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The role of a contracting authority in the optimization of investment and construction process in the Public Procurement Law

Rola zamawiającego w optymalizacji procesu inwestycyjno-budowlanego. Rozważania na podstawie ustawy — Prawo zamówień publicznych

Abstract

In the Polish Public Procurement Law, the role of a contracting authority is focused on the preparation to the process of a public contract award. However, it is difficult to approve of the thesis according to which the role of a contracting authority is limited solely to the application of the provisions of the Public Procurement Law. There is no legal analysis to confirm how important the participation of a contracting authority is in the investment planning and cooperation at every stage of the investment. The technological process of the public contract performance void of activities undertaken by a contracting authority may end as a failure, either economical, qualitative or even legal.

Keywords: contracting authority, public procurement, public funds, investment process, construction process

JEL: K15

Streszczenie

W polskim prawie zamówień publicznych rola zamawiającego skupiona jest wokół przygotowania procesu udzielenia zamówienia publicznego. Trudno jest jednak zgodzić się z tezą, że rola zamawiającego ogranicza się wyłącznie do stosowania przepisów ustawy — Prawo zamówień publicznych. Pod względem prawnym nie analizuje się, jak istotny jest udział zamawiającego w planowaniu inwestycji i współdziałanie na każdym etapie realizacji inwestycji. Technologiczny proces realizacji zamówienia publicznego bez działań podejmowanych przez zamawiającego może okazać się niepowodzeniem, czy to pod względem ekonomicznym, jakościowym, czy nawet prawnym.

Słowa kluczowe: zamawiający, zamówienia publiczne, środki publiczne, proces inwestycyjny, proces budowlany

Introduction

The new Public Procurement Law¹ has defined the concept of a contracting authority and, additionally, classified it into public, sector and subsidized categories. This specification is of enormous importance when it is necessary to establish the obligation to apply the provisions of this Law by specific entities and, consequently, determine funds for the investment implementation (Pawlak, 2013). Pursuant to the thesis contained in the ruling of the National Appeals Chamber of 23 March 2017², "a contracting authority *sensu largo* does not exist. A contracting authority is defined on the

grounds of specific proceedings in accordance with the definition contained in Article 2(12) of the Act of 29 January 2004 — the Public Procurement Law (i.e. Journal of Laws of 2015, item 2164 as amended). According to the definition placed in the above invoked provision, it is necessary to connect the attribute of a contracting authority in specific proceedings with a specific entity obliged to apply the provisions of the Act — the Public Procurement Law, that is such that carries out proceedings on the award of a public contract. It means that a contracting authority must be specified and accurately defined as an entity rather than as a group of entities functioning in any dependency or

subordination relationship". Undoubtedly, the case-law of the National Appeals Chamber has led to changes with regard to the legal recognition of a contracting authority.

A purpose of the study is to show the role of contracting authorities in the initial phase of the investment and construction process through the analysis of individual tasks they face. According to the thesis posed herein, passiveness of contracting authorities or their only basic involvement in the proceedings on the award of a public contract may considerably increase investment costs and concurrently decrease the quality of construction works being performed.

The issue under discussion has been studied with the use of a dogmatic research method, analytical research method and case-law analysis.

The concept of the investment and construction process

Polish legislation does not contain a legal definition of the investment and construction process. Nevertheless, the Building Law Act uses the concept of the "construction process", for instance to the extent of indicating its participants or a possibility of obtaining a building license (Dybic, 2012). In the subject literature, the construction process is described as a sequence of many successive and mutually complementary actions and activities that must be performed to preserve appropriateness of building works leading to the development and completion of a building undertaking (see: Więclaw-Bator, 2017; Kuliński, 2013).

