INSTITUTIONS FULFILLING THE FUNCTION OF A CENTRAL CONTRACTING BODY IN PUBLIC PROCUREMENT LAW

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1. INTRODUCTION

First of all, to organise the issue to be discussed, it should be pointed out that a central contracting body in the Polish system of public procurement is interpreted as an extremely broad term. One can distinguish a central contracting body in a precise sense, which is defined in the Act of 29 January 2004: Public procurement law,[1] but the ministerial central contracting bodies are also distinguished, who can act in particular sectors of government administration. A central contracting body, however, can also represent contracting bodies in territorial self-governments. In addition, the use of this legal institution is regulated at the national as well as cross-border level. The article presents all procurement aspects concerning a central contracting body available in the Polish Public procurement law system.

The above-mentioned legal institution lets contracting bodies aggregate contracts. It is one of the basic results obtained through the use a central contracting body in order to carry out proceedings concerning public procurement. It is worth explaining in this context that the term "aggregate" has not been unambiguously defined in PPL. There is a lack of whatever definition in the legal jargon, however, in legal literature, the term is most often used with reference to the establishment of the value of a contract before the initiation of given proceedings.[2] In my opinion, there

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1 Journal of Laws [Dz.U.] of 2017, item 1579, uniform text, as amended; hereinafter: PPL.

2 Compare, M. Stachowiak, [in:] M. Stachowiak, J. Jerzykowski, W. Dzierżanowski, *Komentarz do ustawy Prawo zamówień publicznych*, Warsaw 2014, 6th edition, p. 261; also compare, A. Sołtysińska's discussion concerning the value of contracts, [in:] M. Lemke (ed.) et al., *Wprowadzenie w zamówienia publiczne w Unii Europejskiej. Sektor użyteczności publicznej*, Urząd Zamówień Publicznych 2000, pp. 42–43.

are no contraindications against referring this term also to legal institutions that serve contracting bodies to award a joint contract within single proceedings. This concerns legal instruments allowing both one contracting authority to aggregate individual orders within proceedings (e.g. with the use of a framework agreement) and to award a joint contract in many institutions within given procurement proceedings. In the latter case, aggregating can take place especially through direct participation of many entities in the process or with the use of a central contracting body.

A central contracting body was introduced to the currently binding PPL by an amendment of 7 April 2006.[3] Originally, the term "central contracting body" was not defined in the legal jargon.[4] However, it was indicated that in accordance with Article 15a(1) PPL, this entity may prepare and carry out procurement proceedings, place orders and conclude framework agreements for the needs of contracting bodies of public administration. According to the justification for the Bill amending PPL, the provisions concerning a central contracting body are also included, apart from the necessity to adjust Polish law to the European Union regulations, to increase competitiveness and improve the purchasing process.[5] The introduction of this legal instrument to Polish legislation was connected with the requirement to implement the provisions of Directive 2004/18/EC.[6] It also aimed at enabling contracting parties to make a purchase with the use of the "returns to scale"[7] and awarding contracts representing a specified level of standardisation.

Many advantages of centralised purchasing procedures, i.e. awarding contracts by a central contracting body in particular, are listed in literature. In this context, it is indicated that there is an opportunity to obtain a better price, increase the volume of a contract, decrease the cost of procurement proceedings, obtain a better product and lower legal risk.[8] The intention to obtain these benefits makes procurement proceedings conducted by a central contracting body result in the increase in the value of a contract, and this leads to aggregation.

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[3] Act of 7 April 2006 amending the Act: Public procurement law and the Act on liability for infringing public finance discipline, Journal of Laws [Dz.U.] of 2006, No. 79, item 551.

[4] There were attempts to define the term, especially in case law; compare, the ruling of the District Court in Warsaw, V Civil Appellate Department, of 19 March 2013, V Ca 3341/12, Legalis No. 1327506.

[5] Compare, justification for the Bill amending the Act of 7 April 2006, available at: http://orka.sejm.gov.pl/Druki5ka.nsf/wgdruku/127.

[6] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134 of 30.04.2004.

[7] In the context of public procurement, returns to scale means in particular benefits resulting from the decrease in costs of the proceedings thanks to summing the values of contracts within single proceedings and benefits from the possibility of obtaining lower prices because of the extended scope of an order.

[8] Compare, J. Pawelec, *Dyrektywa 2014/24/UE w sprawie zamówień publicznych. Komentarz, art. 37*, Legalis; and: OECD (2011), *Centralised Purchasing Systems in the European Union*, SIGMA Papers, No. 47, OECD Publishing.

