

## PRINCIPLE OF TRANSPARENCY IN PROCUREMENT PROCEEDINGS VERSUS PROTECTION OF THE RIGHT TO PRIVACY

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Public procurement proceedings are open.<sup>1</sup> In accordance with Article 3 LPP, the proceeding minutes and annexes to them (i.e. practically all the documents: offers, information, explanations, etc.) must be made available at everyone's request (with the exception of information that constitutes a company's secret). Transparency is to guarantee the maintenance of other rules of proceedings (equal treatment, fair competition and proportionality). The Court of Justice of the European Union (CJEU) consistently indicates that the obligation of transparency, from which the national principle of openness originates, aims to exclude a risk of favouritism and arbitrariness of the ordering institutions.<sup>2</sup>

The law on the protection of confidential information constitutes an exception to the principle of transparency and as such cannot be interpreted in a broadening scope. Confidentiality is applied to information concerning ordering institutions/buyers, which they have indicated as confidential in nature and laid down the rules of their protection (Article 8 para. 2 in conjunction with Article 37 para. 6 LPP). The principle of transparency is also limited in connection with the protection of the contracting company's secrets. Using the concept of a company's secret, the law on public procurement does not develop a separate definition but makes use of the definition contained in the Act on combating unfair competition. A company's secret means technical, technological and organisational information concerning a company or other information of economic value that has not been made public,

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<sup>1</sup> Article 8 para. 1 of the Act of 29 January 2004: Law on public procurement, consolidated text, Dz.U. 2017, item 1579, as amended; hereinafter LPP.

<sup>2</sup> CJEU judgments: of 5 December 2013 in the case C-561/12; of 29 March 2012 in the case C-599/10; of 6 November 2014 in the case C-42/13.

and in connection with which a company has undertaken necessary steps in order to keep it secret (Article 11 para. 4 of the Act of 16 April 1993 on combating unfair competition)<sup>3</sup>. Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure in fact contains a similar definition.

The Supreme Court case law stipulates that information that can be obtained in a lawful way cannot be recognised as secrets, e.g. information obtained from publicly available registers or publicly performed legal actions. The provision of Article 11 paras 1 and 4 ACUC excludes making information secret if a person concerned can obtain it in a standard and lawful way.<sup>4</sup> This means that it is not possible to protect data concerning information about other public procurement proceedings. Information that is publicly available, e.g. on the Internet, cannot be secret.<sup>5</sup> According to the Supreme Court, an inappropriate way of protecting information as a company's secret in case that information does not constitute one results in a buyer's obligation to disclose it.<sup>6</sup> The CJEU also takes a stance that a defective way of making information secret obliges a buyer to correct it.<sup>7</sup> Such interpretation of the provisions on the transparency of proceedings raises a question whether transparency in public procurement also covers the obligation to provide information about persons included in contractors' offers (persons seconded to deal with the order and members of the contractor's bodies). Thus, the principle of transparency must be confronted with the protection of the right to privacy.

It is necessary to decide which provision concerning transparency: the one laid down in the Act: Law on public procurement or a special provision protecting privacy should be a basis for activities performed by a buyer, i.e. which interest (transparency or privacy) should be predominant.

The provisions of common statutes interfering into this principle cannot reduce the right to privacy laid down in Article 47 of the Constitution of the Republic of Poland ("Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life."). Moreover, an activity that constitutes the infringement of a legal act specifying the scope of the protection of privacy should be treated as especially blameworthy because it is connected with the infringement of a constitutional norm. With regard to the right to protect privacy and special rules of obtaining access to confidential personal data, there are sometimes doubts what kind of information about public procurement proceedings concerning persons dealing with an order or managing contractors buyers can demand and to what extent a buyer can make personal data available.

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<sup>3</sup> Dz.U. No. 47, item 211, as amended; hereinafter ACUC.

<sup>4</sup> Supreme Court judgment of 5 September 2001, I CKN 1159/00, OSNC 2002/5/67.

<sup>5</sup> E. Wojcieszko-Głuszko, *Tajemnica przedsiębiorstwa i jej cywilnoprawna ochrona na podstawie przepisów prawa nieuczciwej konkurencji*, Prace Instytutu Prawa Własności Intelektualnej UJ, 2005/86, p. 43.

<sup>6</sup> Supreme Court resolution of 21 October 2005, III CZP 74/05.

<sup>7</sup> CJEU judgment of 14 February 2008 in the case C-450/06.

