

Control procedures in the area of public procurement in the process of ensuring the financial security of European Union funds

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Abstract

The system of public procurement, as well as the supervision and control of the applicable procedures, is set out in the Act of 11 September 2019. Public Procurement Law (hereinafter the Public Procurement Law).

A beneficiary (unit of the public finance sector, private entity) implementing a project co-financed from EU funds uses public funding and is therefore obliged to observe the principles of fair competition and equal treatment of contractors. If it obtains the status of a contracting authority, it is obliged to apply the Public Procurement Law. The obligations of a private entity that does not have the status of a contracting authority within the meaning of the Public Procurement Law are set out in the Guidelines on the eligibility of expenditure under the European Regional Development Fund, the European Social Fund and the Cohesion Fund for 2021-2027.

These obligations depend on the value of the contract to be awarded. The provisions of the Public Procurement Law specify that a simplified market research procedure applies to public contracts co-financed from EU funds in the amount of PLN 20,000 to 50,000 net. In the case of expenditures from PLN 20 thousand net to PLN 50 thousand net inclusive, i.e. without the value added tax (VAT), beneficiaries are obliged to carry out market research and publish an enquiry on their website or another generally available website intended for publishing enquiries.

The aim of the market inquiry is to confirm that a given service, supply or construction work was provided at a price not higher than the market price. In order to document that this condition is met, the beneficiary should present a printout of the request for quotation made in the aforementioned manner together with the tenders received or a confirmation that the request for quotation was sent to at least three potential contractors, provided that there are at least three potential contractors for the given contract on the market, together with the tenders received. In the case of contracts to which the market inquiry procedure applies, it is not required to conclude a written agreement with the contractor. It is sufficient to confirm that the expenditure was incurred on the basis of an invoice, bill or other accounting document of equivalent probative value. In the case of public procurement above PLN 50,000 net, the principle of competitiveness shall apply. In the case of expenditure whose value exceeds PLN 50,000 net, beneficiaries who are not obliged to apply the provisions of the Public Procurement Law must carry out the procedure in accordance with the principle of competitiveness.

Key words: audit, public procurement, funds from the European Union budget.

Introduction

The public procurement control system is set out in the Act of 11 September 2019. Public Procurement Law (hereinafter the Public Procurement Law) and is an important element of the functioning of the public procurement market. The public procurement market is an important part of the country's economy. The value of this market is estimated at PLN 150 billion per year. In comparison, the volume of EU funds available to Poland between 2014 and 2020 is approximately PLN 49 billion per year.

The construction of a public procurement control system is to prevent abuse, which is most often understood as establishing the legality of actions taken when spending public funds. The control system, apart from establishing whether a given action has been undertaken in compliance or not with the Public Procurement Law or with the public finance discipline, should also contribute to the increase in effectiveness (including in the long-term perspective) of spending public funds, but also – which requires special emphasis – help to implement long-term strategies of state development. Regulations concerning the public procurement market may constitute an effective tool for the implementation of active state economic policy, e.g. support the development of the sector of small and medium-sized enterprises, foster innovation and competitiveness of the economy, promote environmental protection, shape exemplary relations between the state administration and entrepreneurs, develop the culture of cooperation (strengthen social capital), support the process of implementing cohesion policy.

The Public Procurement Law defines the principles and procedure for awarding public procurement contracts, legal protection measures, control over the award of public procurement contracts and the authorities competent in these matters.

Pursuant to Article 152(1) of the same Act, the central government administration body competent in matters of public procurement is the President of the Public Procurement Office. The detailed competences of the President of the Office are listed in Article 154 of the Act, which indicates, inter alia, that he supervises the observance of the rules of the procurement system and, in particular, inspects the procurement process to the extent provided by the Act.

The main objective of the article is to present the importance of control in the process of ensuring security related to the award of public contracts co-financed by investment projects with funds from the EU budget. The article presents the principles and procedures of the public procurement system as integrated and embedded in the information and control activity and management of the entity. The study was carried out using several research methods. Among the basic ones we can mention the analysis (comparative-descriptive) of national legal acts and standards defining public procurement procedures and the literature on the subject, as well as the method of synthesis and deduction. The assessment of the importance of control in the process of public procurement in the process of ensuring the security of public finances was supplemented with the results of research carried out in this area, concerning the improvement of procedures for the award of public procurement from the EU budget.

