

Method of Incurring Public Expenditure in Relation to New Public Procurement Legislation in Poland

Abstract: The aim of this paper is to discuss new legal solutions whose implementation may contribute to spending public funds in a targeted and cost-effective manner, obtaining the best effects from the given outlay. This article tries to answer the question whether the new Public procurement law facilitates effective spending of public funds. The conducted analysis includes legal provisions, work of the doctrine as well as data published by the Polish Public Procurement Office. A legal-dogmatic method is the main research method in this paper. The analysis conducted here allows to state that the principle of efficiency under Public procurement law should guarantee spending funds in a targeted and cost-effective manner with maintaining rules arising from the Act on public finance. Therefore, the actions of the legislator connected with the implementation of the new legal legislation on awarding public procurement which promotes greater care for efficient use of public funds should be assessed positively.

Keywords: efficiency, public expenditure, principles of spending public funds, public procurement

Introduction

Art. 44(3) of the Act of 27 August 2009 on public finance (Journal of Laws of 2021, item 305, later amended) includes provisions from which arises the way in which public expenditure should be incurred. Pursuant to this provision, expenditure should be made considering the principles of purpose, economy as well as efficiency, effectiveness and timeliness. Importantly, to maintain the correctness of spending of public funds all these principles should be jointly fulfilled [Cilak 2020, p. 333].

A significant part of public expenditure is implemented by the public procurement system and therefore determined by provisions of the public procurement law. The value of the public procurement market in Poland is estimated at ca. PLN 281 bn (for comparison, in 2019 it was PLN 289 bn). On the other hand, the value of awarded public procurement in 2020 was PLN 183.5 bn accounting for 7.9% of GDP [Sprawozdanie, p. 7].

A public contracting authority that spends public money is obliged to manage funds in such a way that this spending is correct, i.e. desired from the point of view of

proper financial management. Expenditure should be incurred considering the principles of purpose, economy, efficiency and effectiveness. To respect the above principles connected with spending public funds is to serve a new Act binding as of 1 January 2021 on public procurement law (Journal of Laws item 2019, later amended), which included solutions facilitating efficiency and transparency of awarded procurements, considering at the same time the role of procurement in spending public money according to the principles of their spending.

The aim of this paper is to discuss new legal solutions whose implementation may contribute to spending public funds in a targeted and cost-efficient manner, obtaining the best effects from the given outlay. This article intends to answer the question whether new public procurement law facilitates efficient public spending. The conducted analysis includes legal provisions, work of the doctrine and data published by the Polish Public Procurement Office. A legal-dogmatic method is the main research method in this paper. Due to the limited volume of the text, this elaboration focuses on selected legal institutions which, according to the Author, are the most significant in the context of enhancing the efficiency of spending public funds.

Method of Spending Public Funds

Spending public funds is based on the principles arising from the Act on public finance. Pursuant to these principles, expenditures should be made in such a way as to allow their targeted and cost-effective execution while ensuring the best effects from the given outlay, optimal selection of methods and resources serving to achieve assumed objectives, in a manner allowing timely realisation of tasks, within amounts and deadlines arising from previously incurred liabilities. To achieve the purpose and cost-effectiveness connected with public spending it is necessary to jointly fulfil the above principles. Every public expenditure should strive to achieve the best effect with due account of given expenses, which are often financially limited, therefore a special role in spending public funds should be given to the principle of efficiency.

The principle of efficiency in spending public funds is expressed in Art. 44(3)(a) (b) of the Act on public finance and in a way repeated and at the same time strengthened in Art. 17(1) of the Act on public procurement law. Thus, the legislator directly referred to the obligation of effective awarding of procurements and gave efficiency the rank of a principle of awarding public procurements.

In the light of Art. 17(1) of the Act on public procurement law, the contracting authority is obliged to award procurement, i.e. to make public spending in a manner ensuring the best quality of the subject of procurement within the means it may allot to its implementation. Additionally, the way of awarding procurement in relation to the outlay is to ensure obtaining the best effects of the procurement, including social, environmental and economic effects (of course if they are possible to achieve).

The principle of efficiency is mainly to serve the implementation of a strategic approach in awarding procurements / spending public funds. It means that awarding procurements should be an economic process in which the role of planning will be enhanced [Nowak, Winiarz 2021, p. 159]. When constructing this provision, the legislator pointed out two circumstances. Firstly, the contracting authority should strive to achieve the best quality of the procurement in relation to the financial resources it has. This emphasises the planning stage of the procedure, during which the decisions are made regarding financial, organisational and personnel means that the contracting authority may allocate to implement the task. Secondly, the contracting authority should strive to achieve the best effects (including social, environmental and economic) of the awarded procurement. Therefore, every time the contracting authority is obliged to answer three questions:

- is it possible to lower the costs, if yes then how;
- is it possible to take into consideration the best quality and effects of the procurement;
- is it possible to balance costs with maintaining the desired quality and effects.

