

# **Public Procurement of infrastructure projects and energy projects**

## **Organising Commissions: International Business Law and Environmental/Energy Law**

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### **National Report of Poland**

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## **Public Procurement of infrastructure projects and energy projects**

**What is the legal framework on public procurement in your country governing public purchases of energy projects and large-scale infrastructure projects? Are the relevant rules to be found in a broad public procurement package or are they found in separate legislation? Are there relevant thresholds obliging to apply public procurement rules to such projects? Are there any exemptions from the application of the public procurement rules provided for in the legislation for such projects?**

The essential legal act which governs public procurement in the area of energy projects and large-scale infrastructure projects is the Public Procurement Law Act of 29 January 2004 r. (hereinafter referred to as the “**PPL**”) with accompanying implementing (executive) acts issued pursuant thereto. The PPL provides for a comprehensive legislative package which is applied to the overwhelming part of public contracts in the scope of energy and infrastructure projects. There are also other legal acts that are applied only to specific projects designed as concession contracts (the Act on Works and Service Concession of 9 January 2009 – “**AWSC**”) or performed in a public private partnership formula (the Public Private Partnership Act of 19 December 2008).

In general, a financial threshold (contract value) that imposes an obligation to apply PPL provisions amounts to 30.000 euro. However, utility companies (i.e. energy sector) are obliged to apply PPL provisions only if the contract value equals or exceeds EU thresholds i.e. 414.000 euro in case of supplies and services or 5.186.000 euro in case of works. Below that thresholds utility companies conduct contract award procedures pursuant to their internal purchasing regulations. There are no relevant thresholds set forth in respect of works and service concessions, therefore every concession contract must be awarded pursuant to AWSC provisions.

The abovementioned acts does not provide for specific exemptions designed for energy and infrastructure projects. However, there are several exemptions that allow contracting entities to avoid applying PPL regulations, which basically implement relevant provisions of the EU procurement directives (for instance: exemptions for real-estate transfer, labor contracts, certain financial services etc.)

**Is this legal framework based on international agreements and commitments, like the EU Directives?**

Yes, the abovementioned acts are the result of implementing EU procurement directives to the Polish legal system, particularly Directive 2004/18/EC (“**the Classic Directive**”) and Directive 2004/17/EC (“**the Utilities Directive**”). Poland is also a party to the Government Procurement Agreement.

**If based on international agreements and commitments, have your country added any specific procedures and tools to the national legislation directed to the procurement of energy projects and large-scale infrastructure projects?**

The scope of public procurement legal framework generally corresponds with EU directive requirements. However, in respect of some “priority” investments which are considered as essential to ensure energy security of the state, the legislator decided to adopt special acts, which to some extent modify rules governing public procurement procedures associated to such investments. The examples of such dedicated legal acts are the Act of 29 June 2011 on preparation and implementation of investments in nuclear power facilities and associated investments or the Act of 24 April 2009 on investments related to the terminal for liquid natural gas in Świnoujście.

**Which, if any, is the procurement procedure envisaged in the legal framework for the procurement of energy projects and large-scale infrastructure projects? What is the most commonly used procurement procedure within the legal framework for the procurement of energy projects and large-scale infrastructure projects? Are conditions for use of various procurement methods clearly established?**

There is no specific contract award procedure dedicated to energy and infrastructure projects. Selection of the procedure lays at the discretion of the contracting entity and should basically be determined by specifics of the project in question. In general, the most widely used procedure in Poland is open tender, which is applied to award approximately 84% of public contracts. However, in case of large energy and infrastructure projects it is also very common to conduct competitive dialogues (mostly in PPP projects) or negotiations with a public notice, which allows for more flexibility and contractor’s influence on essential terms of the contract, which is often a matter of importance in large and complicated investments.

Open tender and limited tender are considered “basic procedures” meaning that applying them does not require any additional legal prerequisites to be fulfilled by the contracting entity. Furthermore, negotiations with a public notice are considered “basic procedure” for utility companies (f.e. energy sector), which are subject to Directive 2004/17/EC. Using other procedures is limited to specific circumstances provided for in the law, which must be fulfilled and evidenced by the contracting entity (for instance: competitive dialogue may be used provided that it is impossible to describe the subject of the contract due to its particularly complex nature).

