THE CENTRAL ANTI-CORRUPTION BUREAU

ANTI-CORRUPTION RECOMMENDATIONS ON PUBLIC PROCUREMENT PROCEDURES

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Anti-corruption recommendations on public procurement procedures

Public procurements constitute the largest market in Poland, through which streams of financial budget flow as well as a meaningful part of EU funds.

The implementation of public tasks by the bodies administering public funds is associated with the obligation of spending the funds in accordance with applicable procurement procedures, in compliance with the provisions of the Public Procurement Law Act of 29 January 2004 (Journal of Laws of 2010 no. 113, item 795).

While carrying out the tasks imposed by the legislature, the Central Anti-Corruption Bureau draws attention to irregularities that may occur while spending public funds on purchasing services or supplies, and investment processes.

These recommendations aim to introduce the participants to the procurement procedure and provide support to the managers of procuring entities in conducting public procurement by identifying frequently occurring irregularities and suggesting the methods of preventing them. The examples of irregularities and the methods of preventing them may have a positive impact on the implementation of public procurement and thus significantly increase the opportunities of a procuring entity to end the public procurement procedure with the desired effect.

Non-observance by the procuring entity of the provisions regulating public spending may have negative economic consequences on the unit finances and it may result in its bearing responsibility for public finance discipline violation, infringement of public procurement law or criminal liability. The close date of the investment execution as well as the magnitude of work needed to be done in programmes such as the development of road infrastructure and preparing sports facilities for the upcoming Euro 2012 championships will require efficient, reliable and professional preparation and conduct of public procurement procedures.

In order to avoid corruption risks that may arise during the investment implementation, taking into consideration the maximum improvement and transparency of decision-making processes as well

as being guided by the willingness to fulfil its preventive function, the Central Anti-Corruption Bureau presents the following recommendations on procedures and some aspects of liability which are associated with public procurement award.

I. The stage of planning and preparation of a public procurement procedure

Public procurement law defines the manager of the procuring entity as a person responsible for the preparation and conduct of the public procurement procedure. The fact that the manager of the procuring entity is responsible for the preparation and conduct of the procedure does not mean that they themselves should prepare and carry out the procedure. The procuring entity's manager may delegate the preparation or the conduct of the procedure to the procuring entity's personnel as well as to a third party (e.g. in the event of a central institution). Entrusting the preparation and conduct of the procedure to the employees of the procuring entity is associated with the need to develop (or amend the existing) internal legislation, specifying in detail the procedure for public procurement awards in an organisational unit.

Regulations on public procurement award and regulations on the tender committee's performance are the main acts of internal law relating directly to public procurement awards in a given organisational unit. These regulations should be constructed clearly, legibly, in a manner which does not permit leeway for interpretation, but allows identification of persons carrying out activities in public procurement awards as well as documents and records in order to reconstruct the decision-making process at a later date.

Non-observance, by the employees of the procuring entity, of the acts of internal law binding within an organisational unit may be the grounds for the manager to hold the employee liable for the breach of order specified in the Labour Code, i.e. admonition, reprimand, including, in justified cases, the possibility of termination of employment without notice due to a gross breach of their basic work duties.

It often happens that the public procurement regulations or the regulations on the performance of tender committees contain only general provisions. This allows leeway for interpretation and creates a sense of anonymity in decision making at various stages of the procedure. Overcoming the anonymity should give rise to the guidelines on working on the acts of internal law.

At the stage of the public procurement award organisation, the manager of the procuring entity should be aware of the factors which may affect the proposed contract award. The analysis should cover both the internal environment of the procuring entity (e.g.: the amount of their resources, the degree of preparation of the personnel, time needed to carry out the procurements, etc.) and the external environment (e.g. knowledge of the market, the number of potential contractors, the degree of the project innovation, market trends, etc.). To this end, the procurement planning should be associated with an analysis in terms of defining „weaknesses" and major corruption risks.

According to the regulations on public procurement award, the manager of the procuring entity appoints the members of the tender committee who ensure a fair and objective conduct of public procurement procedures. At this point, attention should be paid to the possibility of appointing the tender committee members precisely identifying their tasks or, in other words, at the stage of decision making on establishing the tender committee, specifying the areas of activity for each committee member (e.g. Mr and Mrs X, appointed members of the tender committee – to examine the documents defining the ability of the contractor to participate in the present procedure, Mr and Mrs Y – to assess the procurement object in terms of meeting the requirements set forth in the specification of essential terms of the contract – SETC). While delegating the areas of activity to individual members of the committee, one should be aware of selecting such persons who ensure the proper performance of their tasks as well as of keeping to the „two pairs of eyes rule" in the performance of each activity of the procuring entity.

For the transparency of procedures during the preparation of a public procurement procedure, the manager of the procuring entity is recommended to introduce the requirement to create two SETCs within one procedure, one „outside" SETC and the other one for the procedure documentation (the internal documentation of the procuring entity), indicating the names and surnames of the persons involved in the development of different parts of the specification.

Among the most common symptoms indicating the possibility of unethical or illegal conduct, one can enumerate meetings of the contractor with the tender committee members outside of the premises of the procuring entity, after office hours, frequent telephone calls between the committee members and the contractors, which refer to the arrangement of the record of the specification of essential terms of the contract (SETC) or the content of the bid. The regulations on the performance of the tender committee members should precisely regulate such matters. One of the solutions to eliminate this practice is to create restrictive provisions in the regulations on the performance of the tender committee, ordering strictly to observe the rule of providing all documentation in writing. Each request and each reply to the request should be submitted in writing. The manager of the procuring entity, when regulating such issues in an act of internal law, provides grounds for accountability of a committee member who is violating such regulations. The observance of the „no questions are more important or less important, they are all in writing" rule as well as documenting, in the form of a memorandum, indicating the need to formulate the request in writing to the potential contractor and then submitting the documentation to the procuring entity by mail, fax or email should be respected strictly and categorically.

