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The Public-Private Character of Activities of the Contracting Entity

Publiczno-prywatny charakter czynności zamawiającego

ABSTRACT

The aim of the article is to determine the nature of activities of the contracting entity. Public procurement combines the elements of civil, administrative, economic, and financial law. This solution makes the activities of the contracting entity difficult to classify unambiguously as either public or private. Essentially, the contracting entity's activities are aimed at the conclusion of a civil law contract, but a number of its tasks are of an administrative or public-law nature (e.g., the obligation to publish a contract notice). In addition, contracting entities are subjected to auditing on the part of the economic operators themselves as part of the appeal proceedings and external audit on the part of a specialized State auditing body – the President of the Public Procurement Office. The contracting entity spends public funds, therefore a number of obligations have been imposed on it to ensure the money is spent as efficiently as possible. Hence, it seems that it is the public element that prevails in the contracting entity's activities.

Keywords: public procurement; external audit; contracting entity; appeal proceedings

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INTRODUCTION

Public procurement is a hybrid area of law comprising elements of civil law, administrative law, economic law, and financial law, as it is considered that "public procurement law is not a homogeneous area of law: it is composed of the provisions of the Public Procurement Law and the comprehensive structure of links between this act and other areas of law and legal regulations, both those from the area of private law and those clearly related to public law".[1] It is therefore topical and interesting to answer the question about the nature of the area of law thus developed in the perspective of the classic division into public law and private law.

The prevailing view in the literature states that the main activities, i.e. tender procedure activities, are acts in civil law and their effect is the conclusion of a civil law contract between the contracting entity and the economic operator.[2] However, it is impossible to ignore the provisions of this Act that have a strictly administrative nature, based on which the President of the Public Procurement Office issues administrative decisions on the imposition of financial penalties for violation of the provisions of the Act or entry on the list of organizations authorized (beside the economic operators) to bring legal remedies. It is also difficult to conclude that activities of the authority in the course of an audit are of a civil law nature. We must also notice other statutory obligations and rights of economic operators than those related to the conduct of proceedings.

However, the discussion on the nature of public procurement as part of public law or perhaps private law cannot ignore the contracting entity being an entity responsible for the correct preparation and conduct of the proceedings. The question arises about the nature of individual activities of the contracting entity performed under the Act of 11 September 2019 – Public Procurement Law.[3] The public and private activities indicated in the title hereof form a fundamental, but not exhaustive, division of these activities.

[1] A. Zdebel-Zygmunt, *Organizacja systemu zamówień publicznych w Polsce*, [in:] A. Zdebel-Zygmunt, J. Rokicki, *System zamówień publicznych w Polsce*, Warszawa 2014, p. 111.

[2] Z. Gordon, *Kształtowanie treści umów i stosunków umownych w ramach zamówień publicznych*, [in:] *Prawo zamówień publicznych. Stan obecny i kierunki zmian*, eds. H. Nowicki, P. Nowicki, Wrocław 2015; J. Jerzykowski, [in:] W. Dzierżanowski, J. Jerzykowski, M. Stachowiak, *Prawo zamówień publicznych. Komentarz*, Warszawa 2018; A. Fermus-Bobrowiec, *Wybrane zagadnienia dotyczące wykorzystania umowy cywilnoprawnej jako instrumentu działania administracji*, "Zeszyty Naukowe KUL" 2018, vol. 61(4).

[3] Journal of Laws 2019, item 2019, as amended, hereinafter: PPL.

DEFINITION OF THE CONTRACTING ENTITY IN THE PUBLIC PROCUREMENT LAW

The concept of contracting entity is central to the public procurement system, which is based on the relationship contracting entity-economic operator in which the former wants to buy the product and the latter first offers the product and, when selected as a result of the procedure, delivers it. There are no public contracts without the contracting entity, as seen in the light of the Public Procurement Law, in which the legislature refers to the concept of contracting entity as many as 1,044 times in 623 articles. The contracting entity within the meaning of Article 37 (1) PPL is an entity which prepares and conducts a public procurement procedure and organises a design contest. The contracting entity is therefore the entity which is itself responsible for the entire course of the proceedings, from strictly organisational activities, a formalised procedure for the selection of the economic operator who will supply the best product, to the entering into an agreement with the winner of the proceedings. No wonder it is noted that "the public procurement law is essentially addressed to contracting entities".[4]

