

Rafał Stankiewicz
University of Warsaw

NON-DISCRIMINATION AND THE PRINCIPLE OF EQUAL TREATMENT AS SIGNIFICANT CONSTITUENT PARTS OF THE PROCESS OF SHAPING THE COMPETITIVE NATURE OF PUBLIC PROCUREMENT PROCEDURES

1. INTRODUCTION

Public procurement law establishes specific procedures and requirements which public authorities have to observe when selecting potential contractors providing services or supplies or performing works for public purposes. These procedures should ensure that the process of selection is conducted in a transparent manner, excluding irregularities and manipulation and a situation where the contracting entity and the contractor work together in a way that would impair public interest. The system of public procurement law in particular should make sure that public funds are spent in the most efficient manner and the services, supplies and works commissioned meet the quality requirements. On the other side, the system of public procurement law should safeguard the equal chances for bidders and fair competition between them. Within the European Union, that means also equal access for bidders from other member states. In addition, it is possible to pursue other political objectives within public procurement procedures such as, for example, the promotion of small and medium sized enterprises or the implementation of environmental, social or labour standards.

The current public procurement system of Poland is based on the Act of Public Procurement Law (PPL) adopted on January 29, 2004¹ (see also: “PPL-Act”), with further amendments. This Act specifies the rules and procedures for awarding public contracts, legal protection measures, control of the award of public contracts and the competent authorities. The Polish central government body competent for matters concerning public contracts is the President of the Public Procurement Office, which is assisted in its work by the Public Procurement Office.

¹ Journal of Laws of the Republic of Poland from 2015, item 2164.

Entities obliged to follow PPL are different types of public finance sector units. Such awarding entities are obliged to award contracts according to the rules of fair competition and equal treatment of economic operators, impartiality and objectivity of persons preparing and conducting procedures specified in the act of the Public Procurement Law.

Following to the article 3 (1) PPL-Act, the act shall apply to public contracts awarded by:

1) the public finance sector entities within the meaning of the provisions on public finance;

2) State organisational units not having legal personality other than those specified in subparagraph 1;

3) legal persons other than those specified in subparagraph 1, established for the specific purpose of meeting needs of a general nature, not having industrial or commercial character, if the entities referred to in this provision and in subparagraphs 1 and 2, separately or jointly, directly or indirectly through another subject:

a) finance them at over 50 per cent; or

b) hold more than half of their shares; or

c) supervise their managing body; or

d) have the right to appoint more than half of the members of their supervisory or managing body

– insofar as the legal person does not operate under ordinary market conditions, its purpose is not generating profit and it does not incur losses arising out of the conducted activity;

4) combinations of subjects referred to in subparagraphs 1 and 2, or subjects referred to in subparagraph 3;

5) subjects other than those specified in subparagraphs 1 to 4, where the contract is awarded for the purpose of performing a type of activity referred to in art. 132, and such an activity is performed on the basis of special or exclusive rights, or where the subjects referred to in subparagraphs 1 to 4, separately or jointly, directly or indirectly through another subject, have a controlling influence on them.

Polish public procurement law is to a large extent determined by European law. The European Union has adopted several directives in order to harmonize the legal regulations of public procurement in the member states. The most important acts of EU legislation in the field of public procurement law have been the Directive 2004/18/EC of March 31, 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (see also: “Directive 2004/18”)².

Certain general principles of public procurement law have developed:

² OJ L 94, March 28, 2014, p. 65.

1) The contracting entity has to prepare and perform the procurement procedure in a manner ensuring fair competition and equal treatment of tenderers or candidates.

2) The procedures shall be conducted by persons ensuring impartiality and objectivity.

3) The contract shall be awarded only to a tenderer or candidate chosen in accordance with the provisions of the PPL-Act (choice in accordance with the provisions of the PPL-Act).

4) Contract award procedures shall be public, limitations of the access to information may be established only on the basis of the provisions of the PPL-Act.

5) As a rule, contract award procedures shall be conducted in writing (written proceedings). The contract award procedures shall be conducted in Polish language.

This article concerns the problem of non-discriminatory problems of European and Polish public procurement law.