Results and Discussion

Control and supervision system for the award of public contracts

One of the basic requirements is to make the tender enquiry public on the website prepared by the Ministry of Development (Competitiveness Database). The content of the request for proposals must meet the requirements set out in the Guidelines and guidelines published by the Managing Authority of the Operational Programme under which the project is implemented, if this authority has developed such guidelines. In addition, it is obligatory to describe the subject of the contract and the manner of evaluating the conditions for participation in the procedure (if provided for) in the manner defined in the Guidelines. Contracting authorities are also obliged to formulate the criteria for evaluation of tenders in a manner ensuring preservation of fair competition and equal treatment of economic operators, while observing the detailed requirements laid down in the Guidelines. The selection of the most advantageous tender, made on the basis of the tender evaluation criteria established in the request for proposals, is to be documented by the ordering party in a protocol. The agreement with the contractor and the protocol of the tender award procedure should be drawn up in writing.

A private entity benefiting from financing will be obliged to apply the provisions of the Public Procurement Law if the prerequisites specified in Article 3(1)(5) of the Public Procurement Law, relating to the subject, value and source of financing of the contract, occur in relation to the contract awarded by the entity. These are cases in which:

- more than 50% of the value of the awarded contract is financed from public funds or by entities referred to in art. 3 sec. 1 item 1-3a of the Public Procurement Law,
- the value of the contract is equal to or exceeds the amounts defined in the regulations issued pursuant to art. 11 sec. 8 of the Public Procurement Law,
- the subject of the contract is civil engineering works specified in Annex II to Directive 2014/24/EU, as well as for the construction of hospitals, sports, recreational or leisure facilities, school buildings
- university buildings or buildings used by the public administration or services related to such construction works.

In the above circumstances, all entities will be obliged to apply the Public Procurement Law, regardless of their legal form, ownership structure and object of activity.

The fulfilment of all three prerequisites must be cumulative. Only the cumulative fulfilment of all three prerequisites determines whether a private entity is subject to the application of the Public Procurement Law, although on the occasion of the 2019 amendment, the phrase: “the following circumstances are cumulative” was replaced with: “the following circumstances occur”.

The necessity to fulfil the prerequisites jointly was confirmed in the opinion of the President of the Public Procurement Office. Such a conclusion was also supported by the structure of the provision of Article 3.1.5 of the Public Procurement Law, which allowed the assumption that the intention of the legislator was to apply it only to those entities in relation to which the indicated circumstances occur jointly, i.e. in relation to one contract.

Thus, a private entity benefiting from co-financing will not be obliged to apply the provisions of the Public Procurement Law if only part of the conditions indicated above is fulfilled.

Firstly: the source of financing of the contract. The first premise states that more than 50% of the value of the contract to be awarded is financed from public funds or by entities referred to in Article 3(1) (1-3a) of the Public Procurement Law.

Public funds, within the meaning of art. 5 sec. 1 item 2 of the Act of 27 August 2009 on public finance, to which art. 2 sec. 9 of the Public Procurement Law refers, include funds from the budget of the European Union and non-reimbursable funds from assistance provided by member states of the European Free Trade Agreement (EFTA).

On the other hand, the notion of 'contract financing', which the legislator used in Article 3(1) (5)(a) of the Public Procurement Law, has not been defined in Polish law.

According to the position of the President of the Public Procurement Office, published on the basis of the previous wording of the provision, but still valid, this prerequisite refers to situations in which a given contract is directly subsidised by an institution, i.e. non-returnable financial aid is provided, which may consist in covering part of the costs connected with the performance of such a contract.

Thus, it should be considered that a private entity will fulfil this condition if more than 50% of the costs of performance (price) of the contract will be financed by a non-reimbursable grant from an institution of the European Union. For the purpose of assessing the value of the contract, amounts without VAT should be used.

Secondly: the value of the contract. The second premise indicates that the regime of the Public Procurement Law applies to those contracts financed from public funds whose value is at least equal to the amounts indicated in the Ordinance of the Minister of Development and Finance of 22 December 2021 on the amounts of contract values and competitions on which the obligation to submit notices to the Publications Office of the European Union depends (these are the 'regulations issued pursuant to Article 11(8) of the Public Procurement Law').