It is worth noting that Article 37 (1) PPL is in fact partially a repetition and partially a development of the previously applicable Article 16 of the Act of 29 January 2004 – Public Procurement Law,[5] which lays down the fundamental principles governing the public procurement procedure. According to that provision, the contracting entity shall prepare and conduct the procurement procedure in a way that guarantees fair competition and equal treatment of economic operators, is transparent and proportionate. Thus, Article 16 PPL of 2004 and Article 37 (1) PPL (currently applicable) express the principle of decentralization, according to which the contracting entity has full autonomy to act when awarding public contracts and the head of the contracting entity has full responsibility for the conduct of the procedure. In this respect, the President of the Public Procurement Office does not have any powers which would allow him to interfere in the procurement process, e.g. indicating the mode of proceeding in which the contract should be carried out or the choice of the economic operator. Similarly, under the Public Procurement Law, other entities do not have the option to intervene in the proceedings. On the other hand, the central purchasing authority referred to in Article 44 PPL does not infringe the principle of decentralization, since it has an organizational character as regards the way in which procurement conducted.

The Public Procurement Law, in Articles 4 to 6, lists four types of contracting authorities.

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[4] J. Niczyporuk, *Procedura zamówień publicznych*, "Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu" 2017, no. 497, p. 66.

[5] Journal of Laws 2019, item 1843, as amended, hereinafter: PPL of 2004.

1. Public entities, i.e. in accordance with Article 4 (1) and (2) PPL, public finance sector units within the meaning of Article 9 of the Act of 27 August 2009 on public finance,[6] namely: public authorities, including bodies of central government administration, state auditing and law protection bodies, courts and tribunals; local government units and their associations; metropolitan unions; budgetary units; local government budgetary establishments; executive agencies; budgetary institutions; state special-purpose funds; Social Insurance Institution and the funds managed by it, and the Agricultural Social Insurance Fund and the funds managed by the President of the Agricultural Social Insurance Fund; National Health Fund; independent public health care institutions; public universities; Polish Academy of Sciences and its organizational units; state and local-government cultural institutions and other state or local-government legal entities established under separate laws in order to perform public tasks, with the exception of enterprises, research institutes, institutes operating within the Łukasiewicz Research Network, banks and commercial law companies/partnerships. The extensive catalogue of state entities obliged to conduct proceedings may raise doubts, thus it is worth noting that in the case law of the Court of Justice of the European Union and its predecessors, even under previous directives governing the rules for conducting public procurement in the territory of the Community, it was assumed that the term "State" should be understood in a functional manner, and therefore in terms of the tasks performed, and the scope of the term "State" should include all state bodies: legislative, executive and judiciary as well. In the case of a federal state, this term also includes the relevant federated-state authorities.[7]

2. Public law entities which, pursuant to Article 4 (3) PPL, are legal persons established for the specific purpose of meeting general needs, neither of an industrial nor commercial nature, if entities, state entities, individually or jointly, directly or indirectly through another entity: finance them in more than 50%, or hold more than half of shares or stocks, or supervise their management board, or have the right to appoint more than half of the members of their supervisory or management board. Public-law entities include such legal persons whose functioning is dominated by state entities, when "in the light of the factual and legal circumstances of the case, including mainly the tasks of the entity and its relations with the broadly understood State, there is a risk that this entity, when awarding a contract, will be guided by criteria other than purely economic ones".[8] A public-law entity does not

[6] Journal of Laws 2019, item 869, as amended.

[7] See judgment of the CJEU of 20 September 1988, C-31/87, *Beentjes (Gebroeders Beentjes v. The Netherlands)*, ECR 1988, p. 04635; judgment of the CJEU of 17 September 1998, C-323/96, *Commission v Kingdom of Belgium*, ECR 1998, p. I-05063.

[8] J. Baehr, T. Kwieciński, A. Stawicki, [in:] *Prawo zamówień publicznych. Komentarz*, ed. T. Czajkowski, Warszawa 2006, p. 36.

operate like a regular commercial undertaking competing with others on the free market, but the common nature of the products it offers means that it cannot be guided by the same criteria of operation as ordinary undertakings, as underlined in the tenth recital of the preamble to the currently applicable Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC[9] when examining the nature of the tasks performed by a given entity, "it should be clarified that a body which operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity should not be considered as being a 'body governed by public law' since the needs in the general interest, that it has been set up to meet or been given the task of meeting, can be deemed to have an industrial or commercial character". An ordinary undertaking may offer the same products as a public-law entity, but its driver is profit. On the other hand, a public-law-entity operates only to satisfy common needs, and gainful activity is not the primary aim of its operation.

