The transformation of the tender evaluation process in public procurement in Poland

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Abstract. Procedures regarding the evaluation of tenders have been changed since the public procurement law was enacted (it came into force in January 1, 1995). The contracting authority could apply both the criteria related to the qualities of the contractor and those related to the subject matter of public contract. Two extensive amendments in 2001 and a government project introduced vital regulations and excluded the possibility of applying criteria related to the qualities of the contractor. Act of 29 January 2004 Public Procurement Law allowed to use price as the sole contract award criterion. The changes in the Law in 2014 restricted that possibility to the situation in which the subject matter of a contract is commonly available and has established quality standards. The Act of 22 June 2016 amending the Public Procurement Law Act and some other laws introduced the new criteria list and limited the importance of the price criterion in the certain situations. Instead of price, the cost can also be a criterion for tender evaluation. The cost criterion can be determined using life cycle costing. In the paper, based on contract notices of open tendering published in the Public Procurement Bulletin, the criteria of construction contract selection will be analysed. In particular the effectiveness of changes in the Procurement Law will be researched.

1. Introduction

In Poland, awarding public procurement is regulated by the Act of January 29, 2004, Public Procurement Law (PPL) [1] and its implementing acts. Public Procurement Law has frequently been changed and the most important amendments, related to the process of tender evaluation, are described in this paper.

Polish Public Procurement Law is consistently adapted to EU regulations. The main regulation concerning public procurement are: the Directive of the European Parliament and of the Council 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC; the Directive of the European Parliament and of the Council 2014/25/EU of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services, and repealing Directive 2004/17/EC and the Directive of the European Parliament and of the Council 2014/23/EU of 26 February 2014 on the awarding of contracts [2].

Both the EU Directives and the conditions on the market have impact on the legal provisions on the criteria for the evaluation of tenders. The recent changes in the Polish regulations introduced the obligation for contracting non-price criteria and abolished the dominance of the price criterion.

The purpose of this paper is to analyze the efficiency of putting these regulations into practice. There are procedures in which the decisive criterion of choosing a tender is the price but competitive tendering is still the most commonly used procedure for awarding construction contracts in Poland and some other countries. There is undoubtedly motivation for contractors to reduce costs
but also the contractors offering the cheapest price often have problems with completing the project [3], [4], [5].

2. Criteria for tender evaluation in subsequent amendments to the law

As of June 10, 1994, Public Procurement Law was enacted (and came into force in January 1, 1995), thus introducing a public procurement system in Poland. One of the elements of the Act was the specification of the criteria that public contracting authorities should use when selecting a tender. At the beginning the rules for criteria selection were rather random and the contracting authorities could use both the subject criteria (related to the qualities of the contractor) and object ones (related to the project).

Significant changes affecting the tender evaluation process have been introduced in 2001. Two extensive amendments and a government project introduced vital regulations. Since October 26, 2001 a ban on the use of subject criteria for the evaluation of tenders has been in effect. As stated in the Public Procurement Law amendment, “The criteria for the evaluation of tenders may not affect the properties of the contractor, and in particular their economic, technical or financial credibility.”

In March 2004 a new Public Procurement Law came into force. On the basis of Article 91 “The evaluation criteria are price or price and other criteria relating to the object of the contract, in particular the quality, functionality, technical parameters, use of the best available technologies in terms of environmental impact, operating costs, service, influence of the way the contract executed has on the job market at the place of contract execution and the term of contract execution.” This meant that it was the contracting authority’s decision whether a tender with the lowest price is chosen or other evaluation criteria are used. The provision prohibiting the use of subject criteria remained. Despite the changing conditions, the subsequent amendments sustained the rules for the application of the evaluation criteria.

The amendment of the Public Procurement Law of 2014 includes a new article, the Art. 91 paragraph 2a, whereby in proceedings instituted after October 18, 2014 contracting authority is obliged to use non-price tender evaluation criteria. This does not apply to contracts whose subject is widely available and has established quality standards. These contracts are understood by the availability of the same or similar benefits for everybody concerned and meeting the established quality standards understood as types or standardized species, corresponding to the average ones, offered as a universal standard offer, not as any specific requirement of the contracting authority.

However, the Public Procurement Law does not indicate the extent to which the choice of the best offer is to be decided on the basis of the price or other criteria. The decision in this respect has to be made by the contracting authorities themselves, considering the specifics of the order and their own needs. The price can, and even should, remain the basic criterion for the awarding of a public contract.

The Act of 22 June 2016 amending the Public Procurement Law Act and some other laws introduced substantial changes in the Public Procurement Law Act [6]. The main aim of the changes was primarily to implement the Polish law of Directive 2014/24 / EU and Directive 2014/25 / EU. Changes in the public procurement law were needed and postulated by participants in the public procurement market. The requirements concerned, apart from others, the introduction of changes in the tender selection process e.g. the obligation to use non-price criteria for tender selection procedures in public procurement and limitation of the importance of the price criterion.

