were filed in public procurement procedures whose value exceeds the EU thresholds, totalling 2,499, or

71% of all appeals filed in 2020 (down from 74% in 2019).

The types of procurement in 2020 can be broken down as follows:

- 40% were for services (41% in 2019);
- 32% were for supplies (39% in 2019); and
- 28% were for works (20% in 2019).

Nine cases did not specify the type of contract.

The NAC heard 3,222 appeals in 2020 (not including returned appeals), with the following results:

- 891 appeals were dismissed (28%);
- 648 appeals were allowed (20%);
- 904 proceedings were discontinued due to withdrawal of the appeal (28%);
- 700 proceedings were discontinued as a result of the contracting authority accepting the appeal in its entirety (22%); and
- 79 appeals were rejected (2%).

In 2020, 122 complaints were lodged against NAC judgments.

4.8 Costs Involved in Challenging Decisions

The amount of the appeal fee varies, depending on the value and type of the contract. The funds must be in the account of the Public Procurement Office no later than the day on which the deadline for filing an appeal expires – failure to do so cannot be remedied at a later date.

If a complaint is lodged to the court, the court fee amounts to three times the appeal fee.

The costs of the proceedings shall be borne by the losing party. In addition to the above, such costs may include the fees for legal representa-

tion (PLN3600 in the first instance), the costs of an expert opinion, etc.

Public Supply or Service Contract

The amount of the appeal fee in a procedure for the award of a public supply or service contract or in a competition depends on whether the value is lower than the EU threshold of PLN7,500, or exceeds the upper EU threshold amount of PLN15,000.

Public Works Contract

The amount of the entry fee for an appeal filed in a procedure for the award of a public works contract depends on whether the value is lower than the EU threshold of PLN10,000, or exceeds the upper EU threshold amount of PLN20,000.

5. MISCELLANEOUS

5.1 Modification of Contracts Post-award

A contract may be amended without a new procurement procedure only in the following cases:

- if such has been provided for in the contract notice or the contract documents, in the form of clear, precise and unambiguous contractual provisions that may include provisions concerning the rules for introducing changes in the amount of the price, if all the following conditions are met:
 - (a) the type and scope of the changes are specified;
 - (b) the conditions for introducing the changes are specified; and
 - (c) such changes would not modify the general nature of the contract;
- when a new contractor is to replace the incumbent contractor:
 - (a) if such a possibility has been provided for in the contractual provisions; or
 - (b) as a result of, inter alia, a takeover,

merger, bankruptcy of the current contractor, provided that the new contractor meets the conditions for participation in the procedure, there are no grounds for exclusion against it and it does not involve other significant amendments to the agreement; and/or

- if it concerns the execution of additional supplies, services or works that were not included in the basic contract, provided that they have become necessary and that all of the following conditions have been met:
 - (a) a change of contractor cannot be made for economic or technical reasons;
 - (b) a change of contractor would cause considerable inconvenience or a significant increase in costs for the contracting authority;
 - (c) the price increase caused by each subsequent change does not exceed 50% of the value of the original contract; and
 - (d) if the need to amend the contract results from circumstances that could not be foreseen by the awarding authority when acting with due diligence, provided that the amendment does not alter the general nature of the contract and that the increase in price caused by each subsequent amendment does not exceed 50% of the value of the original contract.

According to regulations issued in connection with the COVID-19 pandemic (see **1.1 Legislation Regulating the Procurement of Government Contracts** regarding the Anti-Crisis Shield), each party to a public procurement contract is required to inform the other party without any delay of the impact, if any, that COVID-19 might have on the proper performance of that contract.

This impact must be confirmed by appropriate documents or statements. By way of an example

(the catalogue is open), the draft act lists such documents as those relating to:

- absent employees or other associates who are or could be involved in the execution of the contract;
- orders issued by the *voivodeships* (the administrative divisions of Poland) or decisions issued by the Prime Minister related to the countermeasures against COVID-19;
- the suspension of the supply of products, product components or materials, as well as difficulties in accessing equipment or in providing transport services; and
- further circumstances that prevent or significantly limit the possibility of performing the contract.

These circumstances may also apply to a subcontractor or a second-tier subcontractor.

The Anti-Crisis Shield 2.0 provides that, for contractors registered outside the territory of Poland or conducting activities related to the performance of the contract outside the territory of Poland, instead of the above-mentioned documents, the documents issued by relevant institutions in these countries or the statements of these contractors should be submitted.

If the awarding authority decides that the circumstances surrounding the occurrence of COVID-19 may affect or do in fact affect the proper performance of the contract, then, in consultation with the contractor, it may amend the contract in the following manner:

- by changing the delivery deadline or suspending the performance of the contract or parts thereof;
- by changing the way in which supplies, services or works are performed; or
- by changing the scope of the contractor's performance, including a corresponding

change in the contractor's remuneration or changing the way the contractor's remuneration is settled.

If the main contract is amended, the contractor and the subcontractor have to agree on the appropriate amendments to the subcontract. The terms of the subcontract shall not be less favourable than those of the main contract. The same applies to the contract with the subsequent subcontractor.

Moreover, if the provisions of the contract contain more favourable conditions for the contractor concerning the amendments to the contract, the provisions of the contract shall apply and not the COVID-19 Act. The circumstances surrounding the occurrence of COVID-19 do not constitute a valid reason for withdrawal from the contract.

The above-mentioned regulations relating to the possibility of making changes to the agreement apply to those agreements on public procurement to which the PPL 2004 does not apply.

5.2 Direct Contract Awards

It is possible for a contract to be awarded directly in specific circumstances that merit the application of any of the non-competitive modes, such as single-source procurement as discussed in **2.3 Tender Procedure for the Award of a Contract**. These regulations are similar to those in other EU countries; however, in each case it is possible to verify the actions of the awarding authority and to appeal to the NAC.