By the way, it can be pointed out that even based on the former Act of 10 June 1994 on public procurement, there was an opportunity to carry out proceedings with the use of an entity similar to the institution being discussed.[9]

The amendment to the Act on public procurement of 22 June 2016[10] introduced fundamental changes in the provisions concerning a central contracting body, which resulted from the necessity to transpose Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement (referred to as new classical directive)[11] to the Polish legal system. The EU legal act introduced broad modification to the possibility of using various legal instruments by contracting entities (including a central purchasing body) serving aggregation of contracts within single proceedings. On the one hand, in general, the purpose of using them has not changed. The basic reason for awarding aggregated contracts still concerns economic benefits. On the other hand, what is interesting is the fact that the increase in micro, small and medium-sized enterprises' (SMEs) access to the public procurement market is one of the main tasks to be achieved by public procurement law in the individual EU Member States.[12] According to many findings resulting from research conducted in recent years, SMEs' share in the public procurement market is decreasing along with the increase in the value of a contract, which results from its aggregation.[13] Therefore, wider use of a central purchasing body to award contracts may undoubtedly cause a decrease in this group of contractors' accessibility to a given contract.

As early as in the course of work on the new classical directive, the European Commission emphasised that "the aggregation and centralisation of purchases should be carefully monitored in order to avoid excessive concentration of purchasing power and collusion, and to preserve transparency and competition, as well as market access opportunities for small and medium-sized enterprises".[14] The thesis demonstrates, in my opinion, that the issue is quite important and should not be underestimated by competent public administration bodies.

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[9] Compare, Article 5 Act of 10 June 1994 on public procurement, Journal of Laws [Dz.U.] of 2002, No. 72, item 664, as amended.

[10] Act of 22 June 2016 amending the Act: Public procurement law and some other acts, Journal of Laws [Dz.U.] of 2016, item 1020.

[11] OJ L 94 of 28.03.2014.

[12] Compare, objective (2) of the Preamble to the new classical directive. For the sake of explanation, it is necessary to additionally indicate that the category of micro, small and medium-sized enterprises (SMEs) includes businesses employing up to 250 workers with annual turnover of up to EUR 50 million and/or with annual balance sheet total not exceeding EUR 43 million, including small businesses employing up to 50 workers with annual turnover and/or balance sheet total not exceeding EUR 10 million and micro businesses employing up to 10 workers with annual balance sheet total not exceeding EUR 2 million. Compare, Article 2 Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, L 124 PL OJ EU of 20.05.2003.

[13] Compare, *SMEs' access to public procurement markets and aggregation of demand in the EU*, study prepared for the European Commission by PwC, ICF GHK and Ecorys, February 2014, p. 49, available at: http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/smes-access-and-aggregation-of-demand_en.pdf.

[14] European Commission Proposal COM(2011), 896 final 2011/0438 (COD) Directive of the European Parliament and of the Council on public procurement, p. 20, http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2011)0896_/com_com(2011)0896_pl.pdf.

2. CENTRAL CONTRACTING BODY: DEFINITION AND STATUTORY TASKS

Article 2(1.16) of the new classical directive defines the term of "central purchasing body", which in the Polish public procurement law system is the equivalent of a central contracting body. However, this fact influenced the introduction of the term of a central contracting body into the Act on public procurement.

The institution in question is at present regulated especially in Articles 15a–15d PPL, while the definition is laid down in Article 15b PPL. In comparison to the legal state before the amendment, the normative construction of particular provisions was changed and some completely new provisions were added. These include an extended opportunity to award contracts. Article 15d PPL may be an example of such totally new provision. Pursuant to it, a contracting body may use the services of a central purchasing body based in another Member State of the European Union.

As far as the change in the construction of the normative provisions is concerned, paragraphs (1)–(3) of Article 15a were repealed. With regard to this modification concerning a central contracting body, it is emphasised that "at the same time, assignment of its basic role to implementing contracts for the needs of contracting bodies from the governmental administration was repealed, provided they concerned the activity of more than one contracting body. With the introduction of a definition of auxiliary purchasing activities (which is discussed below), apart from introducing new regulations, paragraphs (2) and (3) of Article 15 PPL, including the catalogue of a central contracting body's tasks and an opportunity to make central purchases for other, indefinite contracting bodies, were repealed".[15]

However, paragraphs (4)–(6) of Article 15a were left unchanged; therefore, the Article is now the main statutory delegation for the President of the Council of Ministers, who can choose a central contracting body from among the government administration bodies or organisational units subordinate to those bodies or supervised by them. The President of the Council of Ministers still keeps his competence to instruct government administration contracting bodies to purchase specific types of products or services from a central contracting body or contractors chosen by a central contracting body and award contracts based on framework agreements concluded by a central contracting body, as well as the right to determine the scope of information passed to a central contracting body by those contracting entities, which are necessary to carry out proceedings and establish the method of cooperation with a central contracting body. The regulation stipulating that the provisions concerning a contracting body are applicable respectively to a central contracting body remained unchanged, too. It should be taken into account that in such a case "respective application of provisions means their direct application or with some modifications".[16]

Awarding contracts with the use of a central contracting body does not limit the principle of decentralisation, which results from Article 18(1) PPL. I agree with the

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[15] M. Kuźma, *Zamówienia publiczne po implementacji dyrektyw 2016*, Warsaw 2016.