The definition of the most advantageous tender has been changed, indicating a cost-effective approach. The most advantageous tender is consider “a tender (Article 2 paragraph 5 PPL):

a) providing the most advantageous balance of price or cost and other criteria relating to the subject - matter of public contract, in particular in the case of contracts for creative or research activities, where the subject - matter of contract cannot be established in advance in an unequivocal and exhaustive manner, or a tender that best meets criteria other than price or cost, where the price or cost is fixed;

b) offering the lowest price or cost, where price or cost is the only criterion”;

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The cost criterion can be determined using life cycle costing. An important change involves the introduction of the possibility for the contracting authority to establish a fixed price or cost if the generally applicable regulations or the competent authority determine a fixed price or cost. In this case then the evaluation criteria have to be other than price.

According to the new definition of “the most advantageous tender” the text of Article 91 paragraph 2 has been changed and its content is as follows “tender evaluation criteria shall be price or cost or price and cost and other criteria related to the subject-matter of the contract, in particular:
1) quality, including technical parameters, aesthetic and functional characteristics;
2) social aspects, including social and occupational integration of persons who are members of socially marginalized groups such as unemployed, homeless, deprived of liberty (referred to in Article 22.2), accessibility to disabled persons, and responding to user needs;
3) environmental aspects, including energy efficiency of the subject-matter of contract;
4) innovation aspects;
5) organization, professional qualifications and experience of persons appointed to perform the contract, if they can have a significant influence on the contract performance quality;
6) after-sales service and technical assistance, delivery conditions such as delivery deadline, manner of delivery, and lead time or period of completion”.

The list of criteria indicated in the law has increased. They were previously available, such as “social aspects” or “environmental aspects” but were not explicitly indicated in the Act.

A completely new solution is regulation introduced in Art. 91 paragraph 2a PPL, according to which some contracting entities, “may apply price criterion as the only contract award criterion or a criterion with a weight exceeding 60% if quality standards pertaining to all important features of the subject-matter of contract are specified in the description of the subject-matter of contract, and if the contracting authorities evidence in an annex to the procedure record how the costs incurred throughout the life cycle of the subject-matter of contract are included in its description…” On the basis of this provisions the dominance of the price criterion was abolished.
The practical application of the evaluation criteria is depicted in figure 1 presents the percentage of procedures in which the contracting authorities decided to choose a tender on the basis of the lowest price in each year [7]. The tenders included only public procurement for construction works. Figure 1 reveals that regulatory changes have significantly influenced the number of public procedures in which the lowest price was the sole criterion. The number of tenders with the lowest price was increasing up to 2015. This choice is also due to the contracting authorities concern. Being often afraid of the obligation to justify the choice of other criteria, tended to select the simplest solution, that is, the cheapest tender. The price criterion is for sure the most transparent and the easiest to evaluate. In 2015 the tendency has reversed. The year 2015 was the first entire year in which the amended provisions of the public procurement law entered into the regulation of the law from 19 October 2014, which limited the use of the price criterion as the sole criterion for the evaluation of tenders, were into force. In only 4% procedures the price was used as the sole criterion. Following the change of regulations in 2016, this number is likely to decrease.

![Figure 1. Percentage of tenders with the lowest price criterion (2002–2015).](image1)

Figure 2 presents the results of a study concerning the number of tender evaluation criteria when the contracting authority decided to use non-price criteria. The data include 355 notices of open tenders published in the public procurement bulletins in December 2004 and contain the results for tenders with both the price and non-price criteria [8],[9].

![Figure 2. Percentage of tenders with criteria other than price according to notices in 2004.](image2)

Figure 2 shows that the contracting authority, even introducing additional criteria, tended to limit their number. Two criteria were considerably more frequent, namely the price and only one non-price criterion.
After the introduction of the Public Procurement Law in 2004, adverse effects of using the lowest price criterion began to be noticed, namely: the contractor’s problems with the execution of the investment within the assumed costs which, in turn, caused delays in commissioning of the project or its discontinuation; understating costs often leads to lower quality, which means additional expenditures on repairs; the generally difficult situation of the construction market, including numerous companies going bankrupt, which was frequent in Poland, for example in 2012.

Noticing the negative effects of employing the lowest price criterion resulted in the search for more effective methods of tender evaluation, such as introducing a statutory duty to use other criteria, apart from the price one.

3. Consequences of the 2014 amendments

In order to identify whether new provision introduced in 2014 have met the purpose for which they were introduced, research was performed. On the basis of announcements published the Public Procurement Bulletins in 2016 [9], [10] 250 tenders have been researched. Announcements of the analyzed tenders were published in the period from April 1, 2015 to March 10, 2016, that is, during the term of the Act imposing the need for additional non-price criteria.

Figure 3 depicts which non-price criteria were additionally used by the contracting authority when two evaluation criteria were applied.

![Figure 3. Non-price criteria (March 2016).](image)

As figure 2 shows, the most frequent additional criterion was the one related to guarantee and/or warranty (78% of the analyzed tenders). The next most common criterion was the execution time (14%). Other criteria were rarely used. It can be assumed that these two criteria appear most frequently due to the simple and transparent way of determining their evaluation (quantification).