Risks arising from errors made at the stage of the specification of essential terms of the contract refer mainly to three areas:

a) identification of the object of the procurement;
b) determination of the terms of participation in a procurement procedure;
c) specification of the evaluation criteria.

Each of the above areas carries a risk of errors and irregularities, which often result in a violation of fundamental provisions of public procurement law: transparency, equal treatment and fair competition. The elements of the specification of essential terms of the contract – referring to the procurement object, determination of the terms of participation in the procurement procedure and the specification of the evaluation criteria are formulated individually for each procurement by the persons preparing the procurement procedure. In these cases,

the determination of the SETC provisions is subject to a free choice and as such is particularly vulnerable to the threat of lack of objectivity and other corruption-related types of conduct. It often happens that the description of the procurement object is delivered by third parties, which results in the fact that the procuring entity has less impact on the content of the SETC provisions.

Case:

In a short time, the X company became a leading company specialising in designs of sports facilities construction for local government units. It always offered a fairly low price for the implementation of the projects, in this way winning all tenders. At the same time, the owner of the X company agreed with the head of the company representing the producer of water treatment technology that in the projects, for local governments, on the construction of swimming pools he would determine the parameters associated with water treatment technology in such a way that they could be met only by this specific supplier. According to this agreement, the projects included provisions restricting the competition, because the parameters defining the required water treatment technologies indicated only one contractor. The X company received compensation from the representative of the company, the technology of which was described in the project. The amount, specified by percentage, which was attributed to the X company for entering certain parameters, not only allowed to submit tender bids for the contract price which guaranteed the award of the design work, but also earned additional financial advantages. Entities conducting the procedure in order to select the pool contractors on the basis of the design, previously prepared by the X company, did not verify the designer's proposal. The SETC regulations had an impact on the procedure outcome because in the tender for the construction of the swimming pool facilities competitive bids were rejected as they did not satisfy the specification.

During the control, the employees in charge could not provide information on the reasons for defining such strict parameters for water treatment technology.

Such types of agreements between the procuring entity and the persons having impact on the public procurement procedure, e.g. the designers, are inadmissible and, when disclosed, may provide legal grounds for the person's criminal responsibility.

Case:

The manager of the Public Procurement Department ordered his subordinate to prepare a specification for a computer supply. The employee asked his friend, who ran a computer company, for assistance in determining the computer parameters. After two hours, via email, he received a detailed description that he needed to create the SETC. In this way, he could submit the tender documentation without delay. The procedure was launched immediately due to the upcoming end of the financial year and the necessity to spend the reserve funds. Unfortunately, the day after the announcement of the invitation to tender, the procuring entity received many protests, claiming that the presented specification could be satisfied by only one authorised supplier.

Altogether, several dozen of protests and appeal proceedings paralysed the public procurement procedure. As a result, the manager of the procuring entity did not implement the budget.

Taking into consideration the above threats, it is recommended to:

- **conduct a detailed SECT analysis before its approval, with a special focus on the records concerning the procurement object and the terms which must be fulfilled by the contracting authorities, as well as make sure that the records do not favour one definite contractor;**
- **introduce the rule of providing written information on the procurement object obtained from persons preparing its description;**
- **apply reasonably justified criteria of the bid evaluation to guarantee the selection of the best bid;**
- **define persons responsible for the SETC provisions.**

Another important factor is the possibility for the tender committee members to refrain from voting on substantive issues, on which they do not have sufficient knowledge. The acceptance of the rule also

encourages the personification of the responsibility for the content of the documentation procedure.

It is unacceptable to exercise undue influence by the superiors on tender committee members to take a stand when, according to their belief, they cannot participate in decision-making on determination of the SETC provisions due to their insufficient knowledge.

No committee member who has a dissenting opinion from the committee's decisions (he was outvoted) can issue a votum separatum. Under article 96 paragraph 2 of the Public Procurement Law Act, a votum separatum may be accepted as an annex to the minutes in the form of a statement made by the committee member, or in the form of another document. The member of the tender committee, when submitting a justified separate opinion in the form of a statement, discloses that in the course of the committee sessions there appeared a difference of opinions and that his/her opinion was separate from the decision taken. The chairperson of the committee should send a notification of the fact to the manager of the procuring entity prior to the approval of the tender procedure minutes.

Experts may be invited to resolve contentious issues which arouse in the course of public procurement procedure award. They are usually appointed from among expert witnesses, which does not exclude the possibility to appoint any other person having adequate knowledge in the field. Each time, an expert is appointed by the manager of the procuring entity under article 21 paragraph 4 of the Public Procurement Law Act, at his own discretion or on the tender committee's request. Performing the activities in public procurement procedure, under pain of criminal liability for false testimony, the expert submits a written statement on the absence or existence of the circumstances referred to in article 17 of the Public Procurement Law Act, describing the circumstances of the exclusion of a person from the public procurement.

An expert is not a tender committee member but only an adviser. His participation in the works of the committee may be temporary or restricted to written responses to questions asked by the committee. The admission of an expert is justified with reference to individual issues and each time it requires an order (article 734 of the Civil Code).