[16] Thus, the Voivodeship Administrative Court in Kielce in the judgement of 21 March 2013, II SA/Ke 119/13, Lex No. 1299528.

opinion expressed in relation to the former legal state because it is still up-to-date. According to it, there is no contradiction between a central contracting body and the principle of decentralisation that is laid down, although it is not directly articulated, in PPL. As it is rightly noticed, "in this case, it does not concern a specific type of incapacitation of a unit conducting proceedings. The institution of a central contracting body shows a method of organising purchases by public administration, which can choose a model that each organisational unit may follow when making purchases, or indicate one to conduct proceedings on behalf of other units".[17]

As I have mentioned it earlier, after the amendment, a central contracting body has been defined and it has been determined that it is a contracting body referred to in Article 3(1.1–4) PPL. Thus, the legislator unambiguously specifies which entities might be given the status of a central contracting body. It is worth highlighting that the catalogue cannot include entities other than those referred to in Article 3(1.1–4) PPL. In other words, not all institutions, whose purchases are recognised as public contracts in accordance with PPL, may be a central contracting body pursuant to this Act. In case of a contracting body referred to in Article 3(1.5) PPL, there are no grounds for assuming that a given public procurement will be subject to the provisions of PPL.

At present, a central contracting body may be involved in purchasing supplies or services to be used by contracting entities and in awarding contracts or concluding framework agreements concerning works, supplies or services for contracting entities. It is also admissible to perform auxiliary purchasing activities. At the same time, a regulation was adopted which stipulates that contracting entities referred to in Article 3(1.1–4) PPL may purchase supplies or services from a central contracting body. They may also purchase supplies, services and works with the use of dynamic purchasing systems operated by a central contracting body or based on a framework agreement concluded by a central contracting body.

A new solution is that proceedings to award a contract conducted by a central contracting body must be carried out exclusively with the use of electronic communications.[18] It is connected with the development of electronic public procurement systems. This, in the Polish legal system, results from the principle that is in force under the new classical directive, in accordance with which all proceedings concerning awarding contracts carried out by a central contracting body should be performed with the use of the means of electronic communication. The Regulation of the President of the Council of Ministers of 27 June 2017 on the use of means of electronic communication in proceedings concerning awarding public procurement contracts and on the provision of access to and retention of electronic documents entered into force on 4 July 2017.[19] It is interesting that the Regulation is exclusively applicable to a central contracting body in the meaning of Article 15b PPL, while the

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[17] P. Szustakiewicz, *Zasady prawa zamówień publicznych*, Warsaw 2007, pp. 190–191; also compare, Justification for the Bill of the Public procurement law of 7 November 2003, the Sejm paper No. 2218, p. 16.

[18] Compare, I. Ziarniak, *Elektronizacja zamówień publicznych*, Przetargi Publiczne No. 10, 2017, pp. 13–15; moreover, A. Tyniec, I. Wyżgowska, *Centralny zamawiający i oferta elektroniczna*, Przetargi Publiczne No. 10, 2017, pp. 16–19.

[19] Journal of Laws [Dz.U.] of 2017, item 1320.

Act will enter into force and be applicable to other contracting bodies on 17 October 2018. Thus, the domestic legislator took into consideration the requirements imposed by the new classical directive in the amendment to PPL of 22 June 2018. It is an open question whether the obligatory electronic means of communication under proceedings conducted by a central contracting body will not hinder SMEs' access to public procurement. The argument against such a possibility is the fact that the tools used in electronic communications and their technical features should not be discriminating for contractors and they cannot lead to the limitation of fair competition. Moreover, one should agree with a thesis that because of a limited possibility of manipulating electronic materials, the proceedings in question substantially reduce corruption-related threats.[20] On the other hand, the requirement for contractors to have an electronic signature or the necessity to get to know some additional procedures on the part of contracting bodies concerning electronic forms of communication may discourage some SMEs from participating in public procurement proceedings. Those contractors often do not have specialist staff who can help to fulfil the requirements of the proceedings. Such situations may occur especially in the transition period, i.e. till 17 October 2018. Until then, contracting entities shall enable SMEs to take part in procurement proceedings and submit their offers in writing.

At present, there is a much broader opportunity to use central contracting bodies than before the amendment of 22 June 2016. In the present legal state, they may also implement auxiliary purchasing tasks, including especially the right to provide advice concerning conducting or planning public procurement proceedings. These are entitlements which were not envisaged in the former PPL. At present, individual contracting bodies may use the specialist know-how of a central contracting body without the need to purchase goods via this institution.

The provisions of Article 15b(3) to (5) PPL indicate that a central contracting body acts on its own behalf and conducts proceedings for other contracting entities. Individual contracting bodies "covered by the system of central purchases are responsible for fulfilling duties resulting from the PPL provisions within the scope concerning the proceedings they carry out on their own".[21]

3. GOVERNMENT ADMINISTRATION SERVICE CENTRE (COAR)

At present, Centrum Obsługi Administracji Rządowej (COAR, Government Administration Service Centre) plays the role of a central contracting body in the precise meaning of the term. It is a state budget institution founded by the Head of Chancellery of the Prime Minister of Poland in order to ensure the implementation of public tasks of the Chancellery. The Head of Chancellery of the Prime Minister plays the function of a COAR founding body.