Construction process participants often use the term "investment and construction process". The reasons for the formation of a concept alternative to the construction process may be found in the financial aspects of investments. Analyzing the investment and construction process from a legal and financial perspective, one may reach a conclusion according to which both the choice of a proper contracting authority and a way of performing and developing the investment, including the selection of materials, affects the achievement of a final result of the entire process. What matters most therein is the choice of a proper public procurement award procedure, the content of the terms of contract, a manner of choosing the best tender, and proper settlement of the investment implementation (compare: Potyra, 2015, p. 125–154; Borowicz, 2015; Sypniewski, 2013, no. 2, p. 67–79). All these stages require constant co-operation between a contracting authority and economic operator. Passiveness of a contracting authority in the process of contributing to the investment implementation is a frequent and improper phenomenon. Contracting authorities are mostly focused on the application of proper procedures resulting from the Law while effective performance requires them to be involved at every stage of building works, not just at the stage of choosing an economic operator.

An essential aspect of the discussed issue is the content of a building works contract itself which is a result of the public contract award procedure. A building works contract should,

in particular, set out obligations of the parties thereto. Despite this, during the performance of building works contracts disputes about the interpretation thereof often occur, both about the subject matter of these contracts and obligations of the parties thereto as well. It happens that a contracting authority no longer sees the concept of investment but only the effect of its implementation. It is a consequence of accountability imposed on a contracting authority in relation to public finance discipline. Contracting authorities care about the details connected with the contract award but later their interest in the subsequent investment is limited solely to meeting its deadlines. It often happens that contracting authorities do not go into details of the process of investment implementation itself, for example, they do not analyze certificates of building materials, take no notice of the necessity to preserve stages in building works, or do not supervise "covering" works. Such conclusions emerge in effect of a legal service provided to economic operators as part of the cooperation on the investment and their participation in the process of investment implementation. It happens that a contracting authority does not turn up at the construction site at all.

The following conclusion may be reached from the analysis of the case-law concerning the conclusion and performance of building works contracts: these contracts do not embrace the construction process in whole. It seems that the participation of contracting authorities in investment planning as well as their participation in all and every stage of investment implementation is omitted. To perform a contract, it is necessary to appoint a construction site inspector who, as a representative of a contracting authority, will make sure the investment is implemented properly. At the same time, the inspector fulfils the obligation of co-operation between the parties to perform a contract on behalf of a contracting authority. A contracting authority cannot forget that a building works contract is governed by the provisions of the Civil Code whereas the provisions on contracts for specific works will also apply herein to the subsidiary extent.

A contracting authority — an investor — as an entity optimizing the investment and construction process

Investment and construction processes are an elaborate set of mutually dependent obligations and rights. Contracting authorities many a time only point out what building services, supplies or investments they need. If this is a case, the subject of a public contract is not accurately specified and described in a tender. An accurate description of the subject of the contract allows to create a precise cost estimate, both in relation to the investment and performance. It allows to prepare better estimation of costs connected with the investment implementation.

It also happens that a tender selected due to the price proposed by a tenderer does not fully guarantee a successful

implementation of the investment. An example of such a situation was the construction of the A1 motorway during works on the preparation of Polish infrastructure for Euro 2012. Many economic operators became insolvent during the implementation of the road investments and went bankrupt. In consequence thereof, the contracting authority suffered enormous financial loss.

One more problem appears additionally herein, i.e., to what extent contracting authorities deem themselves as investors. Although this question may apparently look completely insignificant, one of the functions of the Public Procurement Law is rational spending of public funds. In consequence thereof, proper understanding of the role of a contracting authority as an investor is a key issue in rational spending of public funds. As long as public funds are none's, construction investments carried out under public procurement will yield negative financial result.

Analyzing the issue of construction investment from a technical perspective, it should be remembered that this is a multistep process.

Literature on building construction describes a preparatory phase as the investment process covering detailed planning and identification of all and possible threats to a project carried out by an investor (Surówka, 2013, p. 18–26.). It happens that in result of a contracting authority's need, a preparatory phase is limited solely to the most important issues. In such a case, these issues are those which are connected with determination of the legal status of the property. Other issues may then be handed over to an economic operator as part of the process "design and build".