The manager of the procuring entity is entitled to replace the tender committee members at each stage of the procedure. He should react immediately in the event of receiving information on the impartiality of one or more members of the committee.

The manager's activity will be based on article 7 paragraph 2 of the Public Procurement Law Act, which provides that „the activities referring to the preparation and conduct of public procurement procedure are performed by persons ensuring impartiality and objectivity".

The manager of the procuring entity is entitled to replace individual members of the committee and even the entire committee, which may take place even after the bids opening, especially when, for example, the committee's first bid evaluation is questioned by the procuring entity or the National Appeal Chamber. This does not mean that in each situation the committee should be replaced. The replacement should take place exclusively in exceptional cases.

Article 17 of the Public Procurement Law Act ensures impartiality in the procedure conducted on behalf of the procuring entity. It is the exclusive legal measure which ensures fair competition envisaged in article 7 paragraph 1 of the Public Procurement Law Act by obligatory exclusion of persons whose impartiality in the procedure may be questioned.

The declaration of impartiality is submitted on Form ZP-11 by all participants in the procuring entity procedure (including the committee members). Due to the fact that this provision refers only to the procuring entity, it cannot be extended on the contractors applying for the public procurement award. The exclusion under article 17 of the Public Procurement Law Act should follow the disclosure of forbidden relations between such a person and the procuring entity. Such a person should immediately restrain from further activity in the procedure and notify the manager of the fact, without delay, or any other person who entrusted the performance of the activity to them. Non-observance of this provision may result in the invalidation of the procedure or even of the concluded contract.

Case:

The procuring entity conducted the public procurement procedure for works in the form of a limited tender.

Additionally, the tender committee members defined requirements which eliminated practically any competition.

Due to this fact, following the stage of applications for admission to participate in the public procurement procedure, the procuring entity issued the invitation to tender to only one of the contractors, notifying them that because of excluding the other contractors from the procedure they remained the only contractor to be invited to submit the bid. As a result, the procuring entity received a bid by 20% more expensive than those available on the market, even without the invitation to tender.

Moreover, while specifying the terms of participation in the procedure, only the chairperson participated actively. The other committee members voted in accordance with his suggestions.

Further analysis of the personal relationships showed family relations between the committee chairperson and the owner of the construction company which was awarded the contract.

Taking into consideration the above threats, it is recommended to:

- **control strictly the terms of participation in the procedure as well as the identification of the persons who specify the terms,**
- **to verify the terms of participation in the procedure and the description of the procurement object with respect to the most extensive access for the potential contractors,**
- **when in doubt, demand the company names or the producers satisfying the set requirements.**

In the course of the preparation of public procurement for construction investment, the manager of the procuring entity and the subordinated services should be familiarised with the basic guidelines on the future investment.

Case:

The procuring entity, which was one of the municipalities, commissioned a project to build an Aqua-Park. A design company did the visualisation and design at their own discretion, tested in other

projects. Because the municipality failed to specify their expectations in advance, in addition to the sports and relaxation part, the designer scheduled other services within the proposed facility, adapting his previous design to the current one. Due to the copying of the solutions implemented in another design and the lack of detailed guidelines on behalf of the procuring entity, the municipality accepted a design of the premises which extended beyond the allotment limits intended for the investment, which was the property of the municipality.

As a result of the procuring entity's negligence within the scope of the description of the detailed guidelines for the investment, it was necessary to bear additional costs due to the purchase of additional allotment for the investment.

Due to the above, when commissioning designs, it is recommended to:

– **precede the design commission with an application programme.**

In designs, bills of quantities and investment cost calculations, errors often appear, which results in the necessity to modify them at a later stage. The errors sometimes result from the negligence and misconduct of design companies. However, errors may appear intentionally, in agreement with others, often even without the knowledge of the procuring entity. This type of collusion between the design company and the prospective contractor, with or without the participation of the procuring entity, often results in the selection of the company which participates in the collusion. In such events, the bid of the winning company is only seemingly the most advantageous one because, as a result of the adjustment of the irregularities revealed at the implementation stage, the scope and cost of the procurement have to be changed.

Design errors in bills of quantities and cost calculations may expose the procuring entity to additional expenses and objections as to the bid selection.

Case:

Public procurement procedure in the form of an unlimited tender for the construction of an administration building.

Design term sheet:		
a) *general costs*	–	*PLN 5,000,000*
b) *construction works*	–	*PLN 40,000,000*
including	–	*the overground part (5 floors) – PLN 25,000,000*
	–	*the underground part (a car park with a lift for cars) – PLN 15,000,000*
TOTAL according to the investment cost calculation	–	*PLN 45,000,000*

The design company entered into agreement with the A contractor. Apart from the A company, the bids were submitted by the B and C companies, which participated in the collusion. The collusion between the design company and the A company involved the fact that only this contractor was informed that due to technical conditions the design would be replaced and instead of the planned, expensive car lift calculated at PLN 15,000,000, a traditional entrance to the car park could be built on the other side of the building, which should not exceed the amount of PLN 5,000,000.