Article 26 para. 1 and Article 26 para. 2f LPP and the provisions of the Regulation of the Minister of Development issued based on Article 25 para. 2 LPP, i.e. Regulation of 26 July 2016,<sup>8</sup> lay down the rules concerning requests for documents in public procurement proceedings.

Article 26 para. 1 imposes an obligation on a buyer, in case the value of an order exceeds the amounts laid down in the EU directives, to demand that a contractor whose offer has been assessed as the best one submit documents confirming the fulfilment of the requirements for participation in the proceedings (including the lack of grounds for excluding from the proceedings). Article 26 para. 2f LPP stipulates the entitlement to demand such documents from every contractor taking part in the proceedings if it is necessary in order to carry out the proceedings properly.

One of the requirements for participation in the proceedings that a buyer can formulate in accordance with Article 22 para. 1b(3) in conjunction with Article 22d para. 1 LPP is that persons who will make things to order should be at the buyer's disposal. The provision of § 2 para. 4(10) Regulation of 26 July 2016 stipulates that a list of persons with information about their education and qualifications constitutes a document that confirms one's disposal.

In turn, a contractor's managers (board members, directors, appointed agents, partners and sole traders) must have no previous convictions (within the scope specified in LPP), which is an obligatory requirement for participation in public procurement proceedings, resulting directly from LPP. Information provided by National Criminal Register (Krajowy Rejestr Karny, KRK) at a buyer's request (resulting from the fulfilment of a statutory obligation or the exercise of a statutory right) constitutes the confirmation of no criminal record. Apart from the given names, a surname and the confirmation of previous convictions or no record, the information contains other data: the date of birth, parents' names and the address.

The processing of data relating to criminal convictions, in accordance with Article 10 GDPR,<sup>9</sup> shall be carried out only under the control of official authority or when the processing is authorised by the Union or Member State law providing for appropriate safeguards for the rights and freedoms of data subjects.

The provisions that allow that are § 2 para. 4(1) and § 5(1) Regulation of 26 July 2016, which do not let buyers choose whether to demand or not a list of persons with their education and qualifications data from a contractor and information from KRK, i.e. a document concerning information resulting from the provisions of the Regulation of the Minister of Justice of 7 July 2015,<sup>10</sup> when they fulfil an obligation under Article 26 para. 1 LPP or exercise the right in accordance with Article 26 para. 2f LPP.

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<sup>8</sup> Regulation of the Minister of Development of 26 July 2016 concerning types of documents that a buyer can demand from a contractor in public procurement proceedings, Dz.U. 2016, item 1126; hereinafter Regulation of 26 July 2016.

<sup>9</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119/1 of 4 May 2016.

<sup>10</sup> Regulation of the Minister of Justice of 7 July 2015 on the provision of information about persons and collective entities based on the data collected in the National Criminal Register (KRK), Dz.U. 2015, item 1025, as amended.

The provisions are formulated clearly and a buyer must demand a list of persons with such data (education and qualifications) and information from KRK containing all data in accordance with the above-mentioned Regulation.

The demand of data determined in the provisions of the law, including the specimen of the information from KRK, does not infringe the provisions of GDPR in any way. In accordance with Article 6 para. 1(e) GDPR, personal data processing is lawful when it is necessary for the performance of a task carried out in the exercise of official authority vested in the controller. The controller – a buyer within the meaning of LPP – must demand such data within the scope indicated in the provisions concerning public procurement. Demanding a document different from information from KRK and a list of persons with a different scope of data from the one laid down in the provisions of Regulation of 26 July 2016 would constitute the infringement of Article 26 para. 1 LPP in conjunction with § 5(1) of 26 July 2016.

However, should a contractor, regardless of a buyer's clear and obligatory demand of a document determined in the provisions of the law (information from KRK), limit (e.g. by covering) the scope of data in this document and leave only a given name and surname and data concerning conviction/no criminal record within the scope under examination in accordance with LPP, the statutory aim of the submission of this document would be obtained (no criminal record would be confirmed) and there would be no grounds to demand a document with all data. However, it is a contractor who can decide to limit the scope of data in the information from KRK and not a buyer who must demand a document indicated in the provisions. However, the possibility of covering some data does not exist in case of demanding information concerning qualifications. These constitute data concerning the subject matter, i.e. the fulfilment of a buyers' requirement that an order should be dealt with by persons with specified qualifications. Thus, the omission of this information would mean failure to meet a requirement for participation in the proceedings.

