WARDYŃSKI & PARTNERS

Subcontracting in public procurement

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The amendment of the Public Procurement Law is not perfect, but it may improve the position of subcontractors

An interview with Mirella Lechna, the partner in charge of the Infrastructure & Transport and Public Procurement & Public-Private Partnership practices at Wardyński & Partners, about the recent amendment of the Public Procurement Law concerning subcontractors.

The provisions of the Public Procurement Law in force since 24 December 2013 regulate for the first time ever in Poland the contractual relationships between contractors in public procurement and their subcontractors. How has the market responded to the new rules?

Mirella Lechna: The response to these provisions, introduced by the amending act of 8 November 2013, has not been uniformly positive. During the legislative process, some institutions commenting on the bill complained that it lacked a comprehensive analysis of the issues covered by the amendment and was addressed more to *ad hoc* concerns rather than addressing the procurement system as a whole. Some commentators also took the view that the new rules, which significantly intervene in the legal relationships between parties which are not subject to the rigours of public finance, are inconsistent with the principles of business freedom and freedom of contract.

What new things were introduced by the amendment?

The amendment introduced detailed rules for payment of fees to subcontractors and sub-subcontractors by the contracting authority in situations where they have not received the fee they are owed from the contractor or subcontractor for construction works—in other words, a mechanism of direct payments.

Is this new approach more beneficial for companies participating in performance of contracts as subcontractors?

The impetus for drafting the amendment and the justification for adopting the amending act of 8 November 2013 was that lawmakers had identified a need to regulate issues concerning failure to make timely payment to subcontractors in public procurements and to create a system of guarantees of payment of fees owed to subcontractors. This initiative was spurred by the pathological situation observed in road construction projects. Many contractors had gone bankrupt during the course of implementation of public works projects, while many others sought to avoid

bankruptcy by abandoning the construction site, leaving the subcontractors unpaid.

The drafters of the amendment regarded the existing rules in the Civil Code as insufficient. Under Civil Code Art. 647[1], for many years a principle of joint and several liability has been applied in dealings with contracting authorities, that is, the rule that the investor is responsible for the debts owed to an approved subcontractor just as it would be for its own debt, which gives the subcontractor the right to demand payment from the investor (including by judicial compulsion). In the case of the Public Procurement Law, it is hard to say that the contracting authority is liable for the subcontractor's fee. There is a mechanism for direct payment, but the act does not make the contracting authority jointly and severally liable to the subcontractor. The Public Procurement Law also limits the direct payment to the principal amount—without interest on delay—while the Civil Code provides a right to seek interest as well.

Under the practice of applying Civil Code Art. 647[1] over the course of several years, effective standards have been developed, such as the rule that for the investor to become jointly and severally liable, it is sufficient to consent to conclusion of the subcontract implicitly or after the fact, when the subcontract has already been concluded and the subcontractor has already completed its portion of the project. The vast importance of this rule for protecting the interests of subcontractors is demonstrated by market practice. The failure to obtain prior written approval for hiring a subcontractor or consent to expansion of the scope of its work often results from oversight by the contractor or errors of a formal nature. Even in that case, under the Civil Code, unlike under the Public Procurement Law, the contractors are not deprived of their claims for payment from the contracting authority.

At a certain stage in the legislative process, however, the drafters decided to introduce a provision that the rules in the Public Procurement Law concerning direct payment shall not infringe the rights and obligations of the contracting authority, contractor and subcontractors arising out of Civil Code Art. 647[1].

So how is the relationship between the contracting authority and subcontractors structured now?

Subcontractors of supplies and services may use the mechanism of direct payment from the contracting authority only on the basis of the Public Procurement Law. But in the case of contracts for construction works, subcontractors have two legal grounds available to satisfy claims for the fees owed them. It appears that this may become the source of problems involving a conflict between the regulations—for example concerning the definition of "construction works," because since the beginning of 2013 there has been a separate definition in the Public Procurement Law.

The purpose of the Public Procurement Law is to set forth rules and procedures for awarding public contracts, and primarily to eliminate situations that foster corruption in spending of public money. Is it proper to regulate in this law issues concerning performance of public contracts by subcontractors, which has traditionally been governed by civil law?