The procuring entity received the following bids:

	Specification	***Cost according to the investment calculation***	***Costs according to submitted bids***		
			A	***B***	***C***
1.	*General costs*	*5,000,000*	*10,000,000*	*5,000,000*	*6,000,000*
2.	*Cost of overground construction works (a 5-floor building)*	*25,000,000*	*30,000,000*	*26,000,000*	*20,000,000*
3.	*Cost of underground construction works (a car park with a lift)*	*15,000,000*	*5,000,000*	*16,000,000*	*20,000,000*
TOTAL		*45,000,000*	*45,000,000*	*47,000,000*	*46,000,000*

The A bid seems the most advantageous. The chart above indicates that the A company is more expensive in entries 1 and 2, and it won the tender only thanks to a low cost in entry 3. Assuming the cost of a traditional entrance (without the car lift) at the amount of PLN 5,000 and calculating the amounts in entries 1 and 2, the winning bid would be different, and the procurement could be implemented for an amount lower by PLN 14,000 or more.

	Specification	*Costs according to submitted bids*		
		A	***B***	***C***
1.	*General costs*	*10,000,000*	*5,000,000*	*6,000,000*
2.	*Cost of overground construction works (a 5-floor building)*	*30,000,000*	*26,000,000*	*20,000,000*
3.	*Cost of underground construction works (a car park with a lift)*	*5,000,000*	*5,000,000*	*5,000,000*
TOTAL		*45,000,000*	*36,000,000*	*31,000,000*

In order to avoid the threats resulting from such irregularities, it is recommended to:

- **in contracts involving the implementation of designs, bills of quantities and investment cost calculations, apply provisions on strict penalties for dishonest preparation of documentation, when the disclosed errors result in the necessity to alter them at the organisational stage of the tender, contract concluding with the contractor or at the stage of implementation or takeover;**
- **consider the possibility of dividing the payment for the designs into the takeover and completion stages;**
- **double-check the purchased designs by independent individuals or companies before accepting them.**

II. The stage of the procurement conduct

Limiting the number of bidders is a common practice by procuring entities who do not care about public money. Such practices should be considered unacceptable, and giving wide publicity to tenders is the most serious step towards the transparency of the procuring entity. It is desirable to catch the attention of as many potential contractors as possible.

Case:

The procuring entity conducted a public procurement for the delivery of printer and photocopier paper, in the form of price inquiry.

The inquiry was directed to the required number of potential bidders, along with precise parameters in the SETC and the deadline for submitting the bids. Due to the fact that the features of the product were very detailed and did not allow any deviations, only two bids were submitted till the deadline.

In the course of an audit, it turned out that the requirements could be met by producers in two European countries only. Due to the fact that the product had to be imported, one of the bidders asked for the extension of the deadline, as he was negotiating with the producer. Since the inquiry was submitted to the procuring entity later than 6 days prior to the deadline, the procuring party did not reply.

The manager of the procuring entity could not provide the auditors with the reasons for introducing provisions restricting competition. The employees in charge could only state that the standards were „the best" but could not justify those specific requirements determined by the procuring entity. A written justification provided to the auditors after several days contained an argument that the paper decreased dusting by 10%, which had an impact on the maintenance and life-cycle of the printing equipment. However, this argument could not be taken into consideration by the auditors as it was not the subject of the evaluation in respect of satisfying the criteria in the course of the bid analyses. Thus, the entire procurement was assessed negatively by the auditors who indicated that because of determining exaggerated requirements within the scope of the description of the procurement object in relation to the actual needs, the procuring entity purchased paper at the price by 25% higher than it could be purchased from other suppliers offering competitive products.

In order to avoid such irregularities, it is recommended to:

– **select the basic forms of public procurement; other forms must be justified by the need and they must meet the statutory prerequisites;**

– **publish information on the procedure beyond the mandatory publications, for example in the press or on a specially created advertising website (for investments of Euro 2012), on the page of the Ministry of Sport and Tourism or the Ministry of Infrastructure (for infrastructure tasks, such as road construction).**

In the procedure conduct, it seems essential to observe anti-corruption practices which aim at minimising the possible influence of certain persons on the procedure, in a manner which does not comply with the rules. The human being is the weakest link at this stage, that is why it is very important to observe the procedures which aim to support and control the activities of persons appointed to conduct the procedure on behalf of the procuring entity.

Many cases of abuse occur at low cost procurements, reoccurring periodically and being implemented by the same people.

Case:

Each year, the city council conducts public procurement for security services.

The tender procedure is always carried out by Mr X. Basically, his job comes down to the copying of the previous year's specification and the application of the existing terms. However, these specifications contain a provision which indicates that a potential contractor, when evaluating the bids, can get extra scores when they show that they:

– *possess at least 10 vehicles with intervention crews,*
– *the distance from the seat of the contractor to the seat of the city council does not exceed 2 kilometres,*
– *the submitted references will prove at least a three-year experience in the protection of public offices.*

Altogether, on the basis of the above criteria, the bidders can get 30 additional scores – 10 for each criterion.

However, the maximum score is being obtained only by the A company, which has protected the city council for years. The company wins tenders thanks to the maximum score awarded by the commission on the basis of the above criteria as it possesses

10 vehicles, purchased from the local police, parked in the city council's car park, at the company's seat rented from the city council.

Although the wording of article 5 of the Public Procurement Law Act, in the event of security services, allows to determine the evaluation criteria based on the properties of the contractor, they finally eliminate all competing companies from the access to the procurement.

The trouble-free implementation of the contracts put the head of the unit off his guard and he stopped paying attention to the information that Wieslaw was on familiar terms with the head of the A company. He also ignored the fact that other committee members, knowing that they had no influence on the procedure outcome, signed the tender documents without any investigation on the procedure. As they explained to the auditors, they were aware that nothing could be changed, and at least they had peace of mind, did not have to participate in the committee meetings, write letters, think about the questions, etc.