A controller (a buyer) must process personal data because he must retain and make them available. Personal data processing (in accordance with Article 4 para. 2 GDPR) means, inter alia, their collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making them available, alignment or combination, restriction, erasure or destruction. The obligation to store documents submitted by contractors (including personal data) results from Article 97 para. 1 in conjunction with Article 96 para. 2 LPP, which obliges a buyer to retain those documents as appendices to proceeding minutes for four years after the conclusion of the proceedings.

Making available of personal data contained in appendices to proceeding minutes, which in accordance with Article 96 para. 2 LPP include, inter alia, any documents submitted by contractors with the exception of company secrets, means the fulfilment of a statutory obligation. The proceeding minutes are not confidential (Article 8 para. 1 in conjunction with Article 96 para. 3 LPP) and are subject to availability at the request of anybody without the need to indicate the interest in obtaining access to information in accordance with the provisions of the Regula-

tion of the Minister of Development concerning a public procurement proceeding minutes.<sup>11</sup> The above-mentioned provisions do not allow whatever departure from the rule of disclosure of information contained in the proceeding documentation, with the exception of company's secrets. Thus, personal data is made available due to the fulfilment of a statutory obligation (resulting from Article 96 para. 3 LPP), i.e. in accordance with Article 6 para. 1(e) GDPR, without a data subject's consent.

Personal data that due to the provisions on transparency and access to information concerning public procurement proceedings will always be made available without any restrictions (also in case of a previously convicted person, provided that they are included in the information about criminal record) include a given name and a surname, the date of birth, parents' names, address, i.e. all data that do not contain information about criminal conviction. Such data also include information about education and qualifications of persons listed as those seconded to deal with an order.

Part of personal data that are in contractors' offers, however, can constitute data concerning conviction sentences in the information provided by KRK if a data subject is a person previously convicted. It is very rare in the practice of public procurement. In other cases, data concern the lack of previous conviction and thus do not concern criminal record so they constitute "standard" personal data.

The provisions of the Regulation concerning public procurement proceeding minutes as well as the provisions of LPP do not provide an exception to the principle of transparency in case of information about criminal record when the document confirms the fact of previous conviction as well as about the location data relating to privacy, e.g. an address or data concerning education and qualifications of persons listed in offers. In accordance with the literal interpretation of Article 96 para. 3 LPP, even in case the information from KRK contains information about conviction (but not about no criminal record), it should be disclosed. Thus, there is a conflict with the GDPR provisions. Common and unlimited availability of data concerning conviction or penalties does not match the obligation under Article 10 GDPR in accordance with which the processing of those data shall be carried out providing appropriate safeguards for the rights and freedoms of data subjects. The provision of information about persons' convictions and penalties, only because they take part in public procurement proceedings, does not meet any rational justification. The penalties most often do not eliminate persons from the proceedings (the exclusion occurs only with respect to a limited catalogue of crimes) and making data about convictions available to the public might constitute an unlawful instrument causing withdrawal from the market of public procurement. It would be in flagrant conflict with the principle of unlimited competition and, in addition, it would constitute a non-judicially imposed sanction of publicising a convicted person's data. Such a conflict would not occur if the national public procurement provisions were limited to the principle of transparency, i.e. informing about proceedings and decisions and not disclosing all information collected in the course of the proceedings.

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<sup>11</sup> Regulation of the Minister of Development of 26 July 2016 concerning public procurement proceeding minutes, Dz.U. 2016, item 1128.

However, the legislator decided to extend public life openness by full transparency of information.

Therefore, it is necessary to look for a resolution of the conflict between the above-mentioned interests (transparency and privacy) in other legal acts. It might result from the provisions of the Act of 6 September 2001 on access to public information,<sup>12</sup> which stipulates that the principle of access to information is subject to limitation, inter alia, due to a natural person's privacy and a company's secrets (Article 5 para. 2). Unfortunately, the application of this statute in case of access to procurement proceeding minutes is recognised as inadmissible according to the dominant approach in case law.<sup>13</sup> Some representatives of the doctrine present a similar stand.<sup>14</sup> If we assume that AAPI and LPP cannot be applied in conjunction, we draw a conclusion that adopting the LPP provisions, the legislator decided that the protection of a company's secrets secured by AAPI must be strengthened and completely excluded the provision of this information in the norm of Article 8 para. 3 LPP. The legislator did not do that in relation to the protection of privacy.