With regard to works contracts, this amount is the Polish zloty equivalent of EUR 5 548 000. When converting this amount into Polish zlotys, it should be assumed that 1 euro = PLN 4.3117 (pursuant to the Ordinance of the Prime Minister of 28 December 2021 on the average PLN exchange rate in relation to the euro constituting the basis for converting the value of public procurement contracts).

Third: the subject matter of the contract. According to the third prerequisite, the object of the contract must be civil engineering works as defined in Annex II to Directive 2014/24/EU, i.e. contracts covered by the CPV code 45200000, or works for the construction of hospitals, sports, recreational or leisure facilities, school buildings, university buildings or buildings used by public administrations or services related to such construction works.

This means that in the case of other construction works and supplies and services, even the fulfilment of the other two prerequisites of Article 3(1)(5) of the Public Procurement Law, will not result in the private entity being obliged to apply the Public Procurement Law. In such a situation, the beneficiary will have to fulfil the requirements resulting from the Guidelines, according to the value of the contract awarded.

Inspections by the President of the Public Procurement Office

The President of the Public Procurement Office (UZP) is obliged to carry out an ex ante control of contracts awarded prior to the conclusion of a contract, if the value of such contracts is equal to or exceeds the equivalent expressed in PLN:

- EUR 20 million – for construction works,
- EUR 10 million – for supplies and services,

and at the same time these contracts are co-financed from EU funds.

The President of the Public Procurement Office has control competences with respect to all public procurements regardless of the source of their financing. The principles of control are set out in Chapter 3, Section V of the Public Procurement Law. According to the Public Procurement Law, the purpose of the control is to verify compliance of the procurement procedure with its provisions. This means that the President of the Office examines only the legality of the contract award, i.e. the compliance of the procedure conducted with the provisions of the Act. The control takes place at the seat of the Public Procurement Office on the basis of documents collected in the case, explanations and expert opinions, and it may have the nature of a prior control (ex-ante, prior to conclusion of an agreement with a contractor) or a follow-up control (ex-post, after conclusion of an agreement with a contractor).

With regard to contracts involving EU funds, the President of the Public Procurement Office conducts:

- mandatory prior audits, if the value of the contract is equal to or exceeds EUR 10 million for supplies and services and EUR 20 million for works (Article 169(1) and (2) of the Act),
- prior or subsequent ad hoc audits initiated ex officio or at the request, if there is a justified suspicion that during the contract award procedure there has been a violation of the provisions of the Public Procurement Law which may have influenced its outcome. An ad hoc control may be preceded by an explanatory proceeding aimed at determining whether there has been an infringement in the procedure which may have influenced the outcome of the procedure, and thus - whether it is justified to initiate an ad hoc control.

The control ends with the delivery of information on the result to the contracting authority, in which the President of the Office states that there have been no infringements or indicates the detected irregularities. In the case of prior control, conducted before the conclusion of an agreement with the contractor, the President of the Procurement Office may additionally issue post-control recommendations to remove the infringements found or cancel the procedure. On the other hand, the post-inspection control takes place after conclusion of the agreement with the contractor, therefore it is impossible to issue recommendations to perform any actions in the procedure afterwards.

In the case of carrying out control of a contract co-financed from EU funds, the relevant Managing and Intermediate Bodies are always informed about the control result - apart from the entity (at the request of which the control was initiated).

Only contracts or framework agreements with the values specified in the Public Procurement Law, i.e. EUR 10 million for supplies and services and EUR 20 million for construction works co-financed from EU funds, are subject to obligatory prior control.

The President of the Public Procurement Office may waive the prior control at the request of the managing authority. The contracting authority and the applicant shall be informed of the waiver without delay. The President of the Public Procurement Office may also waive the obligatory prior control, in the case of awarding contracts in parts, if the value of individual parts of the contract is lower than the amounts referred to in Article 169(2) of the Public Procurement Law. The contracting authority shall be informed of the waiver immediately.

Beneficiaries of EU funds, in the case of awarding contracts with a value equal to or exceeding EUR 10 million for supplies and services and EUR 20 million for construction works, will be obliged to hand over to the Public Procurement Office, immediately after the Chamber issues a verdict or a decision ending the appeal proceedings concerning the selection of the most advantageous offer, or after the expiry of the time limit for lodging an appeal, and before concluding a contract, copies of the documentation of the procedure, confirmed to be true copies of the originals by the head of the ordering party, in order to carry out a prior control (Public Procurement Law).