3. Sectoral contracting entities, i.e. those which pursue one of the activities referred to in Article 5 (4) PPL, that is:

- water management, consisting in the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water, the supply of drinking water to the network, water engineering, irrigation or land drainage projects, provided that the volume of water used for the supply of drinking water represents more than 20% of the total volume of water made available due to such projects or irrigation or land drainage installations, or the disposal or treatment of sewage,
- electricity, consisting in the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transmission or distribution of electricity, the supply of electricity to the network,
- gas and heat, consisting in the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of gas or heat, the supply of gas or heat to the network,
- transport services that is the activity of providing or operating networks intended to provide a service to the public in the field of transport by railway, tramway, trolley bus, bus, cable or with the use of automated systems,
- ports, harbours and airports connected with the exploitation of the geographical area for the purpose of the provision of airports and maritime or inland ports or other terminal facilities to, accordingly, carriers by air, sea or inland waterway, or other terminals,

[9] OJ L 94/65, 28.3.2014, hereinafter: Directive 2014/24/EU.

- postal services, which is the activity consisting in the provision or management of services for the clearance, sorting, routing and delivery of postal items, management of these services and the provision of other services relating, e.g., unaddressed mail,
- the extraction of fuels in the form of oil or natural gas and their natural derivatives and the exploration for, or extraction of, lignite, hard coal, or other solid fuels.

If these activities are carried out by state entities or public-law entities, or where the contracting authorities, whether individually or jointly, directly or indirectly through another entity, have a dominant influence, in particular by holding more than half of the shares or stock, or more than half of the votes attached to the shares or stock, or the right to appoint more than half of the members of the supervisory or management body, or where such activity is exercised based on powers conferred by law or upon an administrative decision which consist in reserving the exercise of a given activity to one or more entities, having a significant influence on the ability of other entities to exercise that activity (concession or permit). Thus, "sectoral contracting entities, unlike contracting authorities, are distinguished not only on the basis of subjective criteria, but also based on the objective criterion: activity pursued in the water, energy, transport and postal services sectors, collectively referred to as sectoral activities".[10] The classification of an entity as a sectoral contracting entity is therefore determined primarily by the type of activity it carries out.

4. Subsidised contracting entities are those who do not fall into the previous categories, but meet three cumulative conditions:

- more than 50% of the value of the contract awarded by this entity is financed from public funds or other non-subsidised contracting entities,
- the value of the contract is equal to or exceeds the EU thresholds,
- the contract covers works as defined in Annex II to the Directive 2014/24/EU, construction of hospitals, facilities intended for sports, recreation and leisure, school buildings, university buildings and buildings for public administration, or services connected with such works.

Classification as the last group of contracting entities is not dependent on the nature of the entity or its activities, but on the source of the funds from which the contract is financed. The obligation to apply the Public Procurement Law is incumbent upon the subsidised contracting entity only on a case-by-case basis, due to obtaining public funds, but it is not of a comprehensive nature and therefore no public contract proceeding is carried out in a situation where using their own funds or funds from commercial sources. A subsidised contracting entity may therefore

[10] Justification to the draft Act – Public Procurement Law, Sejm of the 7th term, Sejm Paper no. 3624, p. 9.

be a completely private entity which has received one-off financial support for a specific project.

The subjective scope of the term "contracting entity" indicates that the legislature has sought to ensure that formalised and transparent procedures for best management possible are applied wherever public funds are spent. Such a solution applies to both public, public-private and even completely private entities.

In the EU law, Article 1 (1) of Directive 2014/24/EU uses the concept of "contracting authorities" understood as the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law; Crucial at this point is the concept of "State", which, as ruled in the ECJ judgment of 12 July 1990 in case C-88/89 *Foster v British Gas plc*,[11] comprises entities which are subject to the authority or control of the State, irrespective of its legal form and whether they are in public or private hands. The State is therefore understood, as has already been said, in a functional or substantive manner, i.e from the perspective of the tasks performed. It is not defined in the formal manner, i.e. by only referring to the name or method of appointment of the entities. A state institution will therefore be an entity carrying out certain tasks attributable only to the State for the benefit of the public and to this end spending public funds.

Thus, the catalogue presented above shows that "contracting entities are primarily organizational units of various legal and ownership status, which means that this group is not limited to public institutions (state and local government) in the broad sense of the term. A contracting entity may also be a private entity and, in certain situations, an undertaking, although the provisions of the Directive 2014/24/EU seem to clearly suggest that entities which operate under normal market conditions and are intended to generate profit, and which incur losses due to their activity, should not be considered as a public-law entity".[12] Polish law, following the EU law, defines the category of contracting entities very broadly. However, such a wide range of entities raises doubts about the nature of the scope of obligations of the public contracting entity, but also of the private one, which rarely or even once applies the provisions of the Public Procurement Law.

[11] ECLI:EU:C:1990:313.

[12] T. Kocowski, *Zamawiający i wykonawcy w systemie zamówień publicznych*, "Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu" 2017, no. 497, pp. 171–172.