However, one can refer to the judgments of administrative courts, which are less restrictive and indicate that, within the scope not covered by special provisions (Regulation concerning public procurement proceeding minutes), the general norms of the Act on access to public information might have supplementary application, i.e. when they are not in conflict with a special provision. Thus, pursuant to this stance, Article 5 para. 2 AAPI concerning access to privacy-related data would be applicable. This is what the Voivodeship Administrative Court in Poznań states in its judgment of 20 September 2017.<sup>15</sup> The stance, in my opinion, is right. Personal data, which as a rule shall be transparent in public procurement without whatever restrictions can be recognised as ones that are subject to disclosure limitation due to a natural person's privacy or a company's secrets (Article 5 para. 2 AAPI). In this context, taking into account the opinion of the Supreme Administrative Court,<sup>16</sup> privacy gives grounds to limiting access to public information but not to excluding access to public information. Therefore, it is necessary to establish the scope of this limitation. At the same time, one cannot ignore the fact that in case of procurement proceedings, natural persons' data that can be protected or made available are not, at least partially, "ordinary" people's data. These are data of authorities of entities that apply for contracts with the public sector. The scope of privacy subject to protection in case of pursuing a position of a party to a contract with the public sector should be less extensive. Thus, it is necessary to determine what this limitation should consist in. As it has been indicated above, it cannot mean the exclusion

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<sup>12</sup> Dz.U. 2001 No. 112 item 1198, as amended; hereinafter AAPI.

<sup>13</sup> Judgment of the Supreme Administrative Court of 18 January 2017, I OSK 2006/16, LEX No. 2290153; judgment of the Voivodeship Administrative Court in Olsztyn of 11 July 2017, II SAB/OI 29/17, LEX No. 2336880; judgment of the Voivodeship Administrative Court in Szczecin of 9 August 2017, II SAB/Sz68/17, LEX No. 2357827.

<sup>14</sup> M. Chmaj, [in:] M. Bidziński, M. Chmaj, P. Szustakiewicz, *Ustawa o dostępie do informacji publicznej. Komentarz*, Warszawa 2010, pp. 31–32.

<sup>15</sup> Judgment of the Voivodeship Administrative Court in Poznań of 20 September 2017, SAB/Po 107/17.

<sup>16</sup> Judgment of the Supreme Administrative Court of 29 September 2017, I OSK 3046/15.

of transparency because there are no grounds for that in AAPI, nor LPP, nor in the systemic interpretation, i.e. the increase in the protection of a company's secret by excluding openness and the lack of such a move towards the protection of privacy, which means that there must be some scope of access to natural persons' data without the infringement of their privacy. The legislator determined the absolutely admissible scope of limitation of the principle of transparency of any data, including common personal data contained in the procurement proceeding documentation that is not confidential. It consists in the possibility of not giving consent to copy such data from contractors' offers.

Any further-reaching limitations are doubtful. A special legal act in relation to the Act on access to public information, i.e. the Act on public procurement, contains its own precise regulation concerning the protection of privacy so, as administrative courts indicate, supplementary application of the provisions on access to public information is not possible. The special provision concerned is Article 8 para. 4(1) LPP, which stipulates that if it is substantiated by the protection of privacy or public interest, a buyer can refuse to disclose personal data but only in case of procurement based on Article 67 para. 1(1)(b). Thus, if the information from KRK is submitted in any other mode than by private treaty (on this special basis under Article 67 para. 1(1)(b)), it is not subject to the protection of privacy.

Therefore, there are no grounds for the application of limitation of access to information referred to in Article 5 para. 2 AAPI in a broader scope than the legislator allowed in § 4 para. 4 Regulation of the Minister of Development concerning public procurement proceeding minutes, where the only restriction consists in the right to refuse to give consent to copy documents submitted by contractors. The provisions on access to public information are indeed applicable exclusively as supplementary ones in relation to special regulations (Regulation concerning public procurement proceeding minutes and Article 8 para. 4 and Article 96 para. 3 LPP).

The provisions of the Regulation as a norm of basic level cannot infringe the norms of the European Union legal acts. The interpretation of those provisions, the linguistic layer of which orders disclosure of information containing sensitive data, must be carried out in compliance with Article 10 GDPR.

When processing sensitive information, i.e. information concerning conviction and penalties imposed on a particular person, a buyer can process it within the scope safeguarding the protection of rights and freedoms. This means that the data can be stored in the minutes but making them available to the public in accordance with Article 96 para. 3 LPP (and all the more the provisions of a lower level) is not possible. It is so because Article 10 GDPR stipulates that only the law providing for appropriate safeguards for sensitive information allows its processing. If there is no provision guaranteeing protection, a particular form of processing (making information available) cannot be carried out.