During the legislative process it was argued that the essence of the new regulations is not to regulate the terms of the agreements between contractors and subcontractors.

However, at least in the case of contracts for supplies and services, the contractors and subcontractors are required to use written form for all supplies and services which are part of a public procurement, even when this is not required by the Civil Code. These and other requirements imposed on agreements with contractors, limiting the freedom of private parties to frame their civil arrangements, will certainly make it more difficult to negotiate and conclude subcontracts.

However, the lawmakers accepted that the new restrictions introduced at the level of dealings between the contractor and the subcontractor are justified by the special nature of contracts awarded in the public sector. It should be pointed out that although this argument was not included in the justification for the bill, extending control to cover the dealings between contractors and subcontractors is consistent with the trend in EU law.

Under Directive 2014/24/EU of 26 February 2014 (one of a set of new directives superseding the EU's existing procurement directives 2004/18/EC and 2004/17/EC, to be implemented by the member states by 18 April 2016), it is necessary to assure transparency in the chain of subcontractors for the purpose of monitoring who is participating in performance of a public contract. It was also deemed to be essential to have the ability to make direct payments to subcontractors in public procurements, while also providing that the member states are free to adopt more rigorous measures with respect to direct payments to subcontractors.

The definition of subcontracting in public procurement

Anna Prigan, Serom Kim

The Public Procurement Law defines what contracts between parties and concerning what subject matter are regarded as a subcontract, and also provides mechanisms protecting the interests of certain subcontractors.

At the time the Defence Procurement Directive (2009/81/EC) was implemented in Poland, effective 19 February 2013, the definition of a subcontract appeared in Polish law as a contract concluded for the purpose of performing a procurement in the fields of defence and security (Public Procurement Law Art. 131m(2)). Until 24 December 2013 there was no statutory definition of a subcontract in other types of procurements, even though subcontracting is a common practice on the procurement market. Given the importance of subcontracting, which profitably involves a greater number of businesses—typically local ones—in the process of performing public contracts, an attempt was made to regulate subcontracting more thoroughly to better assure proper

performance of procurements. The new regulations provide contracting authorities a mechanism for verifying that subcontractors are properly involved and also to protect the fees of certain subcontractors. But not every entity assisting a contractor in performing a procurement is regarded as a subcontractor for purposes of the Public Procurement Law.

Under Art. 1(1)(9b) of the law, a subcontract is a written agreement, for consideration, involving supplies, services or construction works which are part of a public procurement, concluded between the contractor selected by the contracting authority and another party (the subcontractor), and in the case of procurements for construction works also between a subcontractor and a further subcontractor (sub-sub) or between sub-subs. Under this provision, there are three identifiable features of a subcontract: its written form, the fact that it is for consideration, and the subject matter, i.e. that it involves performance of part of a public procurement.

The subject of a subcontract is supplies, services or construction works which are part of a public procurement. According to decisions issued by the National Appeals Chamber, "part of a procurement" means a distinct fragment of the overall subject of the procurement. Contracts that are only related to the subject of a public procurement but do not involve performance of the procurement—such as contracts for insurance, credit, accounting or legal services—cannot be regarded as subcontracts. Thus subcontracts include only contracts involving performance which can be distinguished in the description of the procurement or furthering the performance of the procurement.

In the case of procurements for construction works, a subcontract (for construction works, supplies or services) may be concluded not only by the contractor. A contract at a further level of the structure for performance of the contract, i.e. between a subcontractor and a sub-sub, is also regarded as a subcontract, which means that it is subject to the regulations and protections provided in the Public Procurement Law. But in procurements for supplies or services, only a subcontract at the top level, between the general contractor and a subcontractor, is regarded as a subcontract.

The Public Procurement Law specifies the instances in which a subcontractor may receive its fee directly from the contracting authority. However, the amended regulations do not modify the issue of the contracting authority's joint and several liability for payment of a subcontractor's fee. As before, this issue should be examined solely under Civil Code Art. 647[1], and thus the contracting authority may be jointly and severally liable with the general contractor for a subcontractor's fee only in the case of a contract for construction works. However, in comparison to the previous rules, the position of subcontractors in procurements for construction works has been strengthened: Now protection is provided not only to subcontractors hired to perform construction works, but also subcontractors providing goods and services in a procurement for construction works, on the condition that the agreement with them was concluded in compliance with the Public Procurement Law.