If an appeal or complaint is lodged after the copy of the documentation has been forwarded for inspection, the contracting authority will be obliged to immediately notify the President of the Office. As a result of the notification of the lodged appeal or complaint, the President of the Office will suspend the execution of the inspection until the final resolution of the protest.

Delivery to the Public Procurement Office of a copy of the documentation of the procedure shall result in the initiation of a prior inspection and, at the same time, in the suspension of the time limit for being bound by the tender. The time limit is suspended until the control is completed, i.e. until the information on the result of the control is delivered to the ordering party. The inspection should be completed within 14 days from the date of delivery of the materials constituting evidence in the case, or within 30 days in particularly complex cases. Depending on the findings of the inspection, in the information on the result of the inspection, the President of the Office shall inform that the inspection has not revealed infringements or has revealed infringements not affecting the outcome of the procedure, or indicate post-inspection recommendations if it has been found in the course of the inspection that it is justified to cancel the procedure or remove the infringements found.

A recommendation to remove infringements is issued when during the audit a breach affecting the outcome of the procedure is identified, the removal of which at this stage of the procedure (i.e. before the conclusion of the contract) is still possible.

A recommendation to invalidate the procedure refers to infringements that make it impossible to conclude a valid public procurement contract, the removal of which is no longer feasible.

At the request of the President of the Office, the contracting authority shall inform about the manner of implementation of the post-audit recommendations.

The contracting authority may lodge objections to the results of the audit regardless of the type of infringements found. The contracting authority may lodge reasoned objections to the results of the ad hoc control within 7 days of the receipt of information on the results of the control. The President of the Office shall consider the objections within 15 days of their receipt, and in the event that they are not considered, he shall forward them to the National Board of Appeal for its opinion. The National Board of Appeal shall, within 15 days, express its opinion, in the form of a resolution, which shall be binding on the President of the Office. The President shall immediately notify the controlled contracting authority of the final consideration of the objections. The final consideration of the objections shall be the acceptance of the objections by the President of the Office or, if not accepted, the issuing of an opinion by the National Board of Appeal.

Until the information on the result of the prior control of contracts co-financed from the funds of the European Union is delivered, the controlled contracting authority cannot conclude an agreement with the selected contractor.

The President of the Public Procurement Office, within 14 days (30 days in particularly complicated cases) from the date of sending a copy of the documentation of the procedure, delivers information to the ordering party on the result of the prior control.

This information contains at least:

- 1) definition of the controlled procedure,
- 2) information on whether or not infringements have been found,
- 3) post-inspection recommendations (if it was stated that it is justified to cancel the procedure or remove the infringements found).

Until the information on the result of the prior control is delivered, the contracting authority may not conclude a public procurement contract, and if infringements are found, the head of the contracting authority informs the President of the Public Procurement Office on the manner of implementing the recommendations (if a request in this respect has been received).

Over the last five years, the Public Procurement Office has received around 300 requests for inspection of EU co-financed contracts per year. These requests were mainly submitted by contractors (80% of requests), but also by institutions involved in the implementation of EU funds (20%). The vast majority of requests for ad hoc audits were submitted by, among others, law enforcement bodies and the contracting authorities themselves. Applicants raised allegations concerning mainly: unreliable evaluation of tenders (10% of applications), failure to describe the conditions for participation in the procedure (28% of applications), unreliable description of the subject of the contract (15%), incorrect mode of awarding the contract (10%), failure to apply the Public Procurement Law (5%), cancellation of the procedure (3%), incorrect provisions in the contract notice or the terms of reference (21%), illegal amendments to the contract (3%), incorrect implementation of the contract (25%) and other issues (e.g. estimation of the contract value, deadline for submission of the bids) 1%. The most frequent irregularities in the process of public procurement identified as a result of ad hoc controls carried out by the President of the Public Procurement Office, which have or may have an impact on the outcome of the procedure for awarding contracts co-financed from EU funds, are for example awarding a contract without the application of the Public Procurement Act when there were grounds for its application (15%), awarding a contract under a sole-source procedure, negotiations without an announcement or a request for a price when there were no grounds for their application (20%), failure to publish a contract notice in the Public Procurement Bulletin or the Official Journal of the European Union (15%), unjustified exclusion of a contractor who submitted the most advantageous tender (7%) (Fig.1).