2. CONTENT OF SECTION (2) OF DIRECTIVE 2004/18

First of all, the content of section (2) of Directive 2004/18 has to be pointed out: The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of EU Treaties and in particular to the principle of the freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as: the principle of equal treatment, the principle of non-discrimination (and the ban on discrimination derived from it), the principle of mutual recognition, the principle of proportionality and the principle of transparency. Obeying the aforesaid principles is regarded as a significant means to ensure procedural fairness of the public procurement procedure³.

Obeying the aforesaid principles is supposed to safeguard an adequate level of market competitiveness⁴. What matters in this case is that safeguarding an adequate level of market competitiveness is of fundamental importance. This is the primary objective of creating regulations of public procurement in the European law⁵, and further on, the overarching objective of the existence of public

³ M. Szydło, *Prawna koncepcja zamówienia publicznego [The legal concept of public procurement]*, Warsaw 2014, p. 32 and following.

⁴ A. S. Graells, *Public Procurement and the EU Competition Rules*, Oxford Portland 2011, p. 110 and following.

⁵ J. A. Winter, *Public Procurement in the EEC*, "Common Market Law Review" 1991, Vol. 28, issue 4, p. 471 and following.

procurement at present⁶. The deployment of the aforesaid principles in the public procurement procedure makes it possible to reach an adequate level of market competitiveness. This refers to all stages of this procedure. This is of primary importance for the retention of the principles of equal treatment and non-discrimination⁷. **Therefore, it becomes irrelevant whether one or more entities ultimately participate in the procedures. It is thus likely to happen that one or not many more than one entity will participate in the procedures. What matters is obeying the aforesaid principles.**

Section (3) of Directive 2004/18 indicates that coordinating provisions applicable to the public procurement procedures should comply as far as possible with current procedures and practices in each of the Member States. This refers i.a. to the potential impact of the public authority acts issued earlier on the content of Terms of Reference (bidding specification) drawn up under public procurement procedures.

With reference to the principles of the aforesaid section (2) of Directive 2004/18, it should be indicated that ban on discrimination is of fundamental importance. It should be emphasized that this notion (ban on discrimination) is commonly regarded as equivalent to, and associated with the principle of equal treatment. Moreover, both notions are used interchangeably both in the case law of the Court of Justice of the European Union and in literature dedicated to this subject⁸. The issue seems to be quite obvious. It should also be mentioned at this point that the principle of transparency matters to some extent for the retention of the principles of fair competition.

3. EQUAL AND NON-DISCRIMINATORY TREATMENT (ARTICLE 2 OF DIRECTIVE 2004/18)

The analysis should be commenced by indicating a specific regulation contained in Directive 2004/18, of material importance for the assessment of the issue discussed in this article. The content of art. 2 of Directive 2004/18 has to be invoked here.

Under art. 2 of Directive 2004/18, contracting authorities shall treat economic operators equally and non-discriminatory and shall act in a transparent way. Thus, contracting authorities are obliged to treat all economic operators in an

⁶ W. Dzierżanowski, *Ochrona konkurencji w prawie zamówień publicznych* [Protection of competition in public procurement law], Warszawa 2012, p. 19.

⁷ A. S. Graells, *Public Procurement...*, p. 115.

⁸ T. Tridimas, *The General Principles of EC Law*, Oxford 1999, p. 42.

equal and at the same time non-discriminatory manner⁹. The principle of equal treatment is also guaranteed by the regulations referring to subsequent stages of the procurement proceedings.

What matters for the interpretation of the principle of equal treatment, set forth in art. 2 of Directive 2004/18/EC, is the role and interpretation of art. 18 of TFEU, which introduces a general ban on discrimination in EU law. The Court of Justice of the European Union ruled that non-discrimination is a basic principle of awarding public contracts. This statement was made in an important ruling of the Court dated June 22, 1993 in Case C-243/89 *Commission v Denmark*¹⁰. The principle of non-discrimination, defined in Directive 2004/18, is applicable not only to equal treatment irrespective of nationality, but is also the overarching principle of all procedures to award a public contract, as a principle strictly associated with ensuring fair competition¹¹.

In the opinion of the Court of Justice of the European Union, the general principle of equal treatment is one of the fundamental principles of the EU law. Under this principle, legal entities of EU member states must not be discriminated against if they are in identical situations, and they must not be treated in an equal manner if they are in different situations, unless there are objective grounds for such treatment¹².