Subcontracting under the amended Public Procurement Law

Małgorzata Cyrul-Karpińska

The content of a procurement subcontract is shaped not only by the intent of the parties, but also by the Public Procurement Law, the Civil Code, the terms of reference for the procurement, and the actions taken by the contracting authority when approving the subcontract.

Since 24 December 2013, subcontracts in procurements for construction works in Poland have been subject to greater control of the contracting authority than they were before. Stricter control is provided for in the case of subcontracts for construction works and milder control in the case of contracts for supplies or services.

The Public Procurement Law now provides for a two-stage examination of subcontracts for construction works. The manner in which control is exercised is further specified in the terms of reference for the procurement and the contract for construction works concluded between the contracting authority and the general contractor. Under Public Procurement Law Art. 36(2)(11), the contracting authority may include in the terms of reference of a procurement for construction works the requirements for subcontracts for construction works. Failure to meet these requirements will result in assertion of an objection or reservations by the contracting authority. Meanwhile, the contract for construction works concluded between the contracting authority and the general contractor should specify, among other items:

- The contractor's obligation to present to the contracting authority the draft of a subcontract for construction works, as well as draft amendments, and a certified copy of the subcontract for construction works and any amendments
- The deadline for the contracting authority to assert objections or reservations with respect to a draft subcontract for construction works, or amendments
- The contractor's obligation to present to the contracting authority certified copies of subcontracts for supplies and services, and any amendments
- The rules for payment of the contractor's fee, conditioned on presentation of proof of payment of the fees due and payable to subcontractors and sub-subcontractors
- The deadline for payment of the fees of subcontractors and sub-subs, which may not be more than 30 days after submission to the contractor or subcontractor, as the case may be, of the invoice or bill confirming performance of

the supplies, services or construction worked assigned to the subcontractor or sub-sub

- The rules for conclusion of further subcontracts between a subcontractor and sub-subs
- The amount of contractual penalties for a) failure to make timely payment of the fees owed to subcontractors or sub-subs, b) failure to present a draft subcontract for construction works or amendments for approval, c) failure to present a certified copy of a subcontract or amendments, and d) failure to amend a subcontract with respect to the payment deadline.

The two-level control of subcontracts for construction works means that first the draft subcontract is reviewed and then the subcontract as concluded by the contractor, subcontractor or sub-sub. Under Public Procurement Law Art. 143b(1), a contractor, subcontractor or sub-sub intending to enter into a subcontract for construction works must present a draft of the subcontract to the contracting authority, and the subcontractor or sub-sub is required to enclose the general contractor's consent to conclusion of the subcontract under terms consistent with the draft. The contracting authority must assert any reservations with respect to the draft within the period specified in the contract with the general contractor. The reservations may involve the draft's failure to comply with the requirements set forth in the terms of reference, or inclusion of a payment deadline more than 30 days after delivery of an invoice or bill confirming performance of the assigned construction works. Failure to assert reservations by the deadline is deemed to mean approval of the draft by the contracting authority. Then, after conclusion of the subcontract, a copy of the subcontract for construction works, as concluded, must be submitted to the contracting authority. The contracting authority then has the same time specified in the contract with the general contractor to assert its objection to the subcontract, on the same grounds as for reservations with respect to draft subcontracts. Failure to assert an objection by the deadline is deemed to mean approval of the contract.

It should be pointed out that the specific regulations of the Civil Code continue to apply to subcontracts covered by the Public Procurement Law. More specifically, in a subcontract for construction works, the subcontractor's right to demand a guarantee of payment from the contractor may not be limited or excluded (Civil Code Art. 649[5] in connection with Art. 648[2]).