Determination of the legal status of the property is of crucial importance before an investor makes a decision about the purchase of the property he is interested in. Other solutions appear depending on the property's status, i.e. whether it is owned by contracting authorities or whether they just intend to purchase it. If the property is owned by a contracting authority or a founding body, the contracting authority should ensure a possibility of the lawful exploitation of the property. For instance, if a municipal company intends to expand heat distribution network on the land owned by the municipality, which is a founding body, relevant formalities permitting to use the land for this purpose should be fulfilled: from the activities carried out by the founding body to those carried out by a notary.

Taking notice of the planning situation of the investment area, a contracting authority may make substantial savings taking advantage of the site's location. Pursuant to the Act on Spatial Planning and Development of 27 March 2003³, a document defining the functional zone of a given site is a local spatial development plan. Launching construction investment, still during the pre-tender stage, a contracting authority may match his expectations regarding the investment to the requirements for the use of the property's location. It happens that the contracting authority's expectations blatantly differ from the land features imposed precisely by the land development. Then, adjusting the property under such

conditions to the contracting authority's design expectations increases the costs of the investment implementation.

Moreover, a contracting authority should find out whether a given site is not protected by heritage conservation in the spatial development plan because such protection may hamper the investment implementation. However, when after the choice of the best tender and the conclusion of a contract with an economic operator within the "design and build" scope, it turns out that the investment cannot be implemented, it is a problem. Heritage conservation protection introduces numerous restrictions in the exercise of the ownership right, in particular those concerning refurbishment or redevelopment. Every such action requires a respective decision of a heritage conservation officer⁴.

The next important stage of the investment is a prior diagnosis whether a given property has access to utility infrastructure, whether such access must be provided and, if so, what is a feasible chance of obtaining it⁵. Usually, the construction of technical infrastructure involves considerable costs, which may cause that the investment will become financially unprofitable. Another important issue are the conditions under which a connection to a given utility distribution network may be made. This usually entails payment of the connection fee, the amount of which depends on the investment size. If contracting authorities do not check these issues before, they jeopardizes the success of the entire investment process. It happens that the issues connected with utility infrastructure are a part of economic operators' obligations (Sześciło, 2013, p. 171–174; Urbanek, 2010, p. 241–261; Niewiadomski, 2009, p. 559–575). It is worth paying attention here to the investments implemented by private entities, where investors cooperate with economic operators for the whole duration of the investment implementation wishing, most of all, to achieve the highest quality of the object and, at the same time, not to bear significantly higher costs. Finally, what is also missing in the performance of public contracts is the fact that contracting authorities do not equate their interests with social interests.

Transport accessibility is of key importance for the possibility of using the property. Pursuant to the thesis set out in the ruling of the Provincial Administrative Court in Lublin of 9 June 2009⁶, "if a plot of land designated for investment does not have a direct access to a public road while the existing indirect access to this road does not correspond to legal requirements, the investor may not be granted a building permit". With regard to the above mentioned ruling as well as the applicable law thereon, it should be noticed that the very assurance of a contracting authority of transport accessibility itself is not sufficient. Information on transport service should be included in the local plan or zoning permit. It is noted that in "design and build" contracts these issues may also be delegated to an economic operator for implementation. The problem appears when applying for access to a public road, it turns out that it is impossible to obtain it.

Legal literature rarely points out to the issue of investment and performance cost estimate. The concept of the estimate most frequently appears in the context of legal events where specific legal effects may be connected therewith (Makowski, 2011, p. 28–39.). Recently, the term "business plan" has been more and more popular. Empirical research has indicated that the estimate of performance cost is a standard document submitted together with a tender in the award of public contract proceedings. However, the investment cost estimate is often drawn up by contracting authorities only in order to fulfill a statutory obligation. The importance of the investment cost estimate is invaluable, and yet often belittled. Such approach to the issue of the estimate is connected with the method of selecting the best tender. Currently, the cheapest tender is selected, which guarantees the achievement of the possibly highest quality of the public contract performance. Hence, it evokes doubts as to how a contracting authority may know that this price is adequate to the denoted quality of the public contract performance if the investment estimate has not been accurately drafted. Disputes about underestimated costs of the investment performance occur extremely often.