No safeguards for the rights and freedoms of data subjects that are required in accordance with this provision can be traced in LPP. If anyone can obtain access to proceeding minutes, the protection of sensitive data is illusory. Thus, the entry into force of the GDPR provisions should result in the exclusion of the right to disclose data concerning convictions and penalties. At the same time, a complete lack of

access to those data might be in conflict with a successive constitutional norm: the right to a court and the right to appeal against every decision taken by a buyer guaranteed by appellate-related EU directives concerning public procurement. In order to exercise this right efficiently, it is necessary to have access to information about a buyer's activities.

A bill amending some acts in connection with ensuring the application of Regulation 2016/679<sup>17</sup> serves the implementation of the right. The amendment proposed in the bill adds para. 5 to Article 8 LPP, which limits the principle of transparency in public procurement in case of the processing of personal data concerning criminal convictions, but leaves a possibility of disclosing them only for the purpose of applying the measures of legal protection, i.e. when indicating the interest in filing an appeal and in the time limit for that appeal. At the same time, in accordance with Article 8a para. 6 LPP bill, a buyer will make available documents concerning convictions and sentences after they are pseudonymised.

Although the amendments proposed ensure the possibility of exercising the right to a court and comply with the ban on making available data concerning convictions and penalties imposed, they do not ensure efficient protection of convicts' data. The data in the offers submitted for the purpose of bidding concern persons disclosed in the National Criminal Register. If a buyer, providing data concerning a conviction or a penalty, pseudonymises the data of a particular person (a convict) and at the same time discloses, because of the obligation to do so, the data of all other board members, directors and authorised agents who have no criminal record, it will not be difficult to draw a conclusion which person is pseudonymised among those that the document concerns. Thus, the protection is fictitious and the legislator has not found a method to reconcile the essential interests (openness, the right to privacy and the right to a court).

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<sup>17</sup> Bill presented to the Standing Committee of the Council of Ministers for European Matters on 23 April 2018.



## PRINCIPLE OF TRANSPARENCY IN PROCUREMENT PROCEEDINGS VERSUS PROTECTION OF THE RIGHT TO PRIVACY

### Summary

Transparency of public procurement proceedings is to safeguard the compliance with the principles of equal treatment, fair competition and proportionality, and eliminate the risk of arbitrariness of a buyer's decisions. However, it is necessary to determine whether transparency covering the obligation to disclose information about people listed in contractors' offers is not in conflict with the right to privacy, which is guaranteed by Article 7 of the Constitution of the Republic of Poland. The principle of transparency cannot lead to the infringement of another interest protected by the constitutional provision. It must also be implemented in accordance with the provisions of Regulation (EU) 2016/697. This means that personal data processed (made available) in public procurement proceedings must be protected. While disclosing the data concerning their qualifications, functions and no criminal record does not infringe the rights and freedoms of data subjects, the provision of information about conviction and a penalty adjudicated without a court's ruling concerning making this information public would constitute a non-judicial sanction. The principle of transparency cannot result in sanctions that are not laid down in a sentence. It also cannot lead to discouraging persons from taking part in public procurement proceedings and, as a result, limiting competition. Therefore, it is necessary to protect information concerning the fact of conviction and a penalty imposed on persons whose data are listed in public procurement offers. At the same time, the data must be available to competitors of a contractor who provides the data of those people in an offer so that they can verify whether those persons' conviction should or should not constitute grounds for excluding from a tender process and protect their right to receive an order. However, the legislator has not provided a safeguard so that, after the disclosure to competitors, the data will not be available to a wide circle of people and used for the purpose that is in conflict with statute.

Keywords: public procurement, transparency, right to privacy, personal data, no criminal record/no conviction

## ZASADA JAWNOŚCI W POSTĘPOWANIU O UDZIELENIE ZAMÓWIENIA A OCHRONA PRAWA DO PRYWATNOŚCI

### Streszczenie

Jawność postępowania o udzielenie zamówienia publicznego ma gwarantować respektowanie zasad równego traktowania, uczciwej konkurencji, proporcjonalności oraz wyłączać ryzyko arbitralności rozstrzygnięć zamawiającego. Rozstrzygnięcia wymaga jednak kwestia, czy jawność obejmująca obowiązek ujawniania informacji o osobach zamieszczanych w ofertach wykonawców nie stoi w konflikcie z prawem do prywatności, którego respektowania wymaga art. 7 Konstytucji RP. Zasada jawności nie może prowadzić do naruszenia innego dobra chronionego przepisem konstytucji. Musi być także wykonywana w zgodzie z przepisami rozporządzenia 2016/697 UE. Oznacza to, że dane osobowe przetwarzane (udostępniane) w postępowaniu o udzielenie zamówienia publicznego muszą być chronione. O ile nie godzi w prawa i wolności osób, których dane są przetwarzane, ujawnianie danych o ich kwalifikacjach, pełnionej funkcji i niekaralności, to podanie informacji o fakcie skazania