SCOPE OF CONTRACTING ENTITY'S OBLIGATIONS AND RIGHTS

1. List of contracting entity's activities

The activities of the contracting entity listed in the Public Procurement Law result from the obligations and rights statutorily imposed on it. Basic activities are those addressed to economic operators interested in winning a contract. These are, in chronological order, activities during the preparation of the procurement procedure: drafting a description of the subject matter of contract, setting out the conditions for participation in the procedure, description of the criteria for the evaluation of tenders, drafting a model contract, but also decisions of an informative or organizational nature specifying the date of submission of tenders, the method of their submission, the method of communication between the contracting entity and economic operators, decisions on the rules for bearing the costs of participation in the proceedings, admissibility of settlement of accounts in foreign currencies and others.

These are also the activities of conducting the procedure, including primarily the examination and evaluation of tenders, but also procedural activities as a party in the event of a dispute between the organizer and the participants in the proceedings.

After the end of the proceedings, the contracting entity acts as a party to the public procurement contract by performing activities such as supervising its performance, exercising the rights of the party by enforcing the obligations of the other party and fulfilling its own obligations, in particular the payment of remuneration and the preceding acceptance of the subject of the contract, decisions on the retention or return of the performance bond, making decisions and arrangements regarding modification of the contract, withdrawal, notice or termination. There are also activities consisting in the exercise of rights under statutory warranty and guarantee and, finally, procedural activities when a dispute between the parties to the contract as to the rules of its performance arises.

In addition to those activities, the contracting entity perform obligations which are not directly and strictly linked to the procurement procedure itself. These are, i.a., planning activities setting the scope of purchasing needs having the character of internal activities, activities consisting in organising and division of labour of the persons performing duties related to the award of the contract, activities relating to the provision of information on the proceedings to an unlimited number of interested persons, activities relating to the preparation of proceedings files available to all, activities carried out by the authorised bodies and institutions in which the contracting entity act as an audited entity, activities resulting from obligations of reporting to bodies authorised to be notified on the course of proceedings.

These are also acts in administrative proceedings conducted by the President of the Public Procurement Office initiated due to the occurrence in the course of

proceedings of circumstances indicating law infringements resulting in the imposition of a financial penalty. For contracts co-financed by the EU budget, this catalogue is complemented by activities in a two-stage proceeding (a civil-law stage conducted under the co-financing agreement and an administrative stage conducted under the Act on public finance) to investigate infringements of national and EU law resulting in so-called potential damage to the EU budget and reduction in the funding for this reason.

2. Activities in the contract award procedure

The concept of public procurement in its broad sense is understood as "a public spending process regulated by law for the sake of public interest, consisting of activities aimed at concluding the contract, the conclusion and implementation of the contract, carried out for the purpose of acquiring certain goods and satisfying primarily the public interest".[13] The contract award procedure is one of the key parts of this process, starting with the notice or invitation to the proceedings (Article 7 (18) PPL) and ending with the conclusion of the contract or cancellation of the proceedings (Article 254 PPL). Unless the Public Procurement Law provides otherwise, the provisions of the Civil Code shall apply to the activities taken at this stage of proceedings (Article 8 PPL). There is no doubt as to the nature of activities which are not regulated separately in the Public Procurement Law. The legislature decided that these are civil law acts. The Civil Code, applied to these activities as a basic act of private law, expressly defines the private nature of them. However, it is not tantamount to defining all activities in the procurement procedure as having a private-law nature. It can be stated that the legislature, where it has referred to the Civil Code, has delineated the area of contracting entity's discretion in defining the rules of the tender procedure. The special regulations of the Public Procurement Law, being mostly composed of peremptory norms, is a regulation binding on the public sector, the part of which are contracting entities, and thus confer on the contracting entity the public-law character, i.e. the activities performed by bodies governed by public law towards private entities, and their performance is strictly regulated by the provisions of the law binding on those performing the activity. However, these activities cannot be regarded as administrative activities, since "the relationship between the contracting entity and the economic operator is not the relationship of superiority and subordination typical of administrative-law relations. Both parties to the legal relationship must therefore be regarded as equal entities, even though not equally empowered".[14]

[13] M. Wieloński, *Realizacja interesu publicznego w prawie zamówień publicznych*, Warszawa 2012, p. 32.

[14] *Ibidem*.

That lack of equality between the parties and the purpose of such a development of the relationship between them result from a different perception of the position of the parties to the proceedings. The contracting entity (as is apparent from the title of the Act itself) is a public-law entity and the economic operator is a private entity. The contracting entity's activities under the provisions of the Public Procurement Law must therefore be described as public-law activities, although based on private law.