The next stage of the investment performance preparation is a design phase. There are three basic types of construction projects: concept-based, construction, and construction and performance-based. Contracting authorities may be obliged to prepare and draft a project but this duty may also be delegated to economic operators. Nevertheless, contracting authorities should not withdraw from cooperation at the design stage in both these cases (Sypniewski, 2011). It is a crucial phase for each construction investment because the potential cost of building works as well as the object's functionality depend just on it since a contracting authority has a decisive impact on the amount of projected expenses. The application of cost accounting methods and tools and their use in the process of cost optimization affect limitation or avoidance of a lot of unnecessary expenses at the stage of the project's implementation. Regarding this, it seems indispensable to raise the issue of investment supervision (see: Rzewuska, 2017; Szanciło, 2016; Lewandowski, 2013, p. 217–230; Goldiszewicz, 2017, p. 633–648; Krzemień, 2014; Łapecki, 2013, p. 384–390; Szostak, 2011, p. 3–19; Florecka, 2016; Kasicka, 2016). As an investor, a contracting authority may supervise the investment at every stage of its implementation. What is more, it seems reasonable for a contracting authority to make budget calculations at every stage of the project and update them looking for optimal technical and economical solutions. The subject literature indicates that the appointment of a competent person to act as a supervision inspector is also an optimal solution.

Conclusion

Based on the outcome of empirical research, the study has, most of all, discussed and analyzed a preparatory phase of the investment and construction process. The literature on public procurement pays special attention to the legal aspect of both the award and performance of public contracts. However, the attention does not encompass the entire technological process. It may be assumed that, after all, contracting authorities do not have to be interested in technical issues whereas due to the accountability imposed by the public finance discipline, legal issues take priority therein. Understanding the investment and construction process in this way, contracting authorities fall into "the trap"; they often do not know performance technology of specific works and, therefore, they create specifications of essential terms and conditions of the contract improperly. Consequently, the performance of a public contract falls short of contracting authority's actual expectations and the needs of beneficiaries of a specific good. It would be beneficial for a contracting authority to have a team of persons possessing specific knowledge and expertise, who would act as advisors on the issues connected with the award of a public contract. It is important that contracting authorities cooperate with economic operators the whole time because this cooperation truly facilitates the investment and construction process on the one hand and, on the other hand, specifically ensures a proper fulfillment of the obligation. Each phase of the investment's implementation has their own specificity. The preparatory phase, however, is the most important because mistakes committed during this stage or ensuing negligence (omission or oversight) may affect the implementation of the entire process, and indeed the correct spending of public funds. What is more, a contracting authority is an investor in the building works contract and thus becomes a participant of the construction process. As an investor, he is obliged to secure the investment interest to the fullest extent possible, in particular, through accurate and precise drafting of the provisions of a building works contract. Strategic provisions thereof should concern the participation of sub-contractors in the performance of building works, a manner of partial works accounting, and remuneration. The Public Procurement Law combines both private and public law. Entities performing contracts concluded under this Law enjoy special legal circumstances accompanying it as it is not a case of a free conclusion and performance of a contract.

Przypisy/Notes

- ¹ Public Procurement Law of 11 September 2019 (Journal of Laws of 2019, item 2019 as amended).
- ² The ruling of the National Appeals Chamber of 23 March 2017, KIO 457/17, Legalis number 1581451.
- ³ The Act of 27 March 2003 on Spatial Planning and Development, Journal of Laws of 2003 No. 80, item 717 as amended.
- ⁴ <http://www.budownictwo.abc.com.pl/czytaj/-artykul/oze-etapy-procesu-inwestycyjnego-krok-po-kroku>, accessed on: 24.07.2019.
- ⁵ <https://www.prawo.pl/biznes/oze-etapy-procesu-inwestycyjnego-krok-po-kroku,150981.html>, accessed on: 24.07.2019.
- ⁶ The ruling of the Provincial Administrative Court in Lublin of 9 June 2009, II SA/Lu 219/09, Legalis number 175270.

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