The obligation to obey the principle of equal treatment was in conformity with the objectives of Directive 2004/18, which were aimed at fostering the development of real competition in relevant areas, and which formulated the criteria for awarding public contracts in a manner safeguarding competition¹³.

4. THE PRINCIPLE OF TRANSPARENCY OF THE PUBLIC PROCUREMENT LAW

It should be pointed out that the principle of transparency is also binding in the public procurement law. The principle of transparency of the public procurement law means that the tender procedure contains clear rules, and there are ways to

⁹ A. Sołtysińska, *Commentary on Article 2 of Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts*, LEX.

¹⁰ ERC 1993, p. I-03353.

¹¹ S. Arrowsmith, *The Law of Public and Utilities Procurement*, Sweet & Mawell 2014, p. 462.

¹² Cf. ECJ ruling dated October 16, 1980, Case No. C-147/79 *R. Hochstrass v Court of the Justice of the European Communities*, ECR 1980, p. 03005.

¹³ Cf. CJEU rulings: dated September 17, 2002, Case No. C-513/99 *Concordia Bus Finland*, ECR 2002, p. I-07213, and CJEU ruling dated March 3, 2005, Joint Cases C-21/03 i C-34/03 *Fab-ricom S.A.*, ECR 2005, p. I-01559.

check if they are applied in a correct manner. All tenderers are aware of the rules of the tender¹⁴. Directive 2004/18 does not define the notion of transparency, yet it assumes that it is not an objective as such; rather, it is a means to accomplish other tasks – the effective spending of public funds and allowing for proper monitoring of decisions made in the process of awarding public contracts.

5. REGULATION CONTAINED IN ARTICLE 7 OF PPL ACT (LOCAL REGULATION)

Article 7 of PPL act forms the principles of fair competition as regards public procurement. Under clause 1 of this act, contracting entities shall prepare and conduct contract award proceedings in a manner ensuring fair competition and equal treatment of economic operators.

Given the aforesaid art. 7(1) of PPL act, it should be recognized that two general principles, of fundamental importance for the public procurement law, can be derived from it:

- 1) preparing and conducting the contract award procedures in a manner ensuring fair competition (the principle of fair competition);
- 2) equal treatment of economic operators applying for a public contract (the principle of equal treatment).

The principle of equal treatment is intended to prevent excessive and unfounded requirements which would hinder access to the public contract, in this way limiting or excluding the competitiveness of the procedures.

The contracting entity is responsible for ensuring fair competition. The preparation stage is particularly important for the procedures; at this stage, the contracting entity determines the condition for participation in the award procedure and the description of the object of the contract. These are in fact the most significant elements of the procedure; they are a prerequisite for competing for a contract and submitting a tender¹⁵. Hence, the contracting entity is responsible for preparing and conducting the procedures to award a public contract in a manner which ensures fair competition; thus in a manner that does not eliminate a certain group of economic operators from participation in the award procedure, and which will not put a certain group of economic operators in a privileged position¹⁶.

¹⁴ S. Arrowsmith, *The national and international perspectives on the regulation of public procurement: harmony or conflict?*, (in:) H. Olszewski, B. Popowska (eds.), *Gospodarka. Administracja. Samorząd* [Economy. Administration. Local Government], Poznań 1997, p. 14.

¹⁵ A. Zdebel-Zygmunt, J. Rokicki, *System zamówień publicznych w Polsce* [Public procurement system in Poland], Warsaw 2014, p. 52.

¹⁶ As NAC stated in one of its rulings, “under the requirement regulated in Article 7(1) of PPL act, all economic operators competing for a public contract should be treated in an equal manner

On the other hand, it can be inferred from the case law that unequal treatment of the economic operations is reflected mainly in a different assessment of the same facts or in drawing different consequences from the same circumstances¹⁷. This does not apply to the case in question.

In the public procurement law, the principle of fair competition was taken into consideration in a number of specific provisions. From the point of view of the problematic issue presented in this opinion, the following two specific provisions must be indicated:

1) art. 5a(2) (the contracting entity awards the public contract in a transparent, impartial and non-discriminatory manner);

2) art. 29(2) (the contracting entity must not describe the object of the contract in a manner which could restrict fair competition)¹⁸.