The status of a public-law entity stems both from national law: these are entities of the public finance sector under Article 9 of the Act of 27 August 2009 on public finance,[15] but also from the so-called bodies governed by public law referred to in Article 2 (1) (4) of Directive 2014/24/EU and Article 3 (4) of Directive 2014/25/EU[16] and public undertakings covered by Article 4 (2) of Directive 2014/25/EU.

Therefore, the public-law status of contracting entities does not raise any doubts. It is the cause of a number of obligations imposed on them that determine the detailed content of their activities. Beginning with the contract notice – the first activity in the procedure: its content may not be freely chosen by the contracting entity. It is set by the EU legislature for contracts above the so-called EU thresholds[17] and the national legislatures for smaller contracts. It would be difficult to imagine a similarly far-reaching interference in the content of the tender notice in the case of private tender procedures in the light of the constitutional principles of freedom of economic activity and proportionality. A similarly defined scope of information concerns the Specification of the Essential Terms of Contract – an equivalent of the Terms of Reference in a private tender procedure. Although detailed decisions on the criteria for the evaluation of tenders, conditions for participation in the procedure or the value or form of a bid bond were left to the contracting entity, the framework of discretion in shaping them was defined by the legislature, not leaving full freedom to the organizer of the tender procedure. The implementation of the public goal to ensure equal access to public tendering (implementation of public tasks) and protection of competition as a constitutional value, is carried out by standardizing the requirements and activities of contracting entities, covering, apart from the above-mentioned scope, the documents that may be requested, the form of declarations – including the establishment of a mandatory form for their

[15] Journal of Laws 2019, item 869, as amended.

[16] Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94/243, 28.3.2014).

[17] EU thresholds – according to Article 3 PPL, these are the values of contracts or contests specified in the provisions of EU law referred to therein that require to comply with the provisions of EU directives when awarding public contracts.

submission (the so-called European Single Procurement Document, ESPD),[18] the required form of tenders (electronic form). These are the obligations of each contracting authority, and thus the obligations of the entire public sector. Therefore, they should be perceived as public-law activities, standardized and structured in a specific way by a statutory provision, although of a non-sovereign nature.

3. Activities in implementing the agreement

The provision of services, supplies or works under a basis other than a paid civil-law contract is not covered by the Public Procurement Law. The provisions on public procurement do not apply when it comes to the acquisition of goods under an administrative agreement, administrative decision, court judgment, etc.[19] – this view is completely dominant in the literature on the topic.[20]

It stems from the statutory definition according to which a procurement contract is a "contract for pecuniary interest" (Article 7 (32) PPL). Moreover, Article 8 PPL indicates that wherever the Public Procurement Law does not provide otherwise, the provisions of the Civil Code apply to public procurement agreements. This determines the civil-law nature of a public procurement agreement Nonetheless, the sphere of derogations from the principle of freedom of contract in public procurement contracts is constantly expanding. Following the provisions of EU law (Article 72 of Directive 2014/24/EU), a strict catalogue of prerequisites for permissible changes to such a contract has been defined, the circumstances of permissibility of advance payments, and performance bond have been regulated. As of 2014, the national legislature has regulated in detail the rules on the use of subcontracting and the joint and several liability of the contracting entity and the economic operator towards subcontractors. From 1 January 2021 onwards, as a result of the entry into force of the new Public Procurement Law, a public procurement contract agreement should contain a catalogue of provisions necessary for each such agreement (concerning contractual penalties and their maximum amount, prohibition on excessive transfer of risks to the economic operator, indexation due to an increase in public-law levies and, in the case of long-term contracts, also due to an increase in prices. Finally, it is prohibited for public procurement contract agreements, with few exceptions, to conclude such agreements for an indefinite

[18] The European Single Procurement Document referred to in Article 125 PPL temporarily replacing other subjective means of proof in line with the model set out in Commission Implementing Regulation (EU) 2016/7 of 5 January 2016 establishing the standard form for the European Single Procurement Document (OJ L 3/16, 6.1.2016).

[19] A. Banaszewska, *Skarga na orzeczenie Krajowej Izby Odwoławczej jako środek ochrony prawnej w systemie zamówień publicznych*, Warszawa 2018, p. 26.