The above analysis should be made considering both the character of the procurement as well as its complexity and the needs of the contracting authority. Basically, the implementation of the principle of efficiency leads to the analysis of costs and benefits, which as a result is aimed at obtaining the best effects from the borne expenses. Additionally, another significant factor is the awareness that the awarded procurement is a tool to achieve objectives in social, economic and environmental dimensions, besides obtaining the subject of procurement [Jaworska 2021a, Granecki, Granecka 2021a].

The Principle of Efficiency in the Context of Value for Money

When considering public spending in the context of efficiency of public procurement, it needs to be indicated that expenditure has both legal as well as economic dimension. Decisions of the contracting authority and the contractor made at every stage of the procurement are regulated by legal norms, but their consequences are economic. Therefore, it is the economic situation of the contracting authority, the state of its financial resources which is usually limited, and well-defined needs that shape the decision on the implementation of the procurement and spending of public funds [Nowicki 2013, p. 9]. Due to the fact that public funds are allotted to implement public tasks which satisfy the needs of a wide range of receivers, their spending should be effective, i.e. which prohibits wasting taxpayers' money [Nowak, Winiarz 2021, p. 159]. Following M. Winiarz [2018, p. 167 and following pages], efficiency may be discussed in the economic aspect as a relation between results and expendi-

tures expressed by productivity, effectiveness, and profitability; in the purposive aspect as evaluation of the degree of compliance with organisational aims including economic aspect; in the systemic aspect as evaluation of the degree of using organisational resources and creating certain relation with the surroundings as well as in the comprehensive aspect as an ability of an organisation to achieve its operational goals. However, in the context of targeted and cost-effective spending of public funds, it needs to be indisputably assumed that efficiency is an economic category and should be analysed from this perspective [Winiarz 2018, p. 167]. Efficiency as an economic category is also supported by its dictionary definition, according to which “efficient” means “effective, giving good results” [Dunaj 1999, p. 124]. It is therefore assumed that efficient public procurements are such which implement the Value for Money principle. According to this concept, procurement efficiently fulfils aims set by the contracting authority and at the same time, it is implemented under possibly best terms, including direct savings and maintaining the best quality within allocated resources [Nowicki 2013, p. 10]. Quality in the context of public procurement is understood as “fulfilling or exceeding client’s requirements” [Dolecki 2020].

The aim of the Value for Money is to select an offer which will ensure the contracting authority to obtain possibly the best relation between the quality of acquired deliveries, services or construction works and the price paid or costs incurred. This rule should be applied as a comprehensive approach at every step of the procurement, i.e. from the process of planning, awarding, and supervision over its implementation till its evaluation. Obtaining the best results in relation to incurred costs should mean not only striving to obtain the optimal quality of the procurement in relation to the price but should also demonstrate care for the enforcement of the contract and its evaluation during implementation, sometimes also (if the nature of the procurement allows) should strive to obtain the best results connected with implementation of public objectives without profit-making nature [Nowak, Winiarz 2021, p. 160].

Instruments Implementing the Principle of Efficiency of Spending Public Funds

In order for the public funds to be spent in a targeted and cost-effective manner, obtaining the best effects from the given outlay, the public procurement system should be equipped with legal instruments allowing such spending. This is to be achieved by the principle of efficiency, whose implementation in the procurement procedure should be applied during reliable preparation of the procedure, setting a certain standard of legal actions of the contracting authority [Czyżewska 2020, p. 144].

The first action aiming at efficient public spending is to conduct an analysis of own needs. It is mandatory for procurements whose value equals or exceeds the so-