In order to restrict such abuse, it is recommended to:

- **apply the so called rule of two pairs of eyes;**
- **adopt the rule of contacts with bidders exclusively in the seat of the procuring entity to document the meeting with the representatives of the company applying for the public procurement;**
- **define clearly the tasks of the committee members as well as their responsibilities (the rule of individual liability);**
- **define and execute the sanctions applied in the event of the disclosure of anti-corruption practices or other material irregularities.**

The main responsibility for the correctness of the public procurement is borne by the manager of the procuring entity, which is clearly defined in article 18 paragraph 1 of the Public Procurement Law Act. If the manager of the procuring entity is responsible for the preparation and conduct of the public procurement, it is in his own interests to select suitable persons to prepare and conduct the procedure, on the one hand, and to introduce rules in which specific

actions can be attributed to specific persons, on the other hand. Only with solution, which will make it clear who performed a given action and who is responsible for the performance, it will be possible to implement the full wording of article 18 paragraph 2 of the Public Procurement Law Act which indicates the liability for the preparation and conduct of the procurement of the persons to whom the manager of the procuring entity entrusted certain tasks.

Creating a clear internal procedure, the manager of the procuring entity not only fulfils the requirements of the legislature within the scope of the public procurement transparency but also protects himself against the liability for possible errors. At the same time, he protects the public interest by the opportunity to respond to emerging problems and to indicate, remove or punish individuals who break these procedures.

It is recommended to clearly define, in the tender committee regulations, the subordination of the chairperson and the committee members to the manager of the procuring entity in the course of the procedure. To this point, the internal regulations should be detailed with respect to the procedures of public procurement, e.g. by the following form:

Activity	**Authorised/liable persons**
I. The procedure preparation	
1. Selection of the employee preparing the description of the object	→
2. Creation of an application programme	→
3. Evaluation of the procurement value	→
4. Creation of the material and financial schedule	→
5. Drawing up and submission of the application for the launch of the tender procedure	→

II. The procedure conduct	
6. Appointment of the tender committee	→
7. Selection of the public procedure form	→
8. Determination of the SETC	→
9. Drawing up of the contract	→
10. Acceptance of the design works	→
11. Preparation and publicising of the invitation to tender	→
12. Replies to inquiries	→
13. Contact with the contractors	→
14. Acceptance of bids	→
15. Acceptance of bonds	→
16. Bid opening	→
17. Submission of declarations under art. 17 paragraph 2 of the Public Procurement Law Act	→
18. Bid evaluation	→
19. Appeal settlement	→
20. Conclusions on the exclusion of contractors, bid rejection, selection of the most advantageous bid	→
21. Approval of the committee motions	→
22. Approval of the procedure protocol	→
23. Unwinding of bond commitment	→
24. Acceptance of performance bond	→
25. Contract conclusion	→

III. Implementation of the contract	
26. Contract supervision	→
27. Application for the contract amendment	→
28. Approval and acceptance of the contract performance	→
29. Contract settlement	→
30. Calculating contractual damages	→
31. Activities arising from the implementation of the guarantee or warranty	→

III. Public procurement implementation and takeover

A very common mistake made by the procuring institution is acknowledging that the public procurement is completed at the moment of the contract signing, after the procedure settlement and the expiration of the deadlines envisaged for appeal settlement. This often results in omissions within the scope of the supervision and control over the implementation of the awarded procurements. The Public Procurement Law Act refers also to the implementation stage of the awarded procurement. First of all, it is connected with the determination of future liabilities of both parties at the stage of the specification of material terms of the procurement. These liabilities are covered in Title VI of the Public Procurement Law Act, including article 144, which provides for the inviolability of the terms and conditions of public procurement contracts. Entities, which awarded public procurement according to the Public Procurement Law Act, often and in a manner not compliant with article 144, make amendments to the concluded contract in the course of the procurement implementation. Such irregularities are often reported during audits carried out by authorised institutions. At this point, it must be emphasised that in most cases the necessity to amend

a contract does not result from the circumstances justifying such an amendment, but arises from errors made earlier – at the planning stage and implementation of the public procurement.

Case:

The procuring entity called for tenders for a sports hall design. One of the evaluation criteria assigned a 10% weight to the time-limit of the accomplishment. This criterion influenced the selection of the bid of the B company, which was more expensive than the bid of the A company, but it offered the time of accomplishment shorter by 3 months.

Closer to the deadline, the contractor became aware that they were not able to accomplish the works within the time-limit defined in the bid and in the contract which they concluded.

In this situation, the procuring entity agreed to attach an annex, postponing the time-limit by 6 months. They referred to article 144 of the Public Procurement Law Act as the legal grounds, i.e. the necessity to carry out geological surveys, which could not be predicted at the time of the contract conclusion.

In the course of the audit, on the basis of the explanations provided by the competing company's employees in charge, it was settled that the bid proposed by the A company took into consideration the necessity to carry out a geological survey, because it was obvious at the stage of the design preparation, when the procuring entity did not inform of possessing such a survey for the purpose of the tender.

In this case, the mistake was made by the employee of the Investment Department of the procuring entity by not including, in the SETC, the information on the necessity to carry out geological surveys in the bids.

Also the bidder made a mistake because, intending to win the tender, he shortened the time envisaged for design works and did not take into consideration the necessity to carry out a geological survey.

As a result of the agreement between the procuring entity's employees and the contractor, a detrimental to the procuring authority amendment to the contract was made on the basis of false prerequisites. As a result, the design was implemented on less advantageous conditions – with a delay and at a higher cost.