[20] For example, see G. Wicik, P. Wiśniewski, *Prawo zamówień publicznych. Komentarz*, Warszawa 2007; M. Stachowiak, [in:] W. Dzierżanowski, J. Jerzykowski, M. Stachowiak, *op. cit*.

period. All these restrictions are, on the one hand, to protect the interest of economic operators, for whom the legislature wants to guarantee standardised conditions of cooperation with the public sector, and, on the other hand, to protect the public interest through, e.g., the rules of liability of economic operators for defective performance of agreements. Both of these conditions of the legislature's action make the public procurement contract agreement more and more distant from an ordinary civil-law agreement. Already in the past, there have been claims that this agreement should rather be referred to as a public-law agreement as a contract concluded by the state and other legal persons governed by public law (contracting entities) with private entities to acquire goods or services with public utility characteristics, i.e. purchased to satisfy broadly understood social needs. In this sense, public procurement contract agreements are undoubtedly public-law agreements.[21] Also according to M. Wierzbowski, agreements concluded by public authorities with undertakings by way of a public tendering are public-law agreements (public-law agreements are concluded by public authorities with undertakings by way of a public tender procedure, contest or mutual consent).[22] However, these deliberations, although obviously justified, are not based on any legal provision distinguishing public-law agreements as a separate type of agreement. A public-law agreement as a form of assignment of tasks by the State and at the same time protecting the public interest in a special way could be the subject of legislative work. The above-mentioned mandatory provisions of a public procurement contract agreement, but also e.g. extraordinary reasons for withdrawal from such an agreement for the reasons of public interest included in the Public Procurement Law, could form the ground for an attempt to specify such an agreement in the catalogue of nominate contracts. Such a view was formulated by the Supreme Court already under the first Act on public procurement,[23] according to which public procurement contract agreements constitute type of nominate contract not listed in the Code.[24] However, it seems that under the legislation previously in force, the later view of the Supreme Court, according to which the public procurement contract agreement is not a type of nominate contract, while remaining a civil-law agreement, should have been considered more accurate – "a public procurement contract award agreement is not a separate type of nominate contract. Conclusion and performance of agreements under the Public Procurement Law are subject to a special regulation related to the purpose of this Act, which is intended to ensure fair competition, equal treatment

[21] J. Boć, *Prawo administracyjne*, Wrocław 1998, p. 320.

[22] M. Wierzbowski, *Prawo administracyjne*, Warszawa 2017.

[23] Act of 10 June 1994 on public procurement (Journal of Laws 1994, no. 76, item 344) – repealed.

[24] Judgment of the Polish Supreme Court of 13 September 2001, IV CKN 381/00, ONSC 2002, no. 6, item 75.

of economic operators, and purposeful and austere spending of public funds. This implies the necessity to respect the provisions of the Act, which, however, does not affect the substantive-law qualification of agreements from the point of view of civil law".[25] However, the separation of public procurement contract agreements from agreements subject only to the rules of the Civil Code, significantly expanded by the Act of 11 September 2019, requires serious reconsideration of this view.

4. Planning, organizational and information activities

Beside the main sphere of responsibilities related to the preparation and conduct of the procedure and the performance of the procurement contract agreement, the contracting entities are obliged, as a result of the principles of openness and transparency of their operation, to prepare and publish a plan of the contract award procedure. According to Article 23 PPL, some contracting entities, i.e. those included in the public finance sector (and other organizational units of the State Treasury without separate legal personality), are obliged, upon the adoption of the financial plan, to announce their procurement plans for a given year. This information shall be published in the Public Procurement Bulletin and updated whenever modified. The information is intended for economic operators and allow them to prepare in advance for participation in the tender procedures to come. The purpose of this obligation is clear, but it is more difficult to classify the very activity as a public-law or private-law act. On the one hand, it is a market information measure typical of the private market. On the other hand, however, it is an embodiment of the principle of openness of public life, and thus an activity typical of public-law entities. And the latter is, in our view, crucial for classification of the activity in question. The information about the procurement plans is part of the planned financial management typical of the public sector, and the control over that spending through access to investment plans (or more broadly purchasing plans) is essentially different for commercial activities in the private market based on discretion. The plans of proceedings and their publication must therefore be regarded as material activities serving the proper performance of the tasks of public-sector entities and the efficiency of expenditure, and the ordering of cooperation with the private sector seeking to offer its services to contracting authorities.

Another category of activities of contracting entities are internal activities aimed at organizing the tender procedure, such as appointing a tender committee, adoption of the rules of its operation and responsibilities of committee members, appointing experts, adoption of internal rules for accepting the tender committee's work. This category of activities also includes the provision of technical infrastructure enabling the proceedings to be carried out, especially appropriate IT tools due to the

[25] Judgment of the Polish Supreme Court of 7 February 2013, II GSK 1932/11, LEX no. 1293945.