With respect to subcontracts for supplies and services in a procurement for construction works, the Public Procurement Law provides for a one-step control of the subcontract, after it has already been concluded, limited to checking the deadline for paying the subcontractor. The contractor, subcontractor or sub-sub in a procurement for construction works is required to present a certified copy of a subcontract for supplies or services to the contracting authority within 7 days after the subcontract is concluded. This obligation does not apply in the case of subcontracts for a value less than 0.5% of the value of the procurement contract, or subcontracts for which the items were specified by the contracting authority in the terms of reference for the procurement. However, these exclusions from control do not apply to subcontracts for more than PLN 50,000, and the contracting authority may also set a lower value above which subcontracts must be presented. If the payment deadline specified

in the subcontract is more than 30 days after submission of an invoice or bill confirming performance of the assigned supplies or services, the contracting authority shall notify the contractor and require it to amend the contract accordingly or be charged a contractual penalty.

It should be pointed out that requiring such extensive control of subcontracting on the part of the contracting authority is justified by the introduction of the mechanism for direct payment of the subcontractor's fee by the contracting authority in the case of subcontracts which have been approved (in the case of construction works) or validly presented (in the case of supplies and services).

Apart from the legal requirements, the terms of the subcontract should also be consistent with the terms of the principal contract between the contracting authority and the general contractor. This helps assure that the entire project is carried out properly and on schedule.

The treatment of subcontracting issues in terms of reference

Joanna Florecka

The contracting authority may require in the terms of reference that a portion of the procurement be performed personally by the contractor. Absent such restriction, the contractor may assign performance of even the entire contract to a subcontractor.

A public contract in Poland is awarded to a contractor selected in accordance with the requirements of the Public Procurement Law. However, as expressly provided by Art. 36a(1) of the law, the contractor may generally entrust performance of the contract to one or more subcontractors.

Under Art. 36a(2), the contracting authority may require the contractor to personally perform key portions of a contract for construction works or services, or work involving siting and installation under a supply contract. Such reservation must be included in the terms of reference for the procurement.

The contracting authority may require personal performance of the portions of a procurement for construction works or services which are essential for performance of the entirety of the work connected with performance of the contract. It is the contracting authority which decides which portions of the procurement it regards as essential. However, in the case of a supply contract for goods or intangibles, the duty of personal performance is limited to the requirement of personal siting and installation of the goods or intangibles.

A reservation of personal performance will not be effective, however, against a contractor which relies on the capacity of other entities in order to meet the conditions for participation in the contract award procedure. In that case, in areas where the contractor has relied on the capacity of third parties to meet the conditions for participation in the procedure it will be able to entrust performance of the contract to them even for the tasks reserved for personal performance by the contractor.

The contracting authority may require the contractor to indicate which portions of the contract it intends to entrust to a subcontractor. It may also require the contractor to identify the subcontractors whose capacity it is relying on to meet the conditions for participation in the procedure for award of the public contract. If the contractor was required to identify the subcontractors but failed to identify any subcontractors, it may generally be assumed that the contractor has undertaken to perform the contract itself.

Subsequent conclusion of a subcontract could be regarded as a material modification of the procurement contract, and it is prohibited to make a material modification as compared to the offer on the basis of which the contractor was selected, unless the contracting authority admitted this possibility in the contract notice or the terms of reference. It should be pointed out, however, that if the contractor independently met the conditions for participation in the procedure and later entrusted performance of a portion of the contract to a subcontractor in an area which was not reserved to personal performance by the contractor, the situation could be regarded as a non-material modification.

Under the Public Procurement Law, if the contracting authority does not exercise its right under Art. 36a(2) to require personal performance, the contractor may entrust performance of the entire contract to another entity. This is supported by the reading of Art. 36a. Since a contractor may entrust performance of the contract to a subcontractor, and in this case the contracting authority has not exercised the right to require personal performance of essential tasks by the contractor, then it follows that the contractor has the right to entrust performance of even the entirety of the contract to a subcontractor. The Public Procurement Office also took this position in an opinion issued on 20 January 2014.

In the case of a procurement for construction works, the contracting authority may specify in the terms of reference the requirements concerning subcontracts involving construction works. However, in the case of subcontracts for supplies or services, the contracting authority may specify in the terms of reference which subcontracts need not be submitted to the contracting authority in light of their subject matter or value.

Subcontracting and reliance on third-party resources

Hanna Drynkorn

Independent performance of a complex procurement by a single contractor is not always possible. In order to meet the conditions for participation in the procurement procedure, a contractor may involve subcontractors or rely on the capacity of third parties.