called EU thresholds, however, there is no reason not to make such an analysis for procurements with lower values. This requirement determined in Art. 83 of the Act on public procurement law demonstrates the increase of the role of the preparatory stage and, as the legislator indicated in the explanatory memorandum to the draft act, directly impacts subsequent stages of the procurement procedure [Druk No. 3624, p. 27]. When conducting the analysis of needs and requirements, the contracting authority should take into account both the type and the value of the procurement which should be tailored due to the need which is to be satisfied, requirements connected with, implementation risks and specific needs of the contracting authority [Nowak, Winiarz 2021, p. 288]. Therefore for the contracting authority to obtain information necessary to make the decision whether public procurement is the right tool to make public expenditure, such an analysis should indicate that the possibilities to meet the identified needs from own resources have been checked as well as that an insight into the market has been conducted. Such insight into the market should be carried out in two options: in the aspect of using alternative funds to satisfy the identified needs as well as in the aspect of possible options of procurement implementation. It may happen as a result of the insight into the market that the measure assumed by the contracting authority to meet the needs is not the only one and thus it is not necessary the right one. Insight into the market is also conducted to check possible options of the procurement implementation unless the contracting party indicates that there is only one possibility to implement the procurement [Matusiak 2021]. When conducting the analysis of needs, the contracting authority is obliged to consider whether it has the possibility to meet its needs on its own, using its own resources, or it has to order the implementation of the procurement to an external party. The analysis preceding the execution of public funds is to guarantee to spend them in a purposeful manner, i.e. justifying the need to incur certain expenses, and in a cost-effective way, i.e. ensuring the performance of a public task on a proper level of quality and with a minimal financial contribution. Moreover, to maintain the principles of purpose and cost-effectiveness of public expenditures, within the analysis the contracting authority should indicate: the estimated value for every indicated option of procurement implementation, i.e. initially estimate the value of every option of the procurement implementation; the possibility to divide the procurement into parts, i.e. to consider, within the conducted analysis, the possibility and validity of such division; estimated procedure for awarding the procurement¹; the possibility to include social, environmental or innovative aspects of the procurement as well as risks connected with the procedure for awarding and implementing the procurement.

1 At the preparatory stage the contracting authority should already know whether it has proper resources and knowledge allowing to describe the subject of the procurement in details as well as whether it is advised to select a mode which will allow to identify an optimal way to meet the needs and prepare a description of the subject of procurement during a dialogue with contractors.

To realize the purpose and cost-efficiency of public spending connected with awarding public procurement, the legislator introduced preliminary market consultation² before initiating the procurement award procedure. In the legislator's intention, there are at least two main objectives of such consultations. Firstly, it may be to prepare the procedure in every possible option and aspect. Secondly, it is to inform the contractors about plans and requirements regarding the procurement. Importantly, during market consultations, the contracting authority has the opportunity to get expertise and help of experts as well as public administration bodies, who are specialists in particular industries and may provide necessary information about the most advanced and best technological and organisational solutions which are the subject of the procurement [Granecki, Granecka 2021b]. It is essential that the consultations do not distort competition or do not infringe equal treatment of contractors and transparency of conducted procedure, therefore the contracting authority is obliged to inform on its Internet site about the intention to conduct preliminary market consultations as well as about their subject.

From the point of view of implementing the principle of efficiency, changes in the procurement award procedures are significant. The legislator resigned from the dominance of tenders. For the procurements below the EU threshold, Art. 275 of the Act on public procurement law introduced a new solution regarding a basic procedure. In two out of three options in this procedure (i.e. in the second and third procedure), the contracting authority may use negotiations as a tool to formulate its own expectations optimally and then to implement the contract. It was indicated in the explanatory memorandum to the Act that this regulation is to increase the role of dialogue between the contracting authority and the contractors as well as to deformalize the procurement award procedure [Druk No. 3624, p. 70]. On the other hand, in the procurements above the EU thresholds, this solution should give the contracting authorities greater flexibility in selecting the award procedure, targeted at, e.g. competitive dialogue or innovative partnership³. Such procedures based on dialogue and negotia-

2 Market consultations are a response of the legislator to an unpopular among the contractors technical dialogue, rooted in the previous Act on public procurement law. According to the data published by Public Procurement Office arises that in 2019 the contracting authorities informed about applying technical dialogue in 159 procurement notices in the Public Procurement Bulletin, what constituted 0.14% of the total notices. For comparison, in 2018 technical dialogue made 0.18% of the total notices, in 2017 – 0.35%, and in 2016 – 0.18%. More on this subject: Public Procurement Office (2020). A Report of the President of the Public Procurement Office on the functioning of the public procurement system in 2019. Warsaw: Public Procurement Office. www.uzp.gov.pl (21.01.2021).

3 From the data in the Report of the President of the Public Procurement Office on the functioning of the public procurement system in 2020 arises that for the procurements above the EU thresholds in 2020 90.86% were awarded in open tenders. In 2017–2019 this percentage was 91.00%, 92.22% and 90.94%, respectively. In the case of direct agreement contracts it was 7.49% (in 2017–2019 it was 7.0%, 6.52% and 7.76%, respectively). Restricted procurement, negotiations with

tions bring better results from the point of view of efficiency. They give the possibility of direct contact between a contractor and a contracting authority, and thus ensure optimal flow of important information about market possibilities and meeting the contracting authority's needs [Pieróg 2020, p. 3]. Apart from that, the legislator's actions to relax the criteria to apply procedures other than tenders should facilitate the cooperation of the public and private sectors, a result of which may be the access to expertise on the available solutions including pro-innovative and pro-environmental aspects [Kania 2020, p. 6].