obligation to proceed electronically. It does not matter whether these activities are classified as public-law or private-law. Regardless of the nomenclature, their purpose and actual scope will be the same. Therefore, in the absence of clear definitions of private-law and public-law activity, such a classification attempt is meaningless. The nature of these activities is best reflected by the concept of "owner's activities". It is the owner, acting through any organizational unit, who determines the organization of the institution's work, including work related to procurement procedures, adapting them to a specific actual situation and needs. The freedom of the contracting authority in the activities aimed at organizing a team and tools necessary for the proper conduct of the procedure is broad and the legislature only provides a framework of obligations in this regard, limiting itself to imposing a specific obligation (e.g., by ordering the appointment of a tender committee in procedures with a value exceeding the EU thresholds, defining its basic task). However, the detailed rules of organization of its work, its composition and the decision-making procedure are an internal decision of the contracting entity. A similar, or even larger margin of discretion was left to the contracting entity in the selection of technical infrastructure for conducting the procedures. The only limitation in this respect is the non-discriminatory nature of the solutions (tools and software) that must be used by the public sector, thus ensuring the technological neutrality of the State. This significant freedom, characteristic of management activities, regardless of the sector (public or private), is a confirmation of the ownership nature of activities performed largely at the discretion of the contracting entity.

5. Reporting activities

The common term "reporting activities" refers to a number of activities. These are primarily the obligation to prepare a report (called a protocol by the legislature; Article 71 PPL) on the course of each contract award procedure, and the obligation to submit an annual report on contracts awarded, to be submitted to the President of the Public Procurement Office. A "reporting activity" is also the obligation that arises after each procedure to notify the President of the Public Procurement Office of the tenders submitted. Reporting also concerns the performance of agreements, and in accordance with Article 446 PPL, in the circumstances specified in that provision, contracting entities prepare a report on the performance of the agreement.

Despite their similar nature, the purpose of these activities differ. The protocol reflecting the course of the contract award procedure is the practical implementation of the principle of transparency and serves to provide all interested parties with information on the course of the tendering, and thus constitutes the implementation of the obligation of openness imposed on the public sector. The activity can therefore be qualified as public-law in terms of its purpose. On the other hand, notifying the President of the Public Procurement Office about the tenders submitted in the pro-

cedure, as well as filing annual procurement reports to the President of the Public Procurement Office, means providing the authority competent for procurement matters with knowledge of the state of the market, the functioning of which he supervises. It can be assumed that this is cooperation of state authorities (and other public sector entities) in monitoring the spending of public funds, enforced by the provision of the Act. This is undoubtedly also an activity of a public-law nature.

The obligation to prepare a report on the implementation of the public procurement contract agreement should be assessed differently. The sole addressee of this report is the contracting entity (although, of course, it is subject to access upon request, like any other information on public matters). However, its purpose is to assess the way in which the agreement has been performed, to identify the difficulties encountered and to try to propose remedies for the future. The nature of the activity could be described as practical self-study. It is, in the typology we propose, an owner's activity and therefore one that cannot be classified either as private-law or public-law one.

6. Activities in audit and administrative proceedings

Activities (both actions and omissions) of contracting entities are subject to the audit of the President of the Public Procurement Office in terms of compliance with statutory provisions (Article 603 PPL). The scope of the audit was defined significantly more broadly than in the Public Procurement Law of 2004, which provided only for the audit covering the "award of contracts" (Article 161). Currently, the President of the Public Procurement Office is also entitled to check compliance with the Act of the conclusion and amendment of agreements and the so-called special procedures, i.e. the dynamic purchasing system, the system of eligibility of contractors, the design contest and the framework agreement, which results from Article 603 (2) PPL. However, the planning, organisational, information and reporting activities are not subject to auditing by the President of the Public Procurement Office. This leads to the conclusion that audit, which is a procedure located within the area of administrative law (although not subject to the provisions of the Administrative Procedure Code and not being an act of the body),[26] concerns the performance by the audited of activities of a non-administrative nature and ignores the possibility of auditing activities which, although are not administrative activities in the strict sense, are activities within the administration and, as a rule, are subject to the procedure for intra-administrative audit.

It is not something unusual to subject non-administrative activity to an audit by an administrative authority; on the contrary, the majority of private operators

[26] For example, see decision of the Polish Supreme Administrative Court of 7 October 2011, II GSK 1932/11, LEX no. 1151674.