As a result of the controls carried out by the President of the Public Procurement Office, the most frequent violations of the provisions of the Public Procurement Law which do not influence the outcome of the procedure for contracts co-financed from EU funds (Fig.2), are mainly formal errors such as:

- defective content of contract notices or ToR, especially in terms of documents requested from contractors, including requesting from contractors documents that are not necessary for conducting the procedure (36%)

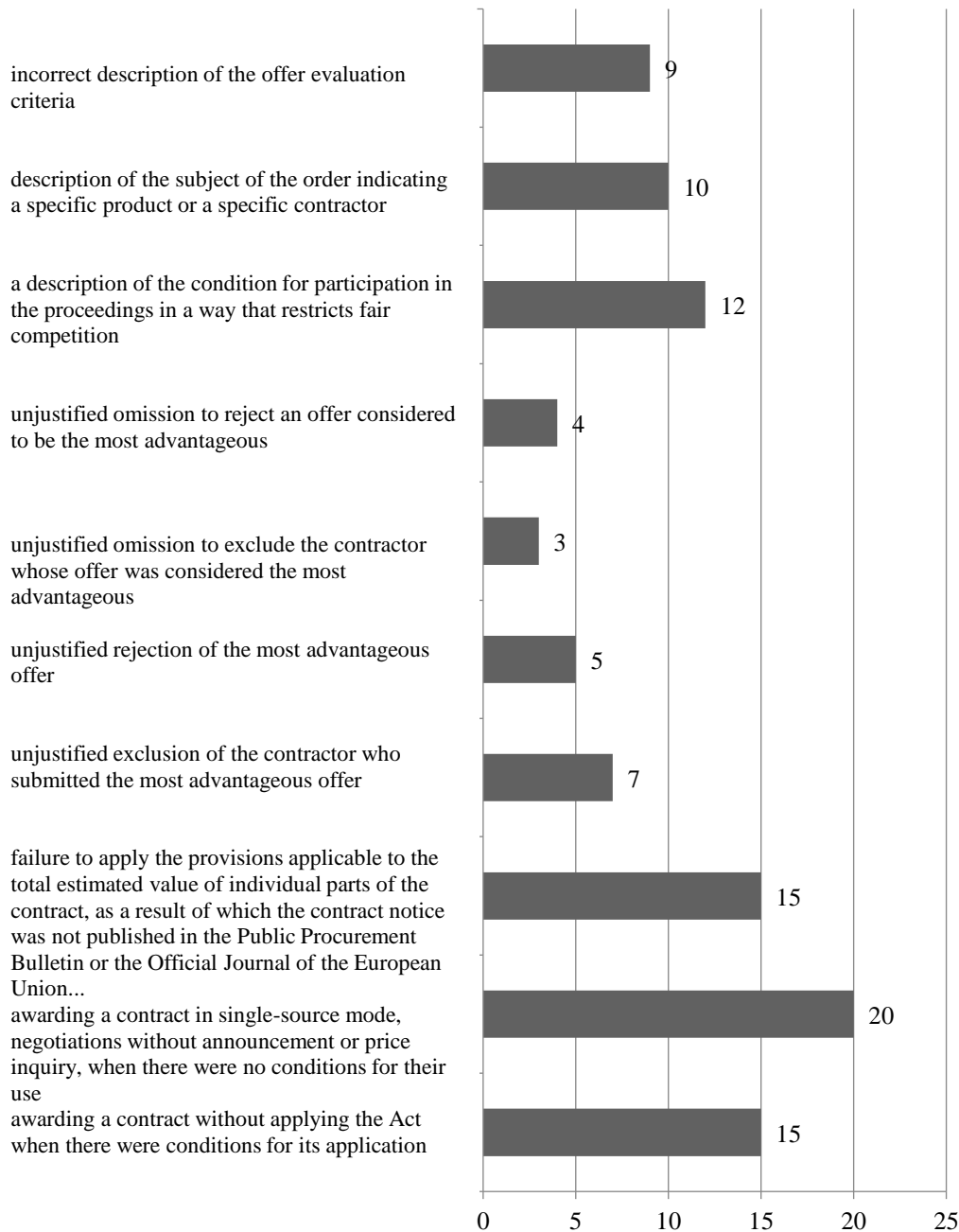


Figure 1. Irregularities found in the course of ad hoc audits by the President of the Public Procurement Office which have or may have an impact on the outcome of procurement procedures co-financed from EU funds (% of irregularities).