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[20] Compare, H. Niedziela's considerations expressed in relation to a dynamic system of purchasing, which is a fully electronic method of awarding contracts, *Nowe podejście do zamówień publicznych*, 1st edition, Warsaw 2011, p. 343.

[21] Compare, M. Jaworska, [in:] M. Jaworska, D. Grześkowiak-Stojek, J. Jarnicka, A. Matusiak, *Prawo zamówień publicznych*, Warsaw 2017, Legalis.

The predecessor of the COAR, Centrum Usług Wspólnych (Shared Services Centre), was founded on 1 January 2017 based on the Regulation No. 16 of the Head of Chancellery of the Prime Minister of 22 October 2010 concerning transformation of an auxiliary economic unit and recognition of its status.

The COAR analyses orders sent by government administration bodies, especially with respect to potential savings in terms of economy of scale. Thus, it is a good practical example proving that one of the basic aims of aggregating contracts is an opportunity to obtain economic benefits by contracting bodies. However, in case the COAR recognises that savings resulting from the process of aggregation are insufficient, the entity may withdraw from participation in the proceedings.[22]

It is interesting that, after the proceedings carried out by a central contracting body, particular entities exercise all rights resulting from concluded contracts. This assumption obviously results in increased responsibility of contracting bodies for failure to fulfil a contract concluded by the COAR on their behalf and for them. It is a right solution because it would be hard to approve of a situation in which, in case of irregularities in the fulfilment of a contract, a contracting body files warranty claims to the COAR and a central contracting body approaches a contractor.

Summing up, the COAR seems to be an institution necessary in the light of the PPL provisions as well as the implementation of public procurement contracts for the most important public administration bodies in Poland. One cannot forget that, apart from the above-mentioned functions, it is involved in administration and management as well as the provision of services to the Chancellery of the Prime Minister, technical services to the government and its bodies: the Council of Ministers, the Standing Committee of the Council of Ministers, and Ministers. However, it is worth drawing attention to the fact that too far-reaching centralisation of purchases may lead to elimination of SMEs from the market, especially local entrepreneurs, which took place temporarily, e.g. in case of the CONSIP's public procurement operations in Italy.[23] Moreover, it can be mentioned that the COAR has its counterparts in other EU Member States. The French UGAP (Union des Groupements d'Achats Publics) or the Italian CONSIP (Concessionaria Servizi Informativi Pubblici) are such examples.[24]

At present, the COAR conducts the first proceedings allowing aggregation of procurement and, at the same time, using exclusively the electronic form of communication with contractors.[25] Thus, it is hard to unambiguously assess the practical activities of the institution at this stage, especially in the context of the obligatory electronic public procurement system.

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[22] Compare, §16(1) Regulation No. 100 of the President of the Council of Ministers of 30 August 2017 concerning indication of a central buyer for government administration bodies and indication of government bodies obliged to purchase goods and services from a central buyer, M.P. 2017, item 832, Vol. 1.

[23] M. Marra, *Innovation in E-Procurement. The Italian Experience*, November 2004, p. 18 ff.

[24] Compare, W. Hartung, M. Bagłaj, T. Michalczyk, M. Wojciechowski, J. Krysa, K. Kuźma, *Dyrektywa 2014/24/UE w sprawie zamówień publicznych, Komentarz*, Warsaw 2015, p. 143.

[25] Compare, A. Tyniec, I. Wyżgowska, *Centralny zamawiający…*, p. 19.

4. CENTRAL CONTRACTING BODY IN LOCAL SELF-GOVERNMENTS

Apart from the activities of the COAR, there is an opportunity to appoint a central contracting body at the local self-government level. The legislator laid down three basic legal bases authorising these administrative units to appoint a central contracting body.

Firstly, the amended PPL of 22 June 2016 does not repeal Article 15a(4) PPL, in accordance with which the President of the Council of Ministers may indicate a central contracting body, inter alia, out of organisational units supervised by public administration bodies.[26] In accordance with this statutory delegation, the President of the Council of Ministers may appoint a commune (*gmina*), county (*powiat*) or voivodeship self-government to act as a central contracting body due to direct supervision over those units.[27]

Thus, the provision entitles a government administration entity to indicate a central contracting body out of local self-government units. However, because of the fact that different provisions regulate the activities of those units and they often have actually conflicting interests, appointing a central contracting body in this way seems to me unrealistic and inefficient in practice.

On the other hand, another opportunity to appoint an entity performing the tasks of a central contracting body at the local self-government level is based on Article 15c PPL, which was introduced as a result of the amendment of 22 June 2016. In accordance with this provision, a legislative body of the local self-government may, by way of a resolution, indicate or appoint an entity to perform tasks of a central contracting body, determine the scope of its activities and specify contracting entities obliged to award contracts via the institution selected in this way. Justifying this way of appointing a central contracting body, the legislator directly stated that, in this case, it is to ensure greater efficiency, professionalization of awarding contracts and increase competition. The last aim of this institution at the local self-government level may raise doubts. Namely, awarding contracts with the use of a central contracting body is generally connected with considerable aggregation of procurement. Such activities together with determination of the requirements for participation in the proceedings, at the level proportional to the contract value, with a lack of division of a contract into parts at the same time, may eliminate from the proceedings many local contractors belonging to SMEs.[28] We may probably speak about an increase in competition with the use of a central contracting body in this area if we assume that local self-government units violate the PPL provisions, especially dividing procurement in an inadmissible way in

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[26] E. Norek, *Prawo zamówień publicznych. Komentarz*, 3rd edition, Warsaw 2009, p. 78.

