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Exploring the contractors’ qualification process in public works contracts

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Abstract

Public contracting authority may award contracts only to contractors who meet certain qualification criteria for participation in tenders. Such requirements can vary between countries; this paper therefore introduces basic legislation governing this process both in the Czech Republic and Poland. The verification of compliance of these requirements should be made individually for each public procurement procedure which is associated with the need to submit corresponding documents. The aim of the article is to analyse and compare current practice in using qualification criteria for public works contracts in both countries.

Information about qualification criteria have been studied on the sample of 345 tenders for public works contracts, in particular for road structures, schools and water and sewage facilities and equipment. Analytical part focuses on the extent of qualification criteria use and discusses their application in the context of ensuring fairness of the competition with regard to non-discriminatory nature of the qualification. Research findings reveal significant disparity between the Czech Republic and Poland in the area of 1) professional and 2) economic and financial qualifications.

It has been concluded that the reintroduction of economic and financial qualification criteria in the Czech Republic is justified if used appropriately and according to methodological guidelines. In Poland, the risk of inappropriate use of criteria lies especially in excessive requirements in relation to the volume and nature of contract. Contracting entity is not obliged to describe and demand all the requirements, it is crucial to require just the fulfilment of those criteria which are necessary to assess the ability of contractors to perform the contract.

Keywords: construction; contractor; qualification; public contracts; public procurement

1. Introduction

Investment projects are complex and require an appropriate management in all their stages. Some researchers even consider the procurement a separate stage of the project [16]. The importance of procurement comes from the main criteria which affect success of the project: cost, quality, time, safety and how the project meets is envisaged purpose (American Institute of Architects, cited [8]). For this reason it is crucial to allow bidding for the contract to only such contractors who are sufficiently qualified for the proper performance of specific contract. From this perspective, authors in [4] and [17] consider selection of an appropriate contractor as one the most critical factors of project success. In response to this request, this paper pays attention to the process of application of qualification criteria

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More specifically, current practice in using qualification criteria for public works contracts in the Czech Republic and Poland have been analysed and compared.

Research community pays considerable attention to the procurement area and deals with its various aspects and implications (innovation aspect of procurement [21], sustainability [22], finding best practices [19], discriminatory procurement in the context of international trade [23], electronic support of procurement [7], [24], problems which can occur while preparing the tender [11], [18] or qualification issues [4], [17], [14]). However, the area of qualification of contractors for public works contracts has not been widely examined yet, therefore this article contributes to the development of knowledge by performed comparative analysis of the Czech Republic and Poland. Based on the above-mentioned facts, research aim of this paper is to perform a comparative analysis of the QC used in the Czech Republic and Poland within public works contracts, in particular with regard to detecting significant differences between examined countries. In order to achieve the stated goal, state of the art based on the respective legislation is introduced as first. Then, research methodology is explained and consequently the results obtained are presented and discussed. Finally, suggestions and recommendations regarding the adjustments of qualifications for public works contracts are formulated.

2. Law regulation related to contractors’ qualification

Requirements of the Polish authorities in order to qualify contractors are related to credibility, knowledge and experience, qualifications of the persons proposed to perform the contract, technical capabilities and financial and economic condition of the contractor. Verification of fulfilment of these requirements is carried out every time for each public procurement procedure and is connected to the need for submitting adequate documents. In the Czech Republic, requirements are generally similar. However, national legislation sets requirements for qualification with certain differences.

2.1. Law regulation in the Czech Republic

Qualification represents a set of requirements defined by law [1] and contracting entity by which the applicant proves its capability to perform the contract. QC should be met by contractors in the Czech Republic that have proven their compliance with: basic QC (§ 53); professional QC (§ 54) and technical QC (§ 56).

Basic qualification prerequisites demonstrate probity of contractors to the state. The contracting authority has to always require their fulfilment. The Czech act defines 13 basic QC. By the fulfilment of basic QC, the tenderer proves e.g. that it has not been finally convicted of a criminal offence committed for the benefit of an organized crime group, is not or has not been subject to insolvency proceedings involving its assets, has not outstanding tax arrears registered in tax records etc.