Under Art. 26(2b) of Poland's Public Procurement Law, a contractor may rely on the knowledge, experience, technical potential, personnel capable of performing the contract, or financial abilities of other entities, regardless of the legal nature of their relations. This rule, implementing provisions of the EU's procurement directives—the Classic Directive (2004/18/EC) and the Utilities Directive (2004/17/EC)—was designed to increase competitiveness by opening up the market for public contracts to smaller contractors and reducing the cost of seeking contract awards.

This approach does not require capital or organisational ties between the contractor and the other entity which has committed its resources, but nonetheless enables the contractor to rely on resources of another operator in order to perform the contract.

An entity lending its capacity is not always a subcontractor

It should be stressed that a third party may commit its resources without taking part in performance of the contract. This is the most important feature distinguishing this institution from subcontracting, in which performance of a portion of the contract is entrusted to the subcontractor (Art. 36a), implying that the operator presented as a subcontractor must actually perform that portion of the contract.

In a decision issued on 9 July 2010 (Case No. KIO 1265/10), the National Appeals Chamber held that Art. 26(2b) "in no way supports the view that the third party in that situation will be required to personally perform all of part of the contract for the general contractor as a subcontractor. … Commitment of knowledge and experience in this respect may thus occur through actual subcontracting, or by the possibility of sharing the experience acquired by the enterprise when the contract is being performed through consultation or advice, as in that form there is also the practical possibility of drawing on the knowledge and experience of the other entity when performing the contract."

In the more recent ruling of 6 June 2013 (Case No. KIO 1201/13), the National Appeals Chamber held, "Commitment by another entity of its resources of knowledge and experience must be combined with the requirement that such entity participate in performance of the contract, but that participation may take any form: not only subcontracting, but also advice, consultation or other form of substantive support."

Various forms of participation in performance of the contract

A commitment of resources under Art. 26(2b) of the Public Procurement Law may take the form of subcontracting, but does not have to. Among the resources that may be shared with the contractor, there are many that do not require the third party to participate in performing the contract. In such situation the third party will not be a subcontractor, but its resources will enable the contractor to meet the conditions for participating in the procedure and properly perform the contract if its offer is chosen.

The cooperation with the third party may take such form as advice, consultation or training, or—as indicated in the ruling of the National Appeals Chamber of 23 July 2010 (Case Nos. KIO 1448/10, 1450/10 and 1451/10)—any form of providing knowhow, e.g. technical schemata for equipment, documentation of technological processes, servicing documentation, computer programming, integrated circuits, or quality management systems. But considering that the commitment of resources must be real, in some instances subcontracting is the only feasible form for sharing the capability to perform a public contract.

Proof of access to resources

Reliance on the resources of a third party requires the contractor to prove to the contracting authority that it will have the resources at its disposal necessary to perform the contract. To this end, it may present a written commitment by third parties that they will make the necessary resources available to the contractor for the period needed to perform the contract (Public Procurement Law Art. 26(2b)). Such written commitment is indicated in the law only as an example. The availability of the resources of a third party could thus be demonstrated in some other way as well, e.g. by presenting a contract between the contractor and the third party.

The freedom to use the resources of another entity to meet the conditions for participating in the procedure is limited by the requirement to prove that the contractor will have real access to the resources. The documents demonstrating the commitment to provide the resources are evaluated on a case-by-case basis, in light of the nature of the specific procurement. It is stressed, however, that the document demonstrating the third party's commitment of its resources must expressly and unequivocally show the third party's intention to provide the appropriate resources to the contractor, identified precisely by type and quantity, and not in a general manner such as a statement that it will provide to the contractor "the resources necessary to perform the contract."

Contracting authority's limitation on subcontracting does not apply to a commitment of resources

The clear distinction between a commitment of resources of a third party and subcontracting was also stressed in the amendment in force since 24 December 2013. Under Public Procurement Law Art. 36a(3), a reservation of personal performance of the contract is not effective in an area in which the contractor relies on the resources of another entity, under the rules set forth in Art. 26(2b), in order to demonstrate fulfilment of the conditions referred to in Art. 22(1). Therefore, although the contracting authority may limit the permissible scope of subcontracting in the terms of reference, it may not thereby limit the ability to rely on the resources of third parties to show fulfilment of the conditions for participating in the procedure.