As it was already stated, the Law does not impose any weight for the criteria applied. The weights of the price criterion in tenders in which two criteria were used are illustrated in figure 4.

![Figure 4. The weights of the price criterion in tenders in which two criteria were used (March 2016).](image)
The lowest criterion weight amounted to 70%, where only 1% of tenders included the price criterion with a specified weight between 70 and 79%. In the greatest number of tenders (42%) the price criterion reached 90%, which means that the additional criterion weighed 10%. What is worrisome, 13% of tenders included the price criterion weighing 96-99.5%, which indicates that the weight of other criterion ranged from 4 to 0.5%. This means that contracting authorities consider the introduction of an additional criterion as a mere necessity dictated by the regulations in force but do not wish it to change tender results in any way.

In a vast majority of tenders in which the contracting authorities decided to use three criteria, the additional non-price criteria included guarantee and execution time. The application of three criteria did not influence the weight of the price criterion in any significant way too. The weight ranged between 70 to 90%.

One of the conditions that might indicate the effectiveness of the use of non-price criteria could be the number of procedures in which the offer with the lowest price was not selected. In the analyzed tenders there were 36 of such procedures, which represented 14% of all procedures. Yet taking into account the tenders in which bids with the lowest price were rejected by the contracting authority, one finds only 5 procedures in which the result was influenced by the non-price criteria. In two cases the decisive criterion was the guarantee one, in the other two it was the execution time one and in one case – two criteria, both guarantee and execution time. It might be concluded then that the application of the non-price criteria do not significantly change the results of procedures; in the vast majority of them bids with the lowest price were selected.

4. Amendment of law in 2016 and its consequences

In order to identify whether changes affected the evaluation process, research was conducted. The subject of concern included open tenders published in the Public Procurement Bulletins at the beginning of 2017 [10]. The study covered 150 tenders. Figure 4 presents the results of a study concerning the number of tender evaluation criteria when the contracting authority decided to use non-price criteria.

The contracting authorities have used the price as the only criterion only in 3 tenders. In the majority of tender procedures two criteria were used (61%). The figure 5 shows the number and percentage of tenders with criteria other than price.

![Figure 5. Percentage of tenders with criteria other than price according to notices in 2017.](image)

The contracting authorities used for the price criterion the highest weight that they could without the requisite justification. And 137 (91%) have chosen a weight of 60% (figure 6).
As table 1 and figure 7 show, the most frequent additional criterion was the one related to guarantee and/or warranty (93% of the analyzed tenders). The next most common criterion was the execution time (22%). Other criteria were used rarely. It should be noted that other criteria were used and here are more and more procedures in which social criteria and those relating to staff experience were chosen.

**Table 1.** Non-price criteria additionally used by the contracting authority.

| Criterion                                                                 |
|---------------------------------------------------------------------------|
| guarantee and/or warranty                                                  |
| project execution time                                                    |
| experience of the construction manager and work managers, experience of the staff provided for the contract |
| technical parameters specific to the subject of the order                  |
| date of payment                                                            |
| the amount of the contractual penalty                                      |
| response time in case of defects found, time of defect removal             |
| social criterion                                                           |
| number of people employed on the contract of employment                    |
| number of people envisaged to fulfill the contract                         |

**Figure 6.** The weights of the price criterion in tenders according to notices in 2017.

**Figure 7.** Percentage of tenders in which non-price criteria were used according to notices in 2017.
As figure 7 shows, the most frequent additional criterion was the one related to guarantee and/or warranty (93% of the analyzed tenders). The next most common criterion was the execution time (22%). Other criteria were rare. More and more often is used the criterion related to experience of the staff being involved in the contract, such as construction managers and works managers. The contracting authorities has also applied social criteria.

5. Conclusions
The purpose of amendments is not only to adapt to EU requirements but also to the needs of the contracting authorities. The use of more than one criterion requires more commitment on the part of the contracting authority. Using non-price criteria involves the necessity on the part of the contracting authority to indicate the methods of tender evaluation by means of the individual criteria and, if possible, a specific definition of what the contracting authority will award points for and in what amount. The method of tender evaluation of should be described in such a way that an objective assessment of the submitted bids is guaranteed, which might prove problematic for the contracting authorities when put into practice. Thus they should be aided by, for example, publications of model descriptions of criteria.

The increased number of procedures using non-price criteria may ensure greater competitiveness and the possibility of submitting tenders involving innovative solutions, thus implementing the principles of public finance for economical, rational and efficient spending of public funds.

The results of the studies presented in this paper show that the last changes in the law have significantly changed the tendency in selecting the evaluation criteria. The contracting authorities, in most cases, limit the number of non-price criteria to mainly two or three: guarantee and execution time” but also increasingly use other non – price criteria such as criteria related to the staff experience. The contracting authorities still use the maximum weight for the price as is allowed by the law.

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