Professional qualifications prerequisites demonstrate professional competence of contractors to pursue activities that are the subject of a public contract. By the fulfilment of professional QC, the tenderer provides e.g. an extract from the Company Register, evidence of possession of a licence to pursue business activities under separate legal regulations to the extent corresponding with the subject-matter of the public contract, particularly, evidence proving relevant trade authorization or licence etc.

Technical qualifications prerequisites demonstrate the technical ability of the contractor to perform the contract being awarded. For technical qualifications prerequisites, the contracting authority selects those that are suitable for a specific contract, e.g. construction, changes in construction or removal of buildings.

Public contracts are divided into three types – public service contracts, public supplies contracts and public works contracts. Each type of technical qualifications prerequisites are defined separately and the contracting authority may not require prerequisites of one type of procurement for a different kind of public contracts. If the public contract corresponds to several types of the public contracts, the contracting authority is entitled to require compliance with technical qualification prerequisites specified in the law in a reasonable range for each type separately. Defining technical qualifications prerequisites does not depend on the financial volume of orders, but on the subject of public works contracts, i.e. on what kind of buildings with regard to their functions should be carried out. For each public works contract only prerequisites effectively projected into business conditions or contract of work have to be defined. They are unable to require prerequisites that should only have “eliminating” character, but the reason for their requirement is missing.
2.2. Law regulation in Poland

According to Art. 22 PPL [2], economic operators which meet the conditions related to the following criteria are eligible to compete for a contract:

- authorisations to perform specific activities or actions, if such authorisations are required by the law - this condition applies to e.g. concessions, licenses required to perform some activities;
- knowledge and experience - this general provision should be clarified by the contracting entity. Description of the condition of knowledge and experience as well as a description of how to assess compliance with this condition knowledge and experience depends on the type and character of public procurement, including the degree of complexity as well as the scope of the required knowledge or skills to carry it out;
- appropriate technical potential and personnel capable of performing the contract – these requirements should apply to key personnel and equipment e.g. persons who will participate in the contract performance, in particular responsible for management of works, along with some information required according to [20];
- economic and financial condition.

The above mentioned conditions are specified by the contracting authority that awards the public contract, and they vary depending on the subject matter of the contract. In order to meet all requirements, contractors may compete for a contract jointly (Art. 23 PPL) or in relation to the knowledge and experience, technical potential, personnel capable of performing the contract or financial abilities of other entities (no matter what is their citizenship or where their principal place of business is located), regardless of the legal nature of their relations with such entities (Art. 26 PPL). In the case of using other entities resources, the contractor is required to prove to the contracting authority that it will have at its disposal the resources necessary to perform the contract, in particular by presenting a written commitment of those entities whereby they consent to put the necessary resources at the contractor’s disposal for the time of their use in performance of the contract. Additionally a contractor cannot be excluded from contract award procedures according to Art. 24 PPL e.g. those economic operators who are in arrears with payment of taxes, charges or social insurance or health insurance premiums. Where the value of the contract is equal to or exceeds the EU thresholds (5,186,000 EUROS for works) the contracting authority is obliged to request documents proving that the economic operators satisfy the conditions for participation in the procedure. The list of such documents is specified in the implementing legislation [20].

3. Research methodology

The investigation of procurement area in its both essential sections (qualification and bid evaluation [15]) requires sufficiently large data set [3]. This paper focuses exclusively on QC applied within public works contracts both in the Czech Republic and Poland. For this purpose, data on 345 (160 in Poland and 185 in the Czech Republic) procedures settled between 2013 and 2014 was collected from official databases, such as: Information System on Public Procurement (CZ) [10] and Bulletin of contracts [5] operated by Czech Ministry for Regional Development and Bulletin of Public Procurement Portal Public Office for Public Orders [6].

Because for different types of structures, diverse QC could be used, purposely the data set consists of three types of works: 1) road structures, 2) schools, 3) water and sewage facilities and equipment. After data collection, QC were categorized among a) professional, b) technical and c) economic and financial (basic qualifications are obligatory; therefore this section is not analysed further). As a next step, occurrence of individual criteria in relation to the type of structure was detected in terms of their relative frequency. Based on the data obtained, particular criteria are then discussed in relation to their use in analysed countries and for different types of structures.