Source: own compilation based on the Reports on the control activities of the President of the Public Procurement Office for the years 2021-2023.

- failure to call upon a contractor to supplement the documents confirming the fulfilment of conditions for participation in the procedure or to provide explanations regarding the submitted tender, if it did not concern the most advantageous tender (45%).

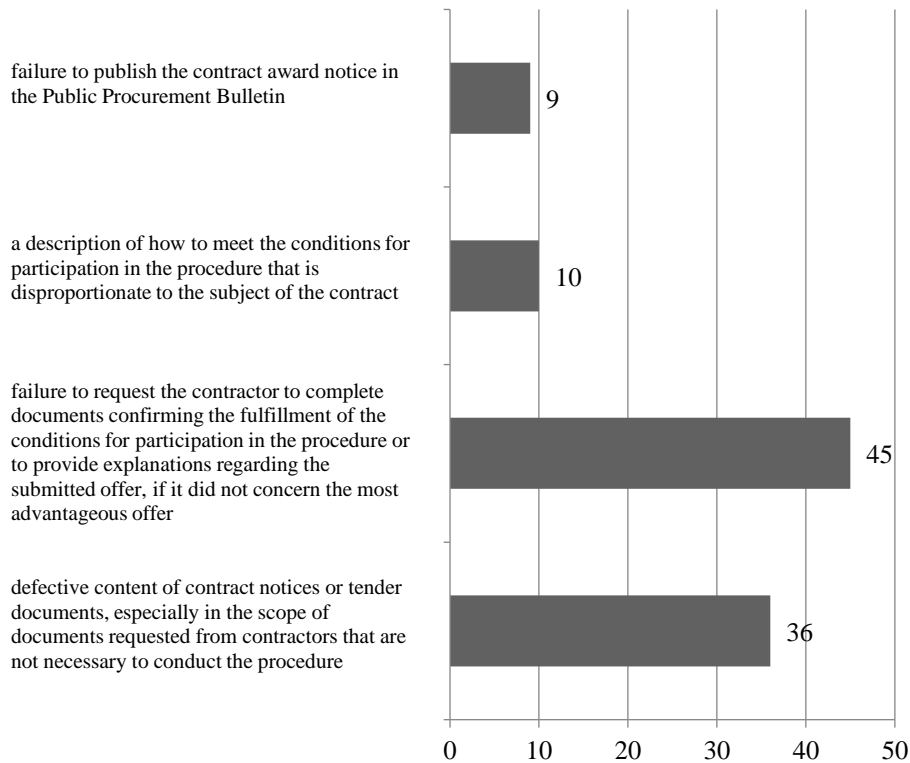


Figure 2. Violations of provisions of the Public Procurement Law found in the course of the control of the President of the Public Procurement Office which do not affect the outcome of the procedure for contracts co-financed from EU funds (% of irregularities).

Source: own compilation based on the Reports on the control activities of the President of the Public Procurement Office for the years 2021-2023.

If irregularities are found as a result of the control, the President of the Public Procurement Office:

- shall notify the Public Finance Discipline Ombudsman if irregularities constituting a breach of public finance discipline within the meaning of the Act on Liability for Breach of Public Finance Discipline have been found in the course of the control;
- may impose a fine if the contracting authority is an entity referred to in art. 3 par. 1 items 2 - 4 and 7 of the Public Procurement Law and in the course of the inspection breaches specified in art. 200 of the Public Procurement Law have been found;
- may request the court to invalidate the contract in whole or in part, if during the inspection violations mentioned in art. 146 par. 1 and 6 of the Public Procurement Law were found, as well as to invalidate the contract amendment, if during the inspection a violation of the Public Procurement Law was found.