**What are the award criteria (in public procurement procedures) most commonly used for energy and large-scale infrastructure projects? Are the Lowest price or the most economically advantageous tender most common? Are circumstances related to quality, time and output evaluated?**

Statistics show that the lowest price criterion is generally the most widely used award criterion in Poland, responsible for selection of most advantageous tenders in approximately 92% of conducted procedures. There is no relevant statistical research carried out exclusively in respect of large energy and infrastructure projects, yet in practice contracting entities very rarely limit the award criteria exclusively to the price criterion and hence the “MEAT” criterion is dominant. Especially in energy investments it is common to award points for quality (technical parameters, cost efficiency), warranty period or time required to complete the investment.

**Do the public procurement rules regulate relations between the investor, the contractors and subcontractors?**

Yes, the PPL regulates some areas of relations between the contracting entity, the contractor and subcontractors. Some of these provisions are considered peremptory norms which means they can not be overridden by provisions of a public contract. The example of such regulation is joint and several liability of consortium members towards the contracting entity (Art. 141 of the PPL). After the latest amendment (which entered into force on 24 December 2013), PPL also contains comprehensive regulations dedicated to subcontractors, with a specific emphasis on strengthening the contracting entity’s supervision over contractual relations between the contractor and its subcontractors, particularly securing subcontractors’ claims towards the contractor.

**Are there works concession procedures used for the procurement of energy projects and large-scale infrastructure projects? And if so, are there one or several specific procurement procedures envisaged for this in your national legislation?**

Works concession procedures are rarely used for the procurement of energy projects. It is also quite uncommon to apply a concession scheme to other large-scale infrastructure projects. Contract award procedures for concessions contracts are set forth in AWCS (see pt. ... above) and are generally less cumbersome and more flexible than standard PPL procedures.

**According to your experience, how often do foreign bidders participate in award procedures related to energy projects and large-scale infrastructure projects in your country?**

We observe a significant presence of foreign bidders in contract award procedures for energy projects and large-scale infrastructure projects. Foreign contractors often form a multilateral consortia with their Polish subsidiaries and other foreign companies. The market of energy investments seems to be highly competitive, with participation of companies not only from all EU member states but also e.g. USA, Canada, China, South Korea or Japan.

**Are the model contracts for the construction works commonly used (at national as well as international level), (like the FIDIC Books). If so, what are the most commonly used model contracts for the procurement of energy projects and large-scale infrastructure projects? Are the model contracts specifically designed for public procurement?**

For large-scale infrastructure projects contracting entities commonly use FIDIC template contracts (FIDIC Red and FIDIC Yellow). However, these model contracts are not specifically designed for Polish public procurement proceedings and usually they are significantly modified by contracting entities. Template contracts are not commonly used in energy sector – contracting entities usually draft contract provisions designed for a specific project, yet they are often very similar to FIDIC books.

Furthermore, on March 2014 Polish Public Procurement Office published “A model contract for construction works on linear structures with a cost-estimated remuneration”. Applying it is not mandatory for contracting entities and at the moment it is rather difficult to assess how commonly this template contract will be used in tenders. The Public Procurement Office is also expected to issue further template construction contracts in the forthcoming months.

**Please briefly describe the how do the model contracts regulate the contractual liability of the contractor Are the models of liability similar to those applied in case of Turn-Key Contracts, design-build contracts or build contracts (where the design is provided by the procuring entity) commonly used?**

Generally the only model contracts commonly used in infrastructure projects in Poland are FIDIC books. However, contracting entities usually significantly modify or strike off model provisions regarding contractual liability of the contractor and replace them with rules relatively similar to Polish Civil Code provisions, pursuant to which the main obligations of the contractor are to construct the investment in accordance with the design and general technical know-how and to hand it over to the investor, whereas the investor is bound to provide the design, takeover the investment and pay the remuneration. Both parties are required to cooperate in performance of the construction contract.

It is however admissible, and an often practice, that the obligation to prepare the design (as well as other extra obligations, such as running a start-up) is contractually entrusted to the contractor, who is free to design the investment it sees fit, as long as it fulfills the basic requirements of the investor. In such case the liability for proper performance of the investment (meaning fulfillment of the basic specifications provided by the investor) is to a great extent shifted to the contractor, in result of which he loses a defense that a potential damage was caused by a faulty design or a design that is impossible to perform.

In general terms, the contracting entity is free to allocate liability of the parties contractually, also by means of using the model contracts or redrafting them to suit the needs of a particular investment. The only statutory limitation is that it is impossible to exclude liability for a damage caused by willful neglect.