i orzeczonej karze bez orzeczenia sądu o podaniu takiej informacji do wiadomości publicznej byłoby sankcją nieorzeczoną przez sąd. Zasada jawności nie może prowadzić do powstawania sankcji niewskazanej w wyroku skazującym. Nie może także prowadzić do odstręczenia od udziału w postępowaniu o udzielenie zamówienia i w konsekwencji ograniczania konkurencji. Konieczna jest więc ochrona informacji o fakcie i rodzaju orzeczonej kary wobec osób, których dane podaje się w ofertach w przetargu publicznym. Jednocześnie dane te muszą być dostępne dla konkurentów wykonawcy, który dane tych osób podaje w ofercie, aby mogli zweryfikować, czy karalność tych osób nie powinna być podstawą wykluczenia z przetargu i chronić swe prawo do uzyskania zamówienia. Ustawodawca nie zapewnił jednak, że dane te po ujawnieniu konkurentom nie będą dostępne dla zbyt szerokiego kręgu osób i wykorzystywane w celu niezgodnym z ustawą.

Słowa kluczowe: zamówienia publiczne, jawność, prawo do prywatności, dane osobowe, niekaralność

## EL PRINCIPIO DE PUBLICIDAD EN EL PROCESO DE ADJUDICACIÓN DE CONTRATACIÓN PÚBLICA Y LA PROTECCIÓN DE DERECHO A LA PRIVACIDAD

### Resumen

La publicidad del proceso de adjudicación de contratación pública ha de garantizar el respeto de principios de igual trato, competencia honesta, proporcionalidad, así como excluir riesgo de arbitrariedad de decisiones del contratante. Sin embargo, hay que analizar si la publicidad que incluye la obligación de revelar la información sobre personas incluidas en las ofertas presentadas por contratistas no viola el derecho a privacidad, cuyo respeto requiere el art. 7 de la Constitución de la Republica de Polonia. El principio de la publicidad no puede infringir otro bien protegido por la Constitución. También ha de ser aplicado de acuerdo con el reglamento (UE) 2016/679. Esto significa que los datos tratados (facilitados) en el procedimiento de adjudicación de contratación pública han de ser protegidas. La revelación de datos de formación profesional, cargos y falta de antecedentes penales no viola derechos y libertades de personas cuyos datos son procesados, sin embargo la información sobre la condena y pena impuesta sin que el tribunal ordene la publicación de tal información, constituye una sanción no impuesta por un tribunal. El principio de publicidad no puede crear sanciones no indicadas por el tribunal sancionador. Tampoco puede desanimar a participar en el proceso de adjudicación de contratación pública y, como resultado, limitar la competencia. Por tanto, es necesario proteger la información sobre el hecho y tipo de la condena de las personas cuyos datos se publican en la ofertas en la contratación pública. Al mismo tiempo, estos datos han de ser accesibles para adversarios del contratista para que puedan verificar si los antecedentes penales de estas personas no constituye supuesto de su exclusión de la contratación y para que puedan proteger su derecho a conseguir la contratación. El legislador no ha previsto que estos datos, tras su relevación a los adversarios, no serán accesibles a un círculo amplio de personas y no serán utilizados para el fin contrario a la ley.

Palabras claves: contratación pública, publicidad, derecho a privacidad, datos personales, sin antecedentes penales