are subject to administrative controlling within the limits laid down by special laws. Contracting entities subject to audit according to the same rules have been treated by the legislature as entities independent and separate from the auditing body, obliged to submit to such an audit. Their position as audited entity does not differ from that of audited private entities, and the scope of activities which they are obliged to perform as audited entities (provide the documentation for inspection, provide explanations – Article 605 PPL) also corresponds, in principle, to the scope of activities required, e.g., from audited undertakings. The activities of the audited contracting entity are therefore not acts of public administration, but the performance of the duty's characteristic of each of the audited entities. Activities seeking to challenge the results of the audit (statement of objections) are also an appellate construct typical of audited private entities. The only doubts in this respect are raised by the lack of judicial review in the case of challenging the results of the audit performed by the President of the Public Procurement Office. In the case of audit of private entities, this would be difficult to imagine in the light of the constitutional right to a fair trial. However, again, the case law shows that the absence of judicial review is not due to the intra-administrative nature of the audit, but to the fact that no new legal situation of the audited entity was generated during the audit, since the result of the audit does not impose any obligations on it and does not alter the scope of its rights. Without analysing the aptness of that view, it prejudges the reason for the refusal of a right to a fair trial, which could be the case both where the audited entity is a public-law entity or administrative authority and where the audited entity is a private entity. The absence of judicial review does not therefore lead to the presumption that the audit of the award of contracts is inter-administrative, let alone that the activities of the audited entity were of an administrative nature.

Similarly to the activities taken by the audited contracting entity, it is necessary to assess the activities of the contracting entity during the administrative procedure in which it is the party against whom the proceedings were initiated by the President of the Public Procurement Office or the so-called Managing Authority of the EU Operational Programme conducting the proceedings for repayment of funds unlawfully used, i.e. due to an infringement of the provisions of the Public Procurement Law during their spending. These are the activities tantamount to activities of each party to the administrative proceedings with the same scope of powers under the Administrative Procedure Code.

CONCLUSIONS

The assertion that public procurement is a hybrid area of law consisting of elements of civil law (private law) as well as administrative law and financial law (the last two undoubtedly forming part of public law) indicates that it does not seem that it would be possible to resolve in a simple manner the dispute over their qualification for public or private law. On the one hand, the private-law element related to the procedure based on solutions adopted (but also modified) from civil law seems to prevail in public procurement, and the procedure itself should end with the entering into a civil-law agreement. But on the other hand, the entire proceeding and even the content of the agreement itself are dominated by the main purpose of public procurement, which "from the point of view of the contracting entity involves the purchase of supply, service or works". Some contracting entities which are entities of the public finance sector, when awarding public contracts, must be guided by the reasonableness of spending funds, as specified in the provisions of the Act on public finance. The reasonableness of spending public funds is undoubtedly a legally defined value (goal) and is additionally protected by the provisions on liability for breaching the public finance discipline. The literature on the subject indicates the basic goal of public procurement, which is cost-effectiveness (value for money) of purchases made under public procurement.[27] The reasonableness and efficiency of public expenditure determine the manner of conducting the contract award procedure as part of public procurement. For contracting entities do not spend their (private) funds, but public funds. This, in turn, causes that the Public Procurement Law provides for a number of safeguards in the course of the proceedings, the purpose of which is to protect public money against unreasonable spending, including especially against fraud or corruption. Hence, contracting entities, regardless of the type of their ownership, have been imposed a number of public-law obligations, such as, e.g., notification and reporting duties. Moreover, contracting entities are subject to audit by the economic operators themselves as part of the appeal procedure and external audit by the auditing body: the President of the Public Procurement Office. The public procurement contract agreement itself has strong public-law accents that must be included in it so as to protect the interests of the contracting entity. It seems, therefore, that when it comes to the contracting entity's activities, the public-law elements prevail, due to the goal of public procurement.

[27] H. Nowicki, *Cele systemu zamówień publicznych*, "Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu" 2017, no. 497, p. 55.

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ABSTRAKT

Celem artykułu jest określenie charakteru czynności zamawiającego. Zamówienia publiczne łączą w sobie elementy prawa cywilnego, administracyjnego, gospodarczego i finansowego. Takie rozwiązanie powoduje, że czynności zamawiającego trudno zakwalifikować jednoznacznie jako publicznoprawne lub prywatnoprawne. Zasadniczo bowiem czynności zamawiającego zmierzają do zawarcia umowy cywilnoprawnej, ale szereg jego zadań ma charakter administracyjny lub publicznoprawny (np. obowiązek publikacji ogłoszenia o zamówieniu). Ponadto zmawiający są poddani kontroli ze strony samych wykonawców w ramach postępowania odwoławczego oraz kontroli zewnętrznej ze strony wyspecjalizowanego państwowego organu kontrolnego – Prezesa Urzędu Zamówień Publicznych. Zamawiający wydaje środki publiczne, dlatego też nałożono na niego szereg obowiązków, które mają sprawić, że publiczne pieniądze będą wydane jak najbardziej efektywnie. Stąd wydaje się, że wśród czynności zamawiającego przeważa element publicznoprawny.

Słowa kluczowe: zamówienia publiczne; kontrola zewnętrzna; zamawiający; postępowanie odwoławcze