5.3 Recent Important Court Decisions

In Resolution III CZP 16/20 of 25 February 2021, the Supreme Court held that contractors who have not been awarded a contract may claim damages without a prior finding of a breach of the PPL.

There is no detailed regulation of damages payable by the awarding authority in Polish law,

although appeal directives 89/665/EEC and 92/13/EEC introduce the obligation to adopt appropriate measures to award damages to contractors who have suffered as a result of an infringement. This case opens new possibilities in that field.

In the resolution of three judges of 30 June 2020 (III CZP 67/19), the Supreme Court determined that, in light of the provisions of the Civil Code, stipulating a contractual penalty for non-payment or late payment of remuneration to subcontractors is permissible.

5.4 Legislative Amendments under Consideration

The amendment to the regulations that came into force in 2021 is comprehensive and far-reaching, so further major changes should not be expected, although some elements requiring improvement have already been identified. For example, the Act of 14 October 2021 on amending the Act – Criminal Code and some other acts was announced in the Journal of Laws of the Republic of Poland under item 2054.

Among other matters, the act introduces an amendment to the PPL Act, and amendments to the Public Finance Act of 27 August 2009 concerning the introduction of a register of agreements concluded by entities of the public finance sector, including agreements on public procurement.

This register, as a teleinformatic system, will be kept by the Minister of Finance and is to contain information on agreements concluded by units of the public finance sector, including agreements in the field of public procurement, which can be made available under the Act of 6 September 2001 on access to public information.

The amendments provided for in the Public Finance Act will come into force on 1 July 2022.

SDZLEGAL SCHINDHELM was founded in 2002. The main seat of the firm is in Wrocław, with a branch office in Warsaw. The team consists of 39 lawyers, including legal advisers, attorneys, tax advisers and restructuring advisers. The firm is a member of SCHINDHELM, the international alliance of commercial law firms that consists of lawyers from 14 countries with offices in 29 locations. It is also a member of

the International Advisory Group, a network of law and tax offices that is present in 74 countries, giving clients access to more than 2,300 lawyers. SDZLEGAL's membership in IAG gives clients the possibility to access new markets knowing that they will be provided with high-quality legal services in Europe, North and South America, Asia and the Pacific.

AUTHORS



Anna Specht-Schampera has been a partner at SDZLEGAL SCHINDHELM since 2003. She is the head of the firm's department for public procurement law and waste

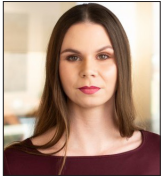
management law, and works in the Warsaw office. She studied law at the University of Wrocław, and has been registered as an attorney-at-law with the Walbrzych Bar Association since 2001. Anna is a founding member of the Public Procurement Law Association and a member of its management board. She is also a member of the board of the Polish Association of Consultants in Public Procurement and a legal consultant of the Board of Regional Installations of Municipal Waste Treatment.



Witold Sławiński graduated from the Faculty of Law and Administration at the Maria Curie-Skłodowska University in Lublin, and earned an LLM in international and comparative

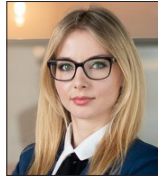
law from Chicago-Kent College of Law, Illinois Institute of Technology. He is a partner at SDZLEGAL and an attorney-at-law at the District Bar Council in Warsaw, specialising in construction law, public procurement law and litigation, and is also an active member of the Public Procurement Law Association. Witold represents clients in court proceedings and proceedings before the National Appeals Chamber. He has expertise in providing legal advice on the implementation of major infrastructure projects involving public contracts for the construction of road infrastructure, power plants and stadiums. Witold also advises construction and engineering companies in infrastructure projects implemented under FIDIC contract conditions. He conducts seminars, trainings and workshops in the fields of construction law and public procurement law.

Contributed by: Anna Specht-Schampera, Witold Sławiński, Aleksandra Płudowska and Adriana Gostępska, SDZLEGAL SCHINDHELM



Aleksandra Płudowska joined SDZLEGAL SCHINDHELM in January 2020, having graduated in law from the Faculty of Law, Administration and Economics of the University of Wrocław,

and from the prestigious French university Sciences Po Strasbourg, where she studied European Politics and Polish-French Co-operation. She completed these studies with an internship at the Polish Consulate General in Montreal. After returning to Poland, she started her pupillage at the Wrocław Bar Association, and also gained professional experience in a renowned law firm in Wrocław. Aleksandra has been registered as an attorney-at-law at the Wrocław Bar Association since 2017.



Adriana Gostępska graduated from the Faculty of Law and Administration at the Maria Curie-Skłodowska University in Lublin. She also studied at the Faculty of Law at the University

of West Bohemia in Pilsen, and completed her legal training at the District Bar Council in Warsaw. Adriana completed postgraduate studies in public procurement law at the Kozminski University in Warsaw, and has conducted seminars, training sessions and workshops in the fields of construction law and public procurement law. She is a member of the Image and Communication Committee and the Warsaw Bar History and Tradition Committee, operating at the District Bar Council in Warsaw.

SDZLEGAL SCHINDHELM

Kancelaria Prawna Schampera, Dubis, Zajęc i Wspólnicy sp.j.
ul. Kazimierza Wielkiego 3
50-077 Wrocław
Poland

Tel: +48 71 326 51 40
Fax: +48 71 326 51 41
Email: wroclaw@sdzlegal.pl
Web: pl.schindhelm.com/en





Chambers Guides to the Legal Profession

Chambers Directories are research-based, assessing law firms and individuals through thousands of interviews with clients and lawyers. The guides are objective and independent.