Fraud, including procurement, is an intentional act or omission affecting the financial interests of the EU in relation to expenditure, which consists of:

- the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the European Union budget;
- non-disclosure of information in breach of a specific obligation, with the same purpose;
- the misapplication of such funds for purposes other than those for which they were originally granted;
- any act or omission, including misrepresentation, which knowingly or recklessly deceives or attempts to deceive a party for a financial or other advantage or to avoid an obligation.

The Government Plenipotentiary for Combating Financial Irregularities to the Detriment of the Republic of Poland or the European Union, appointed by the Regulation of the Council of

Ministers of 1 July 2003, is responsible for organising the process of notifying the European Commission of irregularities in Poland.

According to §2 of this regulation, the tasks of the Government Plenipotentiary include: Initiating, coordinating and implementing activities aimed at safeguarding the financial interests of the Republic of Poland or the EU, including:

- transmitting to the European Commission reports on irregularities in the use of funds from the European Union budget, in accordance with the applicable regulations received from the MAs, which are responsible for detecting and classifying cases and have full knowledge of the details of each case. It is therefore a centralised system, which facilitates coordination and allows for a uniform interpretation of the European Commission's requirements and, as a result, ensures comparability of national data.

Conclusions

Recommendations on the public procurement system arising from the research carried out

1. Keeping amendments to the Public Procurement Law to a minimum – the respondents claimed that each time an amendment causes problems for the whole system, the ordering party and the controlling party have to learn certain things from scratch. The period after the amendment, in the opinion of the respondents, is characterised by an increase in the number of mistakes made by the ordering parties, although we cannot exclude that this type of problem is also on the side of the controllers (they also make mistakes more often).

2. Elimination of the ambiguity of regulations in the public procurement system (which entails ambiguity of their interpretation) and inconsistency of jurisprudence. The consequences of these imperfections are conflicts occurring not only between the contracting authority and the controlling institution, but also conflicts between controlling institutions.

3 Improving the rules on abnormally low prices. Respondents indicated that the current definition of an abnormally low price is difficult to apply in practice and, moreover, the procedure for verifying whether an abnormally low price exists is highly imperfect due to its narrow formalism. Contracting authorities ask contractors to explain the price in their offer, and the contractors often respond in a laconic manner (at the level of generalities) and are convinced that by accepting such an explanation as sufficient, they are acting in accordance with the letter of the law. Even if they suspect that the price may have been abnormally low, they cannot do anything about it, as a formal requirement on the part of the contracting authority has been fulfilled.

4. Improve access to information by contracting authorities and participants in public procurement procedures by organising training for contracting authorities in order to pass on knowledge on the most common problems in the process of conducting public procurement procedures.

5. Develop a system of coordinating the activities of control bodies. It happens (and these are not rare cases) that inspections are carried out (by several bodies) at the same time or at small intervals. The controllers themselves call such actions ineffective (month after month two institutions examine e.g. the legality of the procedure), both for those conducting the control and for the controlled persons (photocopying the same documents several times, answering the same questions).

6. Unification of the standards for tendering procedures, especially limited and open tendering. The existing case law is often inconsistent, so it is easy to make mistakes. Therefore, inconsistent interpretations also occur between controlling institutions, which further emphasises the difficult situation of contracting authorities. Training should cover, among other things: the use of procedures other than open tender, the creation of substantive criteria for the evaluation of tenders,

7 Pointing to the low competences of the ordering parties and those conducting the proceedings, the respondents referred to this problem mainly to "poviat Poland", small local government units. On the other hand, the concerns and habits of the ordering entities are of a more general nature, and also concern larger units of the public finance sector.

8 Respondents also pointed to the fineness of inspections (by the respondents this activity was attributed to local units). It seems that inspectors should have the ability to separate minor deficiencies from breaches that have a real impact on the proceedings. So, in this case, the recommendation is to introduce an inspection standard that would treat a minor misconduct differently from a major breach.

9. Respondents, indicating good practices applied by contracting authorities, emphasised that the most important change was basing the activity on management procedures, creating a good system of procedure management. At the same time, attention was drawn to the occurrence of such examples, when an institution carried out public procurement flawlessly, but as a result of staff changes started to make mistakes.

10. Increase the number of systemic, planned inspections carried out by the President of the Public Procurement Office (e.g. according to areas/directions of control set as priorities).

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