In order to minimise the threats arising from such irregularities, it is recommended to determine uniform and transparent:

- **procedures of amendments to the contracts, in the event of circumstances justifying such amendments;**
- **rules of conduct when accepting the procurement object;**
- **rules of conduct when stating defects of the procurement object.**

The stages of investment supervision and the acceptance of the procurement object create advantageous conditions for corruption. Dishonest investment supervision may lead to the loss of public finance held by the procuring entity. Due to the works nature, the arrangements made by the investment supervision are often difficult or impossible to verify, this is why one should pay particular attention to the contacts between the supervisor and the contractor.

Case:

At the stage of the construction of an expressway, the contractor's laboratory stated that three passages of a total length of 800 metres can be covered with an asphalt substance without the replacement of the road bed. However, upon the agreement with the representative of the company running the investment supervision, an entry was made, stating that the road bed was replaced along the entire road. The investor paid for works which actually were not done.

In order to minimise the threats of an unpermitted agreement between the contractor and the investment supervisor, to the detriment of the procuring entity, it is recommended to:

- **pay due diligence when assigning tasks referring to the investment supervision to independent and impartial individuals or companies;**
- **foster the activities of internal audit, with a special focus on the implementation of each stage of works (according to the schedule).**

Honesty of individuals carrying out the supervision over the investment may have an important impact not only on the quality of works but also on the final value of the contract. Procuring entities

repeatedly make the mistake of relating the compensation for the investment supervision to the investment cost.

Case:

The procuring entity – the W municipality, concluded a contract with the Z company as a substitute developer at a bridge construction. The contract amounted to PLN 220 million. The compensation for the substitute developer, whose task was to supervise the construction, contractors and subcontractors, was determined at the level of 3% of the amount received by the contractors. Such a contract did not motivate the substitute developer to apply an economic approach. The more expensive the construction was, the more the Z company earned, so they included in the costs also the expenses which were not envisaged before. Thus, the substitute developer acknowledged additional costs of expensive expert opinions, extra works resulting in the alterations in designs, which had to be additionally paid. As a result of the conflict of interest between the substitute developer and the procuring entity, the final cost of the investment implementation amounted to PLN 400 million, of which the consideration for the Z company increased from PLN 6.6 million to PLN 12 million.

When determining contractual responsibilities, it is recommended to:

- **conclude contracts on the investment supervision, the content of which guarantees that the conduct of supervisors will comply with the public interest;**
- **include provisions which will motivate the other party to carry out the supervision properly. These may be, among others, additional awards for money saving or shortening of the time of implementation.**

In the public finance sector, the key rule is the implementation of expenses in a purposeful and economic manner, subject to obtaining the best effect of the expenditure. Many administers seem to forget the rule, preferring the implementation of the budget instead.

The relations between the manager of the procuring entity and the chairperson of the tender committee and the committee members

should also be paid attention to. The chairperson of the tender committee should report directly to the manager of the procuring entity, subject to the Public Procurement Law and administrative acts. It is the manager of the procuring entity who appoints the committee, by way of a decision, accepting its composition, but it must be remembered that from the moment of its appointment throughout the entire course of works, the tender committee should not be subjected to the direct supervisor, within this respect. It often happens that the tender committee carrying out the procedure is exposed to undue influence by the direct supervisor who, in turn, wants to perform effectively in the eyes of the manager of the procuring entity.

Case:

The manager of the procuring entity appointed the committee to carry out the public procurement which was one of the biggest and most prestigious procurements in the financial year. The head of the division (not a member of the committee) from which most of the committee members were recruited, intending to perform in the eyes of the manager of the procuring entity, immediately after the appointment of the committee assured the manager that his personnel (the members of the committee) and himself would carry out the procurement confidently and, above all, effectively.

It turned out that the head of the division, due to subordination and the application of the "the end justifies the means" rule, exerted undue influence on the committee chairperson and the committee members, forcing them to take certain decisions, contradictory to the law in force. To this end, he often limited himself to the statement, „the most important goal of our company, which employs you, I'm repeating, which employs you, is the award of the procurement, and not observing all those bureaucratic, often illogical regulations. The director cares about the procurement very much, so do not complicate, get down to work instead; you need to be able to cope; so many people would like to work here…".

In order to obtain better results and minimise the suspicion of procedure manipulation, it is recommended to strictly observe the general rules in force at each stage of the public procurement. i.e.:

- **openness;**
- **fair competition;**
- **equal treatment of entities applying for the public procurement;**
- **elimination of situations indicating the conflict of interests;**
- **elimination of discretion when taking decisions;**
- **responding by the manager of the unit to symptoms of corruption at each stage of the procurement.**

IV. Liability for breach of provisions at public procurement

Liability arising from irregularities in public procurement is divided into two types: disciplinary liability, resulting from e.g. the breach of the discipline of public finance, and penal liability.

1. Liability arising under the Public Procurement Law Act of 29 January 2004 (the consolidated version, Journal of Laws of 2010 no. 113, item 759)

Title VII of the Public Procurement Law Act sets forth the disciplinary liability for the breach of provisions of the Act. This type of liability does not have an individual character, and the decision on the penalty is dependent on the procuring entity.

Under **article 200 paragraph 1** of the Public Procurement Law Act, the procuring entity is subject to penalty when they:

1) award a contract:
   a) infringing upon the provisions of this Act laying down the prerequisites for the application of the individual contract award procedures;
   b) without the required notice;
   c) without applying this Act;
2) modify the concluded contract infringing upon the provisions of this Act.