Furthermore it is worth noting that the Polish Civil Code provides for statutory warranty rights for the investor. The conditions of warranty may be freely modified by the parties in the contract, however if the parties fail to do so, and contractor's performance is defective, the contracting entity may:

- claim for the defects to be removed
- withdraw from the contract if material defects cannot be repaired
- claim reduction of the remuneration (in case of non-material defects that cannot be removed).

Rights under the guarantee expire after 1 year for physical defects generally, and after 3 years for physical defects of buildings, counting from the day of handover.

**To what extent are external lawyers engaged to draft, or otherwise involved, contract notices and/or contract documents in the case of procurement of energy projects and large-scale infrastructure projects?**

In case of large infrastructure and energy projects, external lawyers are frequently hired by contracting entities to give comprehensive legal advice at each stage of the contract award procedure. Such advisory services include among others drafting and verifying tender documentation (contract notice, specification, template contract) and representing the contracting entity in appeal proceedings before the National Chamber of Appeal and common courts, if a contractor challenges the contracting entity's decision.

**Is it, in your country, common to appeal against award decisions related to procurement of energy projects and large-scale infrastructure projects? What is**

**the authority relevant to recognize the appeal (common court, arbitration court, other)?**

The authority responsible for recognizing appeals against contracting entities decisions is the National Chamber of Appeal (hereinafter referred to as the “NCA”) seated in Warsaw. It is a *quasi*-judicial body (in many ways similar to an arbitration court), composed of arbitrators (mostly persons with a degree in law) appointed by the Prime Minister. The NCA is empowered to nullify unlawful acts of the contracting entity and order them to be repeated. Parties are entitled to question the NCA’s judgment by means of a complaint lodged with a district court, which may result in such judgment being set aside.

The NCA recognizes approximately 3.000 appeals per year. Due to relatively low costs of appeal proceedings before the NCA, appeals in large-scale infrastructure and energy projects are filed fairly often. Especially in multistage procedures (limited tender, negotiation with a public notice) this could have an adverse impact on time-effectiveness of the tender, since the contracting entity’s decision might be challenged by several milestone points (contract notice, qualification of candidates, disclosure of specification, selection of the most advantageous bid).

**From your experience – what would you indicate as the most problematic issue while awarding public procurement for such projects and on the other hand what would you call the biggest achievement/improvement made of the legislation implemented during last years for such projects.**

The most problematic issue of Polish public procurement law lays in its excessive formality, especially in respect of numerous documents required from contractors in order to apply for a contract award. The rules on supplementing incorrect or missing documents are also very strict, what frequently results in eliminating potentially advantageous bids for purely formal reasons. It is particularly cumbersome and dangerous for foreign contractors.

It seems that the most problematic issue for contracting entities is lack of clear rules regarding amendments to public contracts. It is often difficult to determine whether or not a contract modification is allowable, especially when it comes to introduce complex modifications of a technical nature.

On the other hand, one should say that the biggest achievement of last few years lies in improving efficiency and quickness of appeal proceedings before the NCA – the judgment is usually issued after 2-3 weeks since an appeal had been lodged.

**What are the most commonly used/provided by the public procurement laws instruments for securing of the performance of the contracts?**



In order to secure due performance of a public contract, a contracting entity may require from a contractor to submit a performance bond (usually a bank guarantee or an insurance guarantee). The value of a performance bond shall be between 2% and 10% of the total price quoted in a bid or of the maximum nominal value of the contracting entity's contractual liability. Contractual instruments such as liquidated damages are also commonly used to secure due performance of the contract.

**Is it possible to sign the contract for the procurement of energy projects and large-scale infrastructure projects in other than national language?**

One of the languages of the contract should be always Polish. Therefore it is not possible to draft and sign a contract exclusively as an English-only version. However, bilingual contracts (e.g. Polish-English) are also allowable, yet they are rather rarely used in practice.

**Is there a legal or regulatory requirement for public disclosure of the information related to the award procedure?**

Yes, according to the principle of transparency of contract award procedures, public contracts and tender documentation are publicly disclosed. Every interested person may demand access to the protocol of the procedure, bids and requests submitted by contractor, contracting entity's decisions etc. The only significant exception from this principle is constituted by information classified as trade secrets, provided that such reservation was made by a contractor on submitted documents.