In other words, a requirement by the contracting authority in the terms of reference under Art. 36a(1) that the contractor personally perform key portions of a contract for construction works or services, or work involving siting and installation under a supply contract, will not apply with respect to an entity committing its resources under the rules set forth in Art. 26(2b).

Contracts for construction works performed using subcontractors: Specific rules for settlement of fees

Natalia Rutkowska

Conditioning payment to the general contractor on prior payment of the subcontractors' fees and the ability for subcontractors to obtain direct payment from the contracting authority are methods used in the Public Procurement Law to protect subcontractors against dishonest general contractors.

Prior to 24 December 2013, when amendments to Poland's Public Procurement Law went into effect, the method of setting the fee in the case of contracts for construction works between the contracting authority, the general contractor and subcontractors was governed by general rules, including Civil Code Art. 647^1 §5. The contracting authority and the general contractor were jointly and severally liable for payment of the fee for construction works performed by a subcontractor whose subcontract had been

approved by the contracting authority. Thus if the general contractor failed to pay the subcontractor its fee, the subcontractor could demand payment not only from the general contractor, but also from the contracting authority.

This solution proved insufficient for Polish lawmakers. Too often payments were made between general contractors and subcontractors late or not at all. This in turn translated into a worsening in the financial situation of entities involved in carry out construction projects and a growing unwillingness to take on such work due to a high risk of loss of financial liquidity.

Thus in order to provide stronger protection to subcontractors, the Parliament enacted Art. 143a and Art. 143c of the Public Procurement Law. This protection extends to all subcontractors working for general contractors carrying out construction works contracts, whether the subcontract is for construction works or for supplies or services. The new rules also apply to contracts at the further level, between a subcontractor and a sub-subcontractor.

Art. 143a requires the contracting authority to pay the fee to the general contractor only after the general contractor presents proof of payment of the fees due to subcontractors and any sub-subs taking part in performing construction works presented for acceptance. The situation is similar when the contractor is to receive the entire payment from the contracting authority only after completion of the works. In that situation, the contractor will receive an advance only upon presentation of proof of settlement with the subcontractors and sub-subs.

Moreover, if the general contractor's fee is payable in instalments, the contracting authority has a right to withhold up to 10% of the general contractor's fee for the final instalment of the fee. In this way, the contracting authority can assure that it has funds available to pay subcontractors and sub-subs if the general contractor carrying out the construction works has not lived up to this obligation. The percentage amount of the final instalment must be expressly stated in the terms of reference for the procurement.

Payment of the fee or advance may be withheld only if the contractor does not comply with its financial obligations toward subcontractors for construction works when the subcontract has been approved by the contracting authority, and subcontractors for supplies or services when the subcontract has been presented to the contracting authority.

The contracting authority will required to pay the subcontractor only when its fee has become due and payable and the subcontract for construction works was approved by the contracting authority or the subcontract for supplies or services was presented to the contracting authority. Moreover, the contracting authority will pay the fee only for amounts that arose after approval or presentation of the subcontract. Because payment of the fee directly by the contracting authority is the consequence of circumstances for which the contracting authority is not responsible, it is not required to pay the subcontractor interest for the general contractor's delay or any other amounts which the general contractor may have been required to pay to the subcontractor.

Before the contracting authority makes a direct payment, it should inquire of the general contractor whether the demand by the subcontractor is justified. If the general contractor shows that the subcontractor is not entitled to the fee (e.g. because it is not yet

due and payable), the contracting authority is not required to make the payment. If there are justified doubts whether the direct payment is justified, the contracting authority will be entitled to deposit with the court an amount to cover the subcontractor's fee.

An immediate consequence of this regulation for the general contractor carrying out a procurement for construction works and failing to make timely payment to subcontractors will be a corresponding reduction in the fee paid to the general contractor by the contracting authority—whether the general contractor seeks payment of the fee or an advance without having settled amounts owed to subcontractors, or the contracting authority has paid the subcontractors directly. Moreover, timely payment of the subcontractors' fees by the general contractor is encouraged by a sanction in the form of a new grounds for renunciation of a public procurement contract under Art. 143c(7) of the Public Procurement Law. If the contracting authority is repeatedly forced to make direct payments to subcontractors and sub-subs, and the amount of the payments exceeds 5% of the value of the procurement, the contracting authority may renounce the contract with the general contractor.