6. ARTICLE 22 OF PPL ACT

Article 22 of PPL act describes the way of preparing and conducting the procedure to award a public contract in a manner ensuring fair competition and equal treatment of economic operators. Following to the article 22(1) of PPL, the following contractors shall be eligible to compete for the award of a contract:

1) which are not subject to exclusion.

2) which meet the conditions of participation in the proceedings where specified by the awarding entity in the contract notice or in the invitation to confirm interest.

Following to the article 22(1a) of PPL, the awarding entity shall specify the conditions of participation in the proceedings and evidence required from contractors proportionately to the object of the contract and permitting the assessment of the contractor's capacity to duly perform the contract, in particular expressing them as minimum capacity levels.

Following to the article 22(1b) of PPL, the conditions of participation in the proceedings may concern:

1) competence or authorizations to conduct a specific professional activity where this ensues from separate provisions;

2) economic or financial position;

by the contracting entity throughout the entire procedure. The equal treatment obligation also means that all requirements which the contracting entity takes into account at the stage of examination and assessment of the submitted tenders must be known to the economic operators upon tender preparation" (Cf. NAC ruling dated January 11, 2011, KIO/UZP 2824/10, www.uzp.gov.pl).

¹⁷ M. Partyka, *Równe traktowanie wykonawców* [Equal treatment of economic operators], "Przetargi Publiczne" 2014, No. 4, p. 14.

¹⁸ Cf. i.a. J. A. Nowicki, *Commentary on Article 7 of the Act – Public Procurement Law*, LEX.

3) technical or professional capacity.

The awarding entity may stipulate in a contract notice that only protected labour establishments and other contractors whose activities or activities of their organizationally separated units that will be fulfilling the contract, includes social and professional integration of persons being members of socially marginalized groups, shall be eligible to compete for awarding a contract, including but not limited to:

1) the disabled as defined in the Act of August 27, 1997 on Occupational and Social Rehabilitation and on Employment of the Disabled¹⁹;

2) the unemployed within the meaning of the Act of April 20, 2004 on Employment Promotion and Labour Market Institutions²⁰;

3) persons deprived of liberty or released from penal institutions referred to in the Act of June 6, 1997 – Executive Penal Code²¹;

4) persons with mental disorders as defined in the Act of August 19, 1994 on the Protection of Mental Health²²;

5) homeless persons within the meaning of the Act of March 12, 2004 on Social Aid²³;

6) persons who obtained in the Republic of Poland the refugee status or supplementary protection referred to in the Act of June 13, 2003 on Granting Protection to Foreigners in the Territory of the Republic of Poland²⁴;

7) persons under 30 years of age and over 50 with a job-seeker status, unemployed;

8) persons being members of minorities in an unfavourable situation, especially members of national and ethnic minorities as defined in the Act of January 6, 2005 on Ethnic and National Minorities and the Regional Language²⁵.

The article also contains positive provisions which define how to describe the conditions for participation in the procedure, and the manner of their assessment (art. 22(4)(5)).

The description of the object of the contract may result in a rejection of the offer, hence the legislator puts particular emphasis on retaining fair competition in this respect. This is reflected in the provisions of art. 29–31, with emphasis on art. 29(2) stating that the object of the contract must not be described in a way that might restrict fair competition.

¹⁹ Journal of Laws of the Republic of Poland from 2011, item 721, as amended.

²⁰ Journal of Laws of the Republic of Poland from 2016, items 645, 691 and 868.

²¹ Journal of Laws of the Republic of Poland from 1997, item 557, as amended, having community integration difficulties.

²² Journal of Laws of the Republic of Poland from 2016, items 546 and 960.

²³ Journal of Laws of the Republic of Poland from 2016, item 930.

²⁴ Journal of Laws of the Republic of Poland from 2012, item 680; 2013, item 1650; 2014, item 1004; 2015, item 1607; 2016, item 783.

²⁵ Journal of Laws of the Republic of Poland from 2015, item 573; 2016, item 749; art. 22(2) of PPL.

Article 22(1)(2) of PPL-Act is of fundamental importance in this case. Under the article, the following economic operators are eligible to compete for a contract: “(2) operators who have the necessary knowledge and experience”.