## ПРИНЦИП ОТКРЫТОСТИ В ПРОЦЕДУРЕ ПРИСУЖДЕНИЯ КОНТРАКТА И ЗАЩИТА ПРАВА НА НЕПРИКОСНОВЕННОСТЬ ЧАСТНОЙ ЖИЗНИ

### Резюме

Открытый характер процедуры государственных закупок заключается в том, чтобы гарантировать уважение принципов равного обращения, справедливой конкуренции, соразмерности и исключить риск произвольности решений присуждающей организации. Однако необходимо решить, не противоречит ли открытость, в том числе обязанность раскрывать информацию о лицах, включенных в предложения подрядчиков, праву на неприкосновенность частной жизни, которое должно соблюдаться согласно ст. 7 Конституции Польши. Принцип открытости не может вести к нарушению другого блага, охраняемого положениями конституции. Он также должен осуществляться в соответствии с положениями Регламента 697/2016 ЕС. Это означает, что персональные данные, обрабатываемые (предоставляемые) в ходе процедур государственных закупок, должны быть защищены. Если разглашение данных о квалификации, функциях и отсутствии судимости лиц, чьи данные обрабатываются, не нарушает их права и свободы, то предоставление информации о факте осуждения и вынесении приговора без вынесения судом решения о разглашении такой информации общественности будет санкцией, не предписанной судом. Принцип открытости не может вести к санкциям, не указанным в обвинительном приговоре. Это также не может вести к сдерживанию от участия в процедуре закупок и, как следствие, к ограничению конкуренции. Поэтому необходимо защищать информацию о факте и виде приговора, вынесенного в отношении лиц, чьи данные приведены в предложениях в открытом конкурсе. В то же время эти данные должны быть доступны конкурентам подрядчика, который предоставляет данные этих людей в предложении, чтобы они могли проверить, не должна ли быть их судимость основанием для исключения из тендера, и защитить свое право на получение контракта. Однако законодатель не обеспечил, чтобы эти данные после разглашения конкурентам не были доступны слишком большому количеству людей и использовались в целях, не соответствующих закону.

Ключевые слова: государственные закупки, открытость, право на неприкосновенность частной жизни, личные данные, отсутствие судимости

## DER GRUNDSATZ DER OFFENHEIT IM VERFAHREN DER AUFTRAGSVERGABE UND DER SCHUTZ DES RECHTS AUF PRIVATSPHÄRE

### Zusammenfassung

Die Offenheit der Auftragsvergabe besteht darin, die Einhaltung der Grundsätze der Gleichbehandlung, des fairen Wettbewerbs und der Verhältnismäßigkeit zu gewährleisten und das Risiko der Willkür der Entscheidungen der Vergabestelle auszuschließen. Es muss jedoch entschieden werden, ob Offenheit, einschließlich der Verpflichtung zur Offenlegung von Informationen über Personen, die in den Angeboten von Auftragnehmern enthalten sind, nicht dem Recht auf Privatsphäre zuwiderläuft, das auf Basis von Artikel 7 der polnischen Verfassung geachtet werden muss. Der Grundsatz der Offenheit darf nicht dazu führen, dass ein anderes durch die Bestimmungen der Verfassung geschütztes Gut verletzt wird. Es muss auch in Übereinstimmung mit den Bestimmungen der Verordnung 697/2016 EU durchgeführt sein. Dies bedeutet, dass personenbezogene Daten, die im Rahmen der Auftragsvergabe verarbeitet (verfügbar gemacht) werden, geschützt werden müssen. Sofern dies nicht die Rechte und Freiheiten von Personen verletzt, deren Daten verarbeitet werden, wäre die Offenlegung von

Daten zu deren Qualifikation, Funktion und Strafregister eine Sanktion, die das Gericht nicht anordnet, wenn Informationen über die Tatsache der Verurteilung und die verhängte Strafe zur Verfügung gestellt werden. Der Grundsatz der Offenheit darf nicht zu Sanktionen führen, die in der Verurteilung nicht vermerkt ist. Sie darf auch nicht zur Abschreckung von der Teilnahme an der Auftragsvergabe und damit zur Einschränkung des Wettbewerbs führen. Daher ist es erforderlich, Informationen über die Tatsache und die Art der Verurteilung von Personen zu schützen, deren Daten in Angeboten in einer öffentlichen Ausschreibung enthalten sind. Gleichzeitig müssen diese Daten der Konkurrenz des Auftragnehmers zur Verfügung stehen, der die Daten dieser Personen im Angebot angibt, damit diese nachprüfen können, dass ihr Strafregister nicht die Grundlage für einen Ausschluss vom Angebot sein sollte, und ihr Recht auf Erlangung des Auftrags schützen. Der Gesetzgeber hat jedoch nicht sichergestellt, dass diese Daten nach Offenlegung gegenüber der Konkurrenz nicht zu vielen Personen zur Verfügung stehen und für Zwecke verwendet werden, die nicht im Einklang mit dem Gesetz stehen.