[27] Compare, Article 86 Act of 8 March 1990 on commune self-government (Journal of Laws [Dz.U.] of 2017, item 1875, uniform text), Article 76 Act of 5 June 1998 on county self-government (Journal of Laws [Dz.U.] of 2017, item 1768, uniform text), Article 78 Act of 5 June 1998 on voivodeship self-government (Journal of Laws [Dz.U.] of 2016, item 486, uniform text, as amended).

[28] As far as the groundless lack of division of a procurement contract into parts is concerned, compare the judgement of the National Appeals Chamber of 8 November 2016, KIO 2018/16, Legalis No. 1546259.

order to be exempt from Article 4(8) PPL. However, then it would be necessary to *a priori* assume that a contracting body, by professional procurement and acting in compliance with law, is to increase contractors' competitiveness, which, in my opinion, is completely unjustified reasoning. On the other hand, one must agree with the thesis that a central contracting body's participation in awarding contracts at the local self-government level may increase efficiency and lead to professionalization.

Unlike in Article 15a(4) PPL, an entity entitled to appoint a central contracting body laid down in Article 15c is a legislative body of the local self-government. This body is a commune council, a county council or a voivodeship assembly (*sejmik województwa*). In my opinion, the legislator should determine a given entity as a legislative and supervisory body, i.e. in accordance with the terms used in the self-government statutes.[29] I also have doubts concerning grounds for appointing a central contracting body by a collective entity that is strictly political in nature and in general does not deal with procurement. A better solution would be to indicate an executive entity as one authorised to appoint a central contracting body. Taking a commune as an example, one can notice that a commune head (*wójt*), a mayor or a president, and not a council, is a body managing current matters of a commune and representing it, in accordance with Article 31 of the Act of 8 March 1990 on a commune self-government. Thus, it seems that it is also an entity which should have competence referred to in Article 15c PPL.[30] Current matters are repetitive and require to be constantly dealt with.[31] In my opinion, conducting public procurement proceedings may be classified as a current and repetitive matter. In this context, it should be pointed out that a legislative body may also determine the way in which an entity performing the tasks of a central contracting body should be appointed, i.e. may in fact partially delegate this entitlement to an executive body.

Because of the fact that the legislator decided to assign a collective body the competence to indicate or appoint an entity performing the tasks of a central contracting body, it is done in the form of a resolution, which of course should not have the status of a local regulation. Also, a resolution should determine the discussed entity's scope of activities. Another important issue to be dealt with is the indication of entities obliged to make purchases, specified in the resolution, from a central contracting body. It seems that in this case, Article 4(11) PPL should be applied. In accordance with it, particular contracting bodies may, without the need to apply the PPL provisions, make purchases of works, supplies and services from a central contracting body. It is interesting that a legislative body may adopt a resolution indicating contracting bodies obliged to award contracts based on framework agreements concluded by a central contracting body or covered by

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[29] Compare, Article 15 Act of 8 March 1990 on commune self-government, Article 9 Act of 5 June 1998 on county self-government, Article 16 Act of 5 June 1998 on voivodeship self-government.

[30] Compare, the interpretation of Article 31 Act on commune self-government provided by the Supreme Administrative Court in its resolution of 13 November 2012, I OPS 3/12, Orzecznictwo NSA i WSA of 2013, No. 2, item 21.

[31] Compare, A. Skoczylas, [in:] R. Hauser, Z. Niewiadomski (ed.), *Ustawa o samorządzie gminnym. Komentarz z odniesieniami do ustaw o samorządzie powiatowym i samorządzie województwa*, Warsaw 2011, p. 388.

a dynamic purchasing system operated by a central contracting body. Therefore, the above-mentioned legal act may oblige particular contracting bodies to use many forms of procurement aggregation. It seems that aggregation, e.g. at a commune level by the obligation to purchase goods from a central contracting body, in addition under a framework agreement, may prevent local contractors, especially those with the smallest potential, from obtaining access to a given market. Such activities are in conflict with the above-mentioned idea laid down in the Preamble to the new classical directive. The above-indicated forms of aggregation of procurement, especially at the self-government level, should be applied very carefully. While centralisation of purchases by the COAR is justified, at the level of particular units of local self-government, one can have fundamental doubts whether the centralisation of purchases will not hinder many smaller local contractors' access to the market.