Within the scope defined in art. 22(1)(2), the contracting entities define specific conditions as regards knowledge and experience, pertaining to the object of the contract. What seems to be of particular significance, the description of the manner of evaluating compliance with the conditions should be associated with the object of the contract and should be proportionate to the object of the contract (art. 22(4)).

The tender notice should contain the description of the manner of evaluating compliance with the conditions referred to in art. 22(1). In fact, the tender notice should contain primarily specific conditions to be satisfied by economic operators applying for the public contract, and only then should the conditions be followed by the description of the manner of evaluating compliance. This can be directly inferred from the provisions defining the content of the tender notice, e.g. art. 41(7) or the content of the invitation to take part in the negotiations, e.g. art. 63(2)(5)²⁶.

The conditions for participation in the procedure, i.e. the conditions related to the economic operator, should be related to the object of the contract. They should also be proportionate to the object of the contract, i.e. to its scope or value. This provision can be found in the act as amended on November 5, 2009; yet before this principle was worked out by case law and doctrine. Hence, when defining the conditions for participation in the procedure, it is not the interests of the contracting entity that should be taken into consideration, but the type of contract, its object, scope and value, the manner of performance and the payment method stipulated in the draft agreement²⁷.

7. CONCLUSIONS

Awarding public contracts should take account of such principles as the principle of equal treatment, non-discrimination (and the related ban on discrimination), the principle of proportionality, and the principle of transparency.

The implementation of the aforesaid principles makes it possible to achieve one of the fundamental goals of the procurement procedures, which is to remain competitive.

The content of section (2) of Directive 2004/18 has to be pointed out: The award of contracts concluded in the Member States on behalf of the State, regional or

²⁶ J. A. Piróg, *Commentary on Article 22 of the Act – Public Procurement Law*, Legis.

²⁷ *Ibidem*.

local authorities and other bodies governed by public law entities, is subject to the respect of the principles of EU Treaties and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as: the principle of equal treatment, the principle of non-discrimination (and the ban on discrimination derived from it), the principle of mutual recognition, the principle of proportionality and the principle of transparency.

NON-DISCRIMINATION AND THE PRINCIPLE OF EQUAL TREATMENT AS SIGNIFICANT CONSTITUENT PARTS OF THE PROCESS OF SHAPING THE COMPETITIVE NATURE OF PUBLIC PROCUREMENT PROCEDURES

Summary

This article concerns about the problem of non-discriminatory problems of European and Polish public procurement law. Awarding public contracts should take account of such principles as the principle of equal treatment, non-discrimination (and the related ban on discrimination), the principle of proportionality, and the principle of transparency. The implementation of the aforesaid principles makes it possible to achieve one of the fundamental goals of the procurement procedures, which is to remain competitive.

BIBLIOGRAPHY

- Arrowsmith S., *The Law of Public and Utilities Procurement*, Sweet & Mawell 2014
- Arrowsmith S., *The national and international perspectives on the regulation of public procurement: harmony or conflict?*, (in:) H. Olszewski, B. Popowska (eds.), *Gospodarka. Administracja. Samorząd* [Economy. Administration. Local Government], Poznań 1997
- Dzierżanowski W., *Ochrona konkurencji w prawie zamówień publicznych* [Protection of competition in public procurement law], Warszawa 2012
- Graells A. S., *Public Procurement and the EU Competition Rules*, Oxford Portland 2011
- Nowicki J. A., *Commentary on Article 7 of the Act – Public Procurement Law*, LEX
- Partyka M., *Równe traktowanie wykonawców* [Equal treatment of economic operators], "Przetargi Publiczne" 2014, No. 4
- Piróg J. A., *Commentary on Article 22 of the Act – Public Procurement Law*, Legalis

- Sołtysińska A., *Commentary on Article 2 of Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts*, LEX
- Szydło M., *Prawna koncepcja zamówienia publicznego [The legal concept of public procurement]*, Warsaw 2014
- Tridimas T., *The General Principles of EC Law*, Oxford 1999
- Winter J. A., *Public Procurement in the EEC*, "Common Market Law Review" 1991, Vol. 28, issue 4
- Zdebel-Zygmunt A., Rokicki J., *System zamówień publicznych w Polsce [Public procurement system in Poland]*, Warsaw 2014

KEYWORDS

public procurement, competition, equal treatment

SŁOWA KLUCZOWE

zamówienia publiczne, konkurencja, równe traktowanie