4. Results and discussion

The research sample contains information on public tenders in three particular areas: road structures, educational facilities (schools) and water and sewage facilities and equipment. The distribution of individual types of structures is clearly displayed in Table 1. In total, 345 registers were examined, which satisfies the condition of sufficiently large sample, as stressed by [3]. In addition, the extent of the categories (examined countries and types of structures) was purposely designed to be comparable.
The evidence of QC relative frequency of occurrence is presented in Table 2. Representation of the data clearly shows that there are significant differences within the use of the QC in the Czech Republic and Poland. Firstly, data on Czech tenders shows that in comparison to Poland, contracting authorities are more demanding in the area of professional QC. The high frequency of occurrence is reported primarily for the requirements on the evidence of possession of a licence and authorisation to perform specific activities or actions (if they are necessary for performance of the specific contract). Occasionally, evidence issued by a professional self-governing chamber or any other professional organisation proving membership (if such membership is crucial for the performance of the contract under separate legal regulations) and evidence proving the economic operator’s capability to safeguard the confidentiality of classified information (applicable for contracts in the fields of defence and security) are stated in the tender documentation in the Czech Republic. In Poland, for defence and security contracts, separate provisions are provided in PPL [2], [20] (similar to the Czech Republic). However, these types of contracts did not appear in the research sample. In addition to this, an extract from the Company Register is also standardly required in both countries. In Poland, the absence of information about particular activity in the Company Register (CR) or in the National Court Register (NCR) does not mean that the economic operator is not able to provide specific services, supplies or works. The lack of such entry in the CR does not exclude the contractor from the tender procedure.

In the category of technical QC, it should be noted that practice in both Poland and the Czech Republic is the most similar. Predominantly, list of works serves as the essential aspect of the qualification. In Poland list of personnel and declaration that persons participating in contract have required qualification/licence are more often required then in the Czech Republic. List of tools plays an important role in connection to the type of the structure, since it is primarily required for road structures and just occasionally for water/sewage facilities. Minimum volume of works per contract is applicable for both countries and all the structure types. However, it is mostly used for schools and water sewage facilities.

Moreover another significant difference was observed regarding economic and financial QC. Based on the amendment to the Czech Act on Public Contract from 2012, these requirements (such as insurance policy, average annual income etc.) cannot be used, instead of this just the statement that the contractor is able to meet all the requirements to perform contract is allowed to be required. This statement can be followed by requirements related to the tender security or bank guarantee. In Poland, in order to prove the financial condition, contractors can be asked to provide financial report or its part, information from a bank or cooperative savings and credit union where the economic operator runs an account or pays insurance policy, and in case of lack of other document confirming that the economic operator is insured against personal liability within the scope of economic operator's activity with reference to subject matter of contract.

QC can be identified as an important risk of corruption. For instance, methodology for local governments [12] notes, that determination of unnecessarily strict QC for suppliers to the subject of the contract results in the elimination of effective competition and contracts can be even tailored to pre-selected contractor. Unjustified technical requirements for contractors (in case of insulation of five buildings in the hospital complex) or an unreasonable requirement for turnover of the contractor (delivery of IT services) are noted in this document [12] as illustrative examples. The potential risk in the Czech Republic currently lies primarily in the area of technical QC since economic and financial QC were cancelled. The absence of economic and financial QC, however, brings the risk that the incompetent applicants could participate in the tender procedure, because it is sufficient to prove the competency by a simple statement. In this context, replacing the fulfilment of economic and financial QC simply by affidavit of financial and economic capacity to fulfil a contract seems to be an unnecessarily radical measure against the abuse of this institute [25]. Since the veracity of affidavit is not reviewable by the authority, risks arising from financial and economic instability of the contractor will actually be transmitted to the implementation phase of the public contract [9].
Table 2 Evidence of QC relative frequency of occurrence [%] (in-house processing using data from [5], [6], [10])