Moreover, it is also necessary to draw attention to the fact that administrative courts' case law rightly distinguishes cooperation between communes and their organisational units in accordance with Articles 10–10d Act on commune self-government and appointment of a central contracting body in accordance with Article 15c PPL. One judgement indicates that a voivode was right to issue a supervisory adjudication stating invalidity of a town council's resolution which has assigned a commune organisational unit the task of preparing procurement proceedings concerning the purchase of services, supplies and works. According to the Voivodeship Administrative Court in Gliwice, a town council, as a legislative and supervisory body, is not authorised to delegate, in the mode and following the rules laid down in the provisions of Articles 10–10d Act on commune self-government, public procurement tasks to a subordinate unit. In order to enable a unit to perform public procurement-related activities for a commune, a legislative body should, first of all, refer to the PPL provisions as *lex specialis* in relation to the Act on commune self-government. In case of appointing such a unit as a central contracting self-government body, a council resolution should be adopted based on Article 15c(1) PPL and must contain all requirements laid down in this Article.[32] This judgement shows how important detailed provisions of resolutions adopted by local self-governments are, especially in the context of their potential recognition as invalid by a supervisory body.

The third, final opportunity to appoint a central contracting body by a local self-government is regulated in Article 16(4) PPL. However, it is not a central contracting body in its precise meaning, which is confirmed by the fact that the legislator does not use this term in this case. In line with the legal basis indicated above, an executive body of the local self-government is authorised to appoint an organisational unit from among subordinate entities which are competent to conduct proceedings and award procurement contracts. In this case, it has been rightly indicated that an executive body of the local self-government unit is an entity competent to appoint this quasi-central contracting body. The doubts emphasised earlier in relation to Article 15c PPL, concerning the legislative and supervisory bodies' entitlement to appoint a central contracting body, remain up-to-date.

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[32] Compare, the judgement of the Voivodeship Administrative Court in Gliwice of 8 March 2017, I SA/Gl 68/17, Legalis No. 1597789.

5. CENTRAL PURCHASING BODY BASED IN ANOTHER EUROPEAN UNION MEMBER STATE

In accordance with Article 15d(1) PPL, a contracting entity may use the services of a central purchasing body based in another Member State of the European Union. Services provided by such an institution are subject to the regulations in force in a Member State concerned.

Thus, in the PPL amendment of 22 June 2016 the domestic legislator took into account the necessity of introducing to PPL a principle directly transposed from the new classical directive, which stipulates that Member States cannot prohibit their contracting institutions from using centralised purchasing systems implemented by central purchasing bodies based in other Member States. As a result of this change in PPL, the limitation of contracting bodies' opportunity to undertake only centralised purchasing activities laid down in Article 2 par. 1(14a) or (14b) of the new classical directive (in relation to purchasing activities implemented through a central purchasing body based in a Member State different from a contracting institution) was not introduced. This means that there is no regulation that would limit the use of centralised purchasing activities which consist in conducting activities in a continuous mode in one of the following forms: purchase of supplies or services for the needs of contracting institutions; awarding public procurement contracts or concluding framework agreements concerning works, supplies or services for the needs of contracting institutions. However, it should be recognised that the legislator's decision is right with respect to the scope of implementation, because the new classical directive only stipulates the Member States' right, not an obligation, to introduce the discussed limitation to their national legislation. Moreover, there is an opportunity to use auxiliary purchasing activities implemented by central contracting bodies based in particular European Union Member States.

The content of Article 15d PPL stipulates that cross-border procurement may be implemented via a central contracting body based in another European Union Member State. Thus, the use of this legal institution may consist in the indication of a central purchasing body by a few entities from particular Member States to conduct proceedings in one of the three cases referred to in Article 15b(1) PPL. It concerns the already mentioned purchase of supplies or services for the needs of contracting bodies; awarding contracts or concluding framework agreements concerning works, supplies and services for the needs of contracting bodies and auxiliary purchasing activities. Therefore, the role of a central contracting body may consist in purchasing services for the needs of particular contracting bodies as well as in providing advice concerning conducting and planning procurement proceedings.

In case a broader use of the above-mentioned legal opportunities by contracting bodies takes place in practice, doubts arise in relation to the provision of access to the procurement market for micro, small and medium-sized enterprises. The regulations directly allow aggregation of procurement on two or more planes under single proceedings. Namely, the procurement may be aggregated because of the use of an opportunity to make cross-border procurement; alternatively, the procurement value may be aggregated as a result of a framework agreement concluded under

a cross-border procurement contract. In case of awarding a contract by a central contracting body based in another EU Member State, it seems, a more frequent (than e.g. in case of the COAR used domestically) solution will be a division of procurement into parts because, otherwise, it would be necessary to assume that there is a joint, indivisible cross-border procurement, which may occur very rarely.

At present, however, it does not seem highly probable that central cross-border procurements may become a broadly used legal tool, even in spite of fundamental regulation of this issue under the new classical directive and PPL.[33] It seems that the issue of different legal systems and practices adopted in particular EU Member States is more important now. The occurrence of those differences does not encourage contracting bodies to undertake broad cooperation in this area. It seems, however, that cross-border procurement may be more frequently used in the future via awarding joint contracts by contracting bodies from particular Member States without the participation of a central purchasing body. Such a conclusion may be drawn from the fact that awarding joint cross-border contracts takes place, in my opinion, through agreements between parties involved, i.e. directly between particular contracting bodies.