Schlüsselwörter: Vergabe öffentlicher Aufträge, Offenheit, Recht auf Privatsphäre, persönliche Daten, Strafenregister

## PRINCIPE DE TRANSPARENCE DANS LA PROCÉDURE DE PASSATION DE MARCHÉ ET PROTECTION DU DROIT À LA VIE PRIVÉE

### Résumé

Le caractère ouvert de la procédure de marché public vise à garantir le respect des principes d'égalité de traitement, de concurrence loyale, de proportionnalité et à exclure le risque d'arbitraire des décisions de l'entité adjudicatrice. Cependant, il est nécessaire de décider si la transparence, y compris l'obligation de divulguer des informations sur les personnes incluses dans les offres des contractants, n'entre pas en conflit avec le droit à la vie privée, qui doit être respecté par l'art. 7 de la Constitution polonaise. Le principe d'ouverture ne doit pas conduire à la violation d'un autre bien protégé par les dispositions de la constitution. Il doit également être effectué conformément aux dispositions du règlement 697/2016 UE. Cela signifie que les données à caractère personnel traitées (mises à disposition) dans le cadre d'une procédure de marché public doivent être protégées. Si la divulgation de données sur les qualifications, les fonctions et casier judiciaire vierge des personnes dont les données sont traitées ne viole pas leur droits et libertés, le fait de fournir des informations sur leur condamnation et de la peine infligée sans décision de justice sur la divulgation de ces informations au public serait une sanction non ordonnée par le tribunal. Le principe de transparence ne peut conduire à une sanction non indiquée dans le jugement de condamnation. Cela ne doit pas non plus dissuader de participer à une procédure de passation de marché et, en conséquence, de restreindre la concurrence. Par conséquent, il est nécessaire de protéger les informations sur le fait et le type de peine infligée aux personnes dont les données sont fournies dans des offres dans le cadre d'un appel d'offres public. Dans le même temps, ces données doivent être disponibles pour les concurrents du contractant, qui communique les données de ces personnes dans l'offre, afin qu'ils puissent vérifier que leur casier judiciaire ne doit pas servir de fondement à l'exclusion du marché et protéger leur droit d'obtenir le contrat. Cependant, le législateur n'a pas assuré que ces données, après avoir été communiquées à des concurrents, ne seraient pas accessibles à un trop grand nombre de personnes et utilisées à des fins non conformes à la Loi.

Mots-clés: marchés publics, transparence, droit à la vie privée, données personnelles, casier judiciaire vierge

## IL PRINCIPIO DI TRASPARENZA NELLE PROCEDURE DI GARA DI APPALTO E LA TUTELA DEL DIRITTO ALLA PRIVACY

### Sintesi

La trasparenza delle procedure di gara di appalto pubblico deve garantire il rispetto dei principi di pari opportunità, di concorrenza leale, di proporzionalità e deve escludere il rischio di arbitrarietà delle decisioni del committente. Bisogna tuttavia valutare se la trasparenza, che comprende l'obbligo di rivelare le informazioni sulle persone, contenute nelle offerte degli appaltatori, non sia in conflitto con il diritto alla privacy, la cui osservanza è richiesta dall'art. 7 della Costituzione della Repubblica di Polonia. Il principio di trasparenza non può portare alla violazione di un altro bene tutelato da una norma della costituzione. Deve essere inoltre attuato conformemente alle norme del regolamento (UE) 2016/679. Questo significa che i dati personali trattati (resi accessibili) nella procedura di gara di appalto pubblico devono essere tutelati. Sebbene la comunicazione di dati sulle qualifiche, sulla funzione svolta e sull'assenza di precedenti penali degli interessati non pregiudichi i loro diritti e libertà, tuttavia la comunicazione di informazioni sulla condanna e sulla pena comminata senza una sentenza del giudice di divulgazione al pubblico di tale informazione costituirebbe una sanzione non comminata dal giudice. Il principio di trasparenza non può generare una sanzione non indicata nella sentenza di condanna. Non può altresì portare a scoraggiare a partecipare alla gara d'appalto e in conseguenza a limitare la concorrenza. È quindi necessaria la tutela dell'informazione sulla condanna e sul tipo di pena comminata nei confronti delle persone i cui dati vengono pubblicati nelle offerte delle gare pubbliche. Allo stesso tempo questi dati devono essere accessibili ai concorrenti dell'appaltatore, che inserisce dati di queste persone nell'offerta, per potere verificare se i precedenti penali di tali persone non costituiscano una base di esclusione dalla gara e tutelare il proprio diritto di vincere l'appalto. Il legislatore non ha tuttavia garantito che i dati, dopo essere stati comunicati ai concorrenti, non diventino accessibili a un gruppo troppo esteso di persone e vengano utilizzati in modo non conforme alla legge.

Parole chiave: appalti pubblici, trasparenza, diritto alla privacy, dati personali, assenza di precedenti penali

#### Cytuj jako:

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