Both Art. 143a and Art. 143c reinforce the position of subcontractors and sub-subcontractors taking part in performance of construction works. It should be stressed that introduction of these provisions has not resulted in amendment or repeal of the rules concerning subcontracts set forth in Civil Code Art. 647[1].

A change in subcontractors announced during a public tender

Anna Prigan

The contracting authority may require the contractor to identify its subcontractors in its offer. Then if the contractor wants to release the subcontractor or use a different subcontractor, it must assure that the conditions for participating in the proceeding are still met to an equal degree.

Under Art. 36b(2) of Poland's Public Procurement Law, a contractor who relies on the resources of another entity to demonstrate fulfilment of the conditions for participation in the procurement procedure may give up the use of that entity as a subcontractor only if it assures that the new subcontractor or the general contractor by itself meets the same conditions to no less a degree than was required during the procedure for award of the contract.

The rule is that a contractor which does not independently meet the conditions for participation in a procurement procedure may rely on the knowledge, experience, technical potential, personnel capable of performing the contract, or financial abilities of other entities regardless of the legal nature of their relations (Public Procurement Law Art. 26(2b)). A contractor which does not itself have all these necessary resources may participate in a tender on the assumption that it will use a subcontractor which has the missing potential, such as the knowledge and experience required by the contracting authority.

Under the regulations in force since 24 December 2013, the contracting authority may specify in the terms of reference for the procurement that a contractor must provide the names of the entities lending it their resources. Use of third parties to fulfil the conditions for participation in the procedure should be done on the assumption that the contractor will actually use the potential indicated in the offer at the stage of contract performance. It would be erroneous to assume that the potential indicated in the offer will not actually be used during contract performance. While reliance on the potential of another operator does not necessarily mean that it will be hired as a subcontractor, in some situations subcontracting is the only feasible form for providing the resources needed to perform a public contract.

As a rule, a subcontractor identified in an offer may be replaced by another subcontractor even after the contract is awarded. But if the replaced subcontractor's attributes were such that they enabled the general contractor's offer to be selected (as an offer that met the conditions for participation in the procedure), then it should be assured that if the new subcontractor had been identified in the offer instead of the original subcontractor, the general contractor would also have met the conditions for participation in the procedure.

The new subcontractor need not have exactly the same qualifications as the original subcontractor. More specifically, if the replaced subcontractor met the specified criteria to a degree higher than required, it is sufficient that the new subcontractor meet the criteria at the minimum level. This is because the potential of a third party may be used only to meet the minimal criteria for participation in the procedure. Such borrowed capacity may not be used by the contractor to obtain a higher position in the ranking of offers, because contractors may be awarded additional points only for their own capacity.

With respect to the time as of which the new subcontractor must meet the criteria of the replaced subcontractor, it is sufficient if this is the case on the date when the change in subcontractors occurs. The current regulations do not support a requirement that the new capacity offered to the contractor by the new subcontractor had to be available to the new subcontractor at the time the contractor filed its offer. Art. 36b(2) refers not only to the possibility of replacing a subcontractor with another subcontractor, but also to the possibility of the general contractor releasing the subcontractor and performing by itself the portion of the contract originally assigned to the subcontractor. This provision indicates that the contractor may take on independent performance of the portion of the contract which was to be performed by the subcontractor lending it its potential, if the contractor is now in a position on its own to meet the conditions for participation in the procedure specified in the terms of reference (previously met by relying on the

subcontractor). Because reliance on resources of a subcontractor at the stage of the offer is always tied to the contractor's inability to meet the conditions for participating in the procedure on its own, it follows that the contractor could gain the ability to meet the conditions on its own only subsequently, after the date for submission of offers.

Consequently, as the contractor may release a subcontractor because the contractor itself obtained the relevant attributes (knowledge, experience, and technical, human or financial resources) some time after submission of the successful offer, so also may a subcontractor be replaced by another subcontractor which at the time of consideration of the general contractor's offer would not have assured the general contractor's compliance with the conditions for participation, but at the time it becomes a subcontractor does have the capacity required by the contracting authority.

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