6. MINISTERIAL CENTRAL CONTRACTING BODY

Apart from the above-mentioned possibilities of implementing centralised procurement, PPL also stipulates grounds for awarding contracts by the ministerial central contracting bodies. Article 16(3) PPL determines legal grounds for appointing an organisational unit competent to conduct proceedings and award contracts for the needs of those units by a minister managing a particular sector of public administration. It is noted that: "Article 16(3) indicates the form of management in which a representative is appointed by a minister managing a sector of government administration. In other cases, the appointment may take place in any form appropriate for the legal status of a contracting body (e.g. a contract/agreement regulating the rules of awarding a joint procurement contract), provided that it is made in writing, which results from the principle of conducting proceedings in writing and adequate provisions of the Civil Code, including granting authorisation".[34]

The Regulation of the Minister of Justice of 16 September 2014 concerning indication of a contracting body preparing and conducting proceedings to award a procurement contract, awarding contracts and concluding framework agreements for the needs of common courts may be an example of a legal act that enables a minister managing a sector of public administration to indicate an organisational

[33] For difficulties connected with awarding cross-border procurement contracts, compare a paper prepared for the European Commission entitled *Feasibility study concerning the actual implementation of a joint cross-border procurement procedure by public buyers from different Member States*, available at: http://ec.europa.eu/DocsRoom/documents/22102/. In addition, Z. Raczkiewicz, *Zamówienia ponadgraniczne*, Przetargi Publiczne No. 6, June 2017, p. 47.

[34] Compare, M. Stachowiak, *Komentarz do ustawy…*, p. 173.

unit he manages or supervises to be a competent contracting body conducting proceedings and awarding contracts for the needs of those units.[35] Based on this document, the Appellate Court in Kraków is an entity that conducts and implements procurement for the needs of common courts.

On the other hand, in accordance with the Regulation of the Director of the Appellate Court in Kraków of 11 January 2012, an institution called Centrum Zakupów dla Sądownictwa Instytucja Gospodarki Budżetowej (Purchasing Centre for Courts – Budgetary Institution) was founded and entered in the National Court Register (KRS). The unit belonging to the public finance sector is mainly responsible for central public procurement for the needs of the common courts system.[36] Thus, it is a unit completely different from a central contracting body operating in accordance with Article 15a PPL. Nor is it a ministerial central contracting body, which is a function held by the Appellate Court in Kraków. The Purchasing Centre for Courts mainly plays the role of a unit representing the Appellate Court in Kraków which acts on behalf of common courts in the territory of the Republic of Poland. However, it is not a counterpart of a central purchasing body in the meaning of the new classical directive. The opportunity to award contracts with the use of an institution of a ministerial central contracting body is a special instance of awarding joint contracts by contracting bodies, in this case with the use of an entity that represents other institutions.

Procurement with the participation of the above-mentioned central contracting body may, as practice shows because of a considerable level of aggregation of procurement, prevent SMEs from getting access to the market. Contracts awarded by the Purchasing Centre for Courts on behalf of the Appellate Court in Kraków may be an example of such proceedings. This concerns especially proceedings in which contractors cannot submit partial offers. For example, in the procurement proceedings concerning supplies of stationery for common courts, the ministerial central contracting body established a bid security of PLN 400,000 and a requirement of solvency of PLN 2,000,000, which, in my opinion, was an amount unavailable for many small businesses operating in a given sector.[37] To avoid such unfavourable situations for SMEs, it sufficed to divide the procurement into smaller parts for the needs of particular appellate courts and units subordinate to them.[38]

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[35] Dz.U. MS. of 18 April 2014, item 153.

[36] Compare, Chapter 2 of Statute of the Purchasing Centre for Courts, published at: http://www.czdsigb.gov.pl/attachments/article/119/Zarz%C4%85dzenie%20nr%207.16.IGB%20z%20dn.%2015.07.2016r.%20informuj%C4%85ce%20o%20zmianie%20Statutu%20CZDSIGB.pdf.

[37] The advertisement was published in the Official Journal of the European Union, OJ/S S146 of 30.07.2016, 264396-2016-PL.

[38] In order to make it possible to submit partial offers if the procurement content is divided, compare the judgement of the Arbitrators Team of 11 April 2005, UZP/ZO/0-648/05, Legalis No. 1472188. Moreover, for the analysis of conditions for division of services, compare the Supreme Court judgement of 14 March 2002, IV CKN 821/00, Legalis No. 65083.