| Qualification criteria                                      | Roads | Schools | Water/Sewage |
|-------------------------------------------------------------|-------|---------|--------------|
| Professional                                               | CZ    | PL      | CZ           | PL           |
| Evidence of possession of a licence                         | 94.1  | 93.2    | 98.3         |
| Evidence issued by a professional self-governing chamber   | 1.5   | 6.8     | 10.2         |
| Authorisations to perform specific activities or actions    | 98.5  | 0.0     | 76.3         | 0.0          | 78.0         | 17.0         |
| Evidence proving the economic operator’s capability to      | 0.0   | 3.4     | 0.0          |              |
| safeguard the confidentiality                              |       |         |              |              |              |
| Technical                                                  | CZ    | PL      | CZ           | PL           |
| Declaration that persons participating in contract have     | 32.4  | 66.0    | 28.3         | 68.0         | 47.5         | 93.0         |
| required qualification/licence                              |       |         |              |              |              |
| List of personnel                                          | 11.8  | 60.0    | 28.3         | 90.0         | 22.0         | 90.0         |
| List of tools, equipment and technical devices              | 52.9  | 20.0    | 0.0          | 0.0          | 8.5          | 2.0          |
| List of works with documents confirming if previous works    | 100.0 | 90.0    | 100.0        | 100.0        | 100.0        | 95.0         |
| were performed properly                                     |       |         |              |              |              |
| Average no. of personnel annually                          | 7.4   | 0.0     | 6.8          | 0.0          | 0.0          | 0.0          |
| Minimal volume of works on contract                        | 2.9   | 24.0    | 86.4         | 72.0         | 91.5         | 52.0         |
| Economic and financial                                     | CZ    | PL      | CZ           | PL           |
| Information from a bank                                     | 12.0  | 36.0    | 48.0         |
| Paid insurance policy                                      | 22.0  | 42.0    | 43.0         |
| Statement that the contractor is able to meet all the       | 97.1  | 100.0   | 86.4         | 100.0        | 88.1         | 100.0        |
| requirements / perform contract                             |       |         |              |              |              |
| Average annual income (netto)                               | 0.0   | 10.0    | 0.0          |
| Annual turnover                                             | 0.0   | 2.0     | 0.0          |
| Tender security / bank guarantee                            | 79.4  | 0.0     | 78.0         |

As regards the disparities in the application of the QC from the perspective of the type of construction, only 2 more apparent deviations were revealed. Specifically, this refers to 1) technical QC for roads in both countries (more frequent use of list of tools, equipment and technical devices to the detriment of minimal volume of works on contract) and 2) economic and financial QC in the Czech Republic (non-application of tender security or bank guarantee for educational facilities).

The authors of this study consider applying the economic and financial QC to be justified, but it is desirable to create methodological guidelines for their practical application in order to minimize the risk of misuse. As an example, methodical recommendations for unification of qualification and evaluation criteria for public works contracts [13] could serve as the guidelines for setting limits for the adequacy of requirements. In Poland, QC have to be determined in accordance with the rules of fair competition and equal treatment of economic operators and according to the legitimate needs of the contracting authority. Contractors should be selected in a non-discriminatory way; one of them cannot have an advantage over another. Contracting authority is not obliged to describe and require all the requirements stated in Art. 22 of PPL [2] but only those which are necessary to ensure correct implementation of public contracts. The risk of failure of the principles of fair competition may be associated with requesting unreasonable demands e.g. the performance of works of a value much greater than the estimated value or the demand for contractors to dispose of experience in the performance of contracts not related to a contract award.

5. Summary

This study has explored the use of QC in the Czech Republic and Poland within public works contracts. It has been found, that disparities in 1) professional and 2) economic and financial QC exist between examined countries. In addition, the use of certain QC is different from the perspective of the type of contract (road structures, schools, water and sewage facilities and equipment). It can be concluded, that in the Czech Republic, the return of use of economic and financial QC is desirable since e.g. limitations in relation to the volume of annual turnover would
satisfactorily exclude ineligible applicants. In Poland conditions for participation in the procedure (Art. 22) are separated from those determining contractor exclusion (Art. 24). The lack of entry for the specific activity to CR authorizes almost any company to apply for a contract.

However, it should be emphasized, that each QC has to be used appropriately in order to preserve the competition in the tender, thus methodological guidelines should be implemented as a precaution against corrupt practices.

This research has two main limitations. Firstly, the detailed documentation of particular tenders has not been explored; therefore findings presented in this study are based on the frequency of QC use. Secondly, the subject of the study were just QC that show a variability of use, therefore basic QC (such as if contractor has not accomplished elements of unfair competition practices in the form of bribery) were not examined. Future research should provide more in-depth information about contracts, in particular in relation to technical QC.

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