Moreover, a financial penalty is imposed on the procuring /awarding entity:

1) where the requirements to participate in a contract award procedure as defined by the awarding entity distort fair competition,
2) where the awarding entity describes the object of contract in a way that restricts fair competition,
3) where the awarding entity conducts a contract award procedure in breach of the rule of openness,
4) where the awarding entity fails to comply with the respective time limits fixed for in this Act,
5) where the awarding entity excludes an economic operator from the contract award procedure in breach of the provisions of the Act governing the preconditions for such exclusion,
6) where the awarding entity rejects a tender in breach of the provisions of the Act governing the preconditions for such rejection,
7) where the awarding entity selects the best tender in breach of the provisions of this Act.

The procuring entity who breached article 200 of the Public Procurement Law Act is subject to a financial penalty in the amount of:

1) PLN 3,000 where the contract value is less than the amounts specified in the provisions issued under article 11 paragraph 8,
2) is equal to or exceeds the amounts specified in the provisions issued under article 11,
3) PLN 30,000 – where the contract value is equal to or exceeds the amounts specified in the provisions issued under article 11 paragraph 8, but is less than EUR 10,000,000 for services and supplies and EUR 20,000,000 for works,
4) PLN 150,000 – where the contract value is equal to or exceeds the expressed in PLN equivalent of EUR 10,000,000 for services and supplies and EUR 20,000,000 for works.

The financial penalty is imposed by the President of the Public Procurement Office by way of an administrative decision, which means that the decision should be preceded by administrative proceedings conducted according to the Code of Administrative Proceedings.

2. Liability arising under the Act of 17 December on Liability for the Breach of Public Finance Discipline (Journal of Laws of 2005 no. 14, item 114, as amended)

Penalties imposed for the breach of public finance discipline are not assigned to specific violations. The selection of the type of penalty is at the discretion of the judgment authority.

Under article 31 paragraph 1, the penalties for the breach of public finance discipline are:

1) penalty of admonition – this penalty is inflicted for an unintentional breach of public finance discipline or where the gravity of the breach of public finance discipline is not marked;
2) penalty of serious reprimand;
3) pecuniary penalty – administered in the amount of one to three times the monthly remuneration of the person responsible for violating the public finance discipline – as calculated for the period of annual leave – due in the year in which the breach took place: if it is not possible to determine the amount of remuneration (as in the case of a person performing a function under a contract) – the penalty is imposed in the amount of one to five times the average remuneration;
4) prohibition on performing functions related to the disposal of public funds for the term of one to five years.

Under article 4 of the Act, liable for the breach of public finance discipline are:

1) persons in the composition of an authority implementing the budget or the financial plan of the public finance sector entities or non-public finance sector units receiving public funds or managing the property of these entities;
2) managers of the public finance sector;
3) employees of the public finance sector entities entrusted with specific responsibilities in the field of finance and activities envisaged in the provisions on public procurement;
4) persons in charge of public funds transferred to non-public finance units.

Under article 17 of the Act, the breach of public finance discipline is:

1) the award of public procurement to a contractor who was not selected in the manner set forth in public procurement provisions;
2) the award of public procurement in a manner which breaches public procurement provisions defining:
   a) the prerequisites on the forms of public procurement award: negotiations without the invitation to tender, unrestricted sale or price inquiries;
   b) the obligation to convey or publish the invitation to tender in public procurement;
   c) the obligation to notify the President of the Public Procurement Office;
3) the object or terms of which are defined in a manner which breaches the rules of fair competition;
4) with another than the listed above breach of public procurement provisions if the breach influenced the outcome of the public procurement award;
5) the conclusion of a contract on public procurement:
   a) not in writing;
   b) for a period longer than defined by public procurement provisions or for a non-definite time, excluding the events stated in public procurement provisions;
   c) before the announcement of the decision by the National Appeal Chamber, with the breach of public procurement provisions;
6) the invalidation of public procurement procedure with the breach of public procurement provisions defining the prerequisites authorising to the invalidation of such procedure;
7) the failure to submit, by a committee member or a person participating in the public procurement, on behalf of the procuring entity, declarations required by public procurement provisions;
8) the failure to exclude from the procedure a person subject to such an exclusion under public procurement provisions;
9) an amendment of the contract on public procurement which breaches public procurement provisions;

10) a commission by the manager of a public finance sector entity of breaching the public finance discipline as a result of negligence or omission within the scope of management control.

3. Liability under the Penal Code Act of 6 June 1997 (Journal of Laws of 1997, no. 88, item 553, as amended)

The breach of public procurement law may also result in penal liability.

Typical offences committed in public procurement are those set forth in articles 228 – 231 of the Penal Code. The following conduct is attributed to the offences:

Acceptance of financial or personal advantage set forth in article 228 of the Penal Code.

1) Whoever, in connection with the performance of a public function accepts a financial or personal advantage or a promise of the above, or demands such an advantage is subject to the penalty of deprivation of liberty for a term of between 6 months and 2 years.
2) Whoever, in connection with the performance of a public function accepts a financial or personal advantage or a promise of the above, for a conduct which constitutes the breach of law, is subject to the penalty of deprivation of liberty for a term of between 1 and 10 years. The penalty specified is also imposed on anyone who, in connection with his official capacity, makes the performance of his official duties conditional upon receiving a financial or personal advantage or demands such an advantage.
3) Whoever, in connection with the performance of a public function accepts a financial advantage of considerable value or a promise of such an advantage is subject to the penalty of deprivation of liberty for a term of between 2 and 12 years.
4) Whoever, in connection with the performance of a public function in a foreign country or in an international organisation, accepts a financial or personal advantage or a promise of the above, for a conduct which constitutes the breach of law, is subject to the penalty of deprivation of liberty for a term of between 1 and

10 years. The penalty specified is also imposed on anyone who, in connection with his official capacity, makes the performance of his official duties conditional upon receiving a financial or personal advantage or demands such an advantage.