7. CONCLUSIONS

The discussed issue regulated in PPL in the wording before the amendment of 22 June 2016 well describes the opinion expressed in literature that: "the legally uncertain role of a central contracting body and the lack of detailed norms in the field of legal relations between a central contracting body and other contracting bodies do not forecast a reduction in prices, which was an idea of the authors of a central contracting body in Polish law. Indeed, the authors of respective provisions in the EU directives adopted a similar assumption. As joint procurement experience shows, the economy of scale has real impact on prices reduction. On the other hand, the scale of procurement hinders and sometimes even prevents small and medium-sized enterprises from bidding. Such limitation of competition produces an effect opposite to the desired one".[39] I fully share the opinion presented in the above quotation. It is hard to resist an impression that an institution of a central contracting body, in the wording being in force in the period 2006–2016, was to serve mainly contracting bodies as parties to public procurement proceedings.

At present, a central contracting body, as a legal institution, has been defined and specified in PPL because of the necessity of implementing the provisions of the new classical directive. Determination of statutory rights and obligations in the field of appointing a central contracting body at the local self-government and central government level requires approval. The institution has been appropriately implemented and the issue is more broadly regulated than the new classical directive required. As far as the influence of new provisions on the practical use of a central contracting body is concerned, it must be noted that the CUW[40] at the governmental level and ministerial central bodies had already been organisers of procurement proceedings before the PPL amendment of 22 June 2016. In this case, one cannot expect radical changes in the frequency or scope of using this method to aggregate procurement.

On the other hand, the situation concerning the appointment of a central contracting body for local self-government units may be different. The detailed regulation of Article 15c PPL may encourage legislative and supervisory bodies of particular units to adopt resolutions concerning indication of a central contracting body. The direct reason for such activities may be the aim to reduce costs and introduce professionalization of purchases. However, I fear that centralisation of procurement may, in this case, be often implemented to the detriment of the local SME contractors. Procuring standardised services, supplies and works jointly by a central contracting body, e.g. for all units in a given commune, may prevent the smallest contractors from being awarded contracts. Thus, competent public administration bodies, especially Urząd Zamówień Publicznych (Polish Public Procurement Office) should monitor the process.

Summing up, it seems justifiable to make a *de lege ferenda* proposal to amend Article 15a(4) PPL by repealing the opportunity to indicate a central contracting body

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[39] J. Pieróg, *Prawo zamówień publicznych, Komentarz, art. 15a*, Warsaw 2015, Legalis.

[40] At present, COAR.

by the President of the Council of Ministers from among the local self-government units. As I have mentioned it earlier, such activity is admissible at present but there are no grounds whatsoever for the existence of such a competence typical of a major public administration body. Another amendment that should be considered is the enactment of an articulated principle, i.e. the obligation to divide a procurement contract into parts (under given proceedings) in relation to particular contracting bodies for which a central contracting body conducts the proceedings. It seems that the present mechanism, resulting especially from Article 36aa and Article 96(1.11) PPL, in relation to centralised procurement, is too weak to ensure appropriate protection to SMEs in the process of awarding public procurement contracts.

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INSTITUTIONS FULFILLING THE FUNCTION OF A CENTRAL CONTRACTING BODY IN PUBLIC PROCUREMENT LAW

Summary

The article presents institutions performing functions of a central contracting body in the Polish system of Public Procurement Law. It contains a comparison of particular issues and makes reference to the respective European Union provisions laid down in Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement. The author presents fundamental aims and results of awarding procurement contracts with the use of a central contracting body and indicates differences depending on whether a given institution has been appointed in central public administration, local self-government or is additionally a cross-border one. The main aim of appointing a central contracting body is to aggregate procurement, which is to ensure economic benefits for contracting parties. On the other hand, the main threat in this context consists in possible difficulties, which micro, small and medium-sized enterprises may have in obtaining access to the procurement market.

Keywords: central contracting body, aggregation of procurement contracts, use of electronic communications in public procurement, SME

INSTYTUCJE WYKONUJĄCE FUNKCJĘ CENTRALNEGO ZAMAWIAJĄCEGO W PRAWIE ZAMÓWIEŃ PUBLICZNYCH

Streszczenie

Niniejszy artykuł przedstawia instytucje wykonujące funkcje centralnego zamawiającego w polskim systemie Prawa zamówień publicznych. Zawarto w nim porównanie poszczególnych zagadnień wraz z odniesieniami do regulacji unijnych, zawartych w Dyrektywie Parlamentu Europejskiego i Rady 2014/24/UE z dnia 26 lutego 2014 r. w sprawie zamówień publicznych. Autor prezentuje podstawowe cele i skutki udzielania zamówień publicznych z wykorzystaniem centralnego zamawiającego, wskazując różnice w zależności od tego, czy dana instytucja została powołana w administracji rządowej, samorządzie terytorialnym czy też ma dodatkowo wymiar transgraniczny. Jako podstawowy cel powołania centralnego zamawiającego uznano zagregowanie zamówienia, które ma zapewnić osiągnięcie korzyści ekonomicznych po stronie zamawiających. Za główne zagrożenie z kolei uznano w tym kontekście wystąpienie możliwości utrudnienia dostępu do zamówienia dla sektora mikro, małych i średnich przedsiębiorstw.

Słowa kluczowe: centralny zamawiający, agregowanie zamówień, elektronizacja zamówień publicznych, MŚP

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