Providing a financial or personal advantage is specified in article 229 of the Penal Code.

1) Whoever gives a financial or personal advantage or promises to provide it to a person performing public functions is subject to the penalty of deprivation of liberty for a term of between 6 months and 8 years. In the event that the act is of a lesser significance, the perpetrator is subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to two years.
2) *A penalty will not be imposed on the perpetrator of the offence described above if a financial or personal advantage or a promise of the above was accepted by a person performing a public function, and the perpetrator informed about it an authority established for law enforcement purposes and disclosed all essential circumstances of the offence – before the authority found out about the facts.*
3) Whoever gives a financial or personal advantage to a person performing public functions in order to induce him to disregard his official duties or provides such an advantage for disregarding such a duty shall be subject to the penalty of deprivation of liberty for a term of up to 10 years.
4) Whoever provides or promises to provide a financial advantage of considerable value to a person performing a public function is subject to the penalty of deprivation of liberty for a term between 2 and 12 years.
5) Whoever provides or promises to provide a financial or personal advantage to a person performing a public function in a foreign country or in an international organisation – in connection with the performance of the function – is subject to the above penalties.

Intercession in exchange for a financial advantage and intercession related to activities detrimental to the public interest are set forth in articles 230. 230a, 231 of the Penal Code.

1) Whoever, claiming to have influence on a state or local government institution, international organisation or a internal or foreign unit

administering public funds, or eliciting a belief or fostering the belief in the existence of such influence, undertakes to intercede in the settling of a matter in exchange for a financial or personal advantage or for a promise of such an advantage is subject to the penalty of deprivation of liberty for a term of between 6 months and 8 years.

2) Whoever provides or promises to provide a financial or personal advantage in exchange for intercession in the settling of a matter in a state or local government institution, international organisation or a domestic or foreign unit administering public funds, involving undue influence on the decision, omission or negligence of a person performing a public function, in connection with the performance of the function, is subject to the penalty of deprivation of liberty for a term of between 6 months and 8 years. In the event that the act is of a lesser significance, the perpetrator is subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to two years.
3) *A penalty will not be imposed on the perpetrator of the offence described above if a financial or personal advantage or a promise of the above was accepted, and the perpetrator informed about it an authority established for law enforcement purposes and disclosed all essential circumstances of the offence – before the authority found out about the facts.*
4) A public official who, exceeding his authority, or not performing his duty, acts to the detriment of a public or individual interest is subject to the penalty of deprivation of liberty for up to 3 years. If the perpetrator commits the act with the purpose of obtaining a financial or personal advantage, he is subject to the penalty of deprivation of liberty for a term of between 1 and 10 years.

   If the perpetrator acts unintentionally and causes an essential damage, he is subject to a fine, the penalty of restriction of liberty, or deprivation of liberty for up to 2 years.

The obstruction of a public tender is set out in article 305 of the Penal Code.

This offence involves unlawful acting to the detriment of the beneficiary of a public tender, i.e. the organiser of the tender or the

entity on behalf of which the tender was organised, through the violation of its course. This offence may involve:

1) prevention or obstruction of a public tender in order to gain a financial profit;
2) dissemination of false information or withholding of information of significant importance to the contract conclusion;
3) entering into co-operation with another person, to the detriment of the owner of property or a person or institution for which the tender is to be held.

The perpetrator is subject to the penalty of deprivation of liberty for up to 3 years. Moreover, under article 33 § 2 of the Penal Code, the court may additionally impose a fine.

In connection with public procurements, the Penal Code sets out the offences against business transactions, defined in articles 296a § 1 as well as in article 297.

Article 296a sets out the liability of a person performing a public function in an organisational unit:

– Whoever, while performing a public function in an organisational unit dealing with business activities or, due to the performed function or the position, having a significant influence on decisions referring to the activities of such a unit, accepts a financial or personal advantage or a promise of such an advantage in exchange for a conduct which may cause it to suffer considerable financial damage, unfair competition, or inadmissible preferential activities on behalf of the purchaser or the recipient of the goods, services or performance is subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years.
– § 2 of this article stipulates that the perpetrator who, under analogical circumstances, provides or promises to provide a financial or personal advantage is subject to the same penalty.

  However, a penalty will not be imposed on the perpetrator of the offence set forth in § 2 or in relation to this paragraph if a financial or personal advantage or a promise of the above was accepted, and the perpetrator informed about it an authority established for law enforcement purposes and disclosed all essential circumstances of

the offence – before the authority found out about the facts.

– article 297 defines the liability of a person who in order to obtain a public procurement for themselves or for a third party from an authority or an institution administering public funds submits false documents or documents attesting untruth, or dishonest statements regarding circumstances that are of significance to public procurement award is subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years.

The types of disciplinary or penal liability, enumerated above, indicate that the spectrum of irregularities which may occur in the course of public procurement award is very wide.

The expenditure of public finance should always comply with the Public Procurement Law as well as with the principle of legality, appropriateness, reliability and economy.