This Act also introduced new solutions regarding the implementation of contracts on public procurements, which should enhance efficiency. Pursuant to Art. 431 of the Act on public procurement law there is an obligation of the contracting authority to cooperate during the implementation of the public procurement contract. Cooperation and balancing the position of the parties to the procedure, mandatory indexation or abusive clauses are to ensure security during the implementation of the procurement [Pieróg 2020, p. 4] as well as to secure its proper fulfilment and mutual respect of both parties [Druk No. 3624, p. 83]. Another legal instrument impacting the execution of the principle of efficiency of public spending is the obligation put on the contracting authority to prepare an implementation report. According to Art. 446(1) of the Act on public procurement law, the obligation to evaluate is mandatory in the situations provided in the Act, namely when during the procurement implementation arise difficulties such as: the amount spent on the implementation of the procurement is at least by 10% higher than the offer price; a contractual penalty in the amount of at least 10% of the offer price value is imposed on the contractor; there are delays in the implementation of the procurement⁴ or the contracting authority or the contractor renounces the contract in part or completely, or terminates the contract in part or completely. The above obligation to evaluate should be considered right, since it allows to look at the process as a whole, from making a first decision about the preparation of the procedure, up to its implementation and assessment. The obligation to evaluate may have a preventive character since its conclusions should increase the chance to avoid similar difficulties in the future. Moreover, if public procurements are to be really effective, this efficiency should be analysed

an announcement, competitive dialog and negotiations without an announcement represented 1.65% of all procurements. The data indicate that the least applied procedures were the ones which may bring the biggest benefits connected with insight into the market and increased competition.

4 Delays of at least 90 days, in the case of procurement on construction works of the value equal to or exceeding the equivalent expressed in PLN for the construction works – EUR 20 000 000, and for the supplies or services – EUR 10 000 000, and delays of at least 30 days in the case of procurements of the value smaller than the equivalent expressed in PLN for the construction works – EUR 20 000 000, and for supplies or services – EUR 10 000 000.

both prior to as well as after the procurement is awarded. Then the diagnosis regarding the appropriateness of the decisions will be possible [Borowicz 2021, p. 6].

Conclusion

The analysis conducted in this elaboration leads to the following conclusions.

Firstly, public procurements are an essential form of public sector participation in the economy and a significant part of public expenditure is implemented through the public procurement system, therefore it is determined by the provisions of public procurement law.

Secondly, pursuant to the Act on public finance, public funds should be spent in a targeted and cost-effective manner, obtaining the best effects from the given outlay. Therefore, the public procurement system should be equipped with legal instruments allowing such spending.

Thirdly, due to the fact that every public spending should be made in a manner targeted at achieving the best effects considering limited resources, a special significance in spending public funds should be given to the principle of efficiency.

Fourthly, the principle of efficiency, expressed in the Act on public procurement law, relates to the method of spending public funds based on the Act on public finance, joining the way of spending public funds with obtaining the best results from the given financial outlays. Thus, a strategic approach has been applied when awarding procurements / spending public funds, which has made procurement an economic process, in which the role of planning during the whole process of procurement has been strengthened.

Fifthly, the implementation of the principle of efficiency should be mainly manifested in proper preparation and planning of the procedure, setting a certain standard of legal actions of the contracting authorities, which impact the manner of public spending. The principle of efficiency expressed on the basis of public procurement law should guarantee the execution of public funds in a targeted and cost-effective manner, maintaining at the same time principles arising from the Act on public finance. Therefore, the action of the legislator to introduce new legal legislation in awarding public procurement which facilitates greater care for efficient spending of public funds should be evaluated positively.

Bibliography

- Borowicz A. (2021), *Aspekty ekonomiczne i rynkowe nowego Prawa zamówień publicznych*, "Zamówienia Publiczne. Doradca" No. 1.
- Cilak M. (2020), *Komentarz do art. 44 ustawy o finansach publicznych* [in:] Z. Ofiarski (ed.), *Ustawa o finansach publicznych. Komentarz*, Wolters Kluwer, Warsaw.

- Czyżewska B. (2020), *Z problematyki zasady efektywności zamówień publicznych*, "Prawo Zamówień Publicznych" No. 2.
- Dolecki J. (2020), *Kilka uwag o zasadzie efektywności*, "Zamówienia Publiczne. Doradca" No. 4.
- Dunaj B. (ed.) (1999), *Popularny słownik języka polskiego*, Wydawnictwo Wilga, Warsaw.
- Granecki P., Granecka I. (2021a), *Komentarz do art. 17 ustawy Prawo zamówień publicznych* [in:] P. Granecki, I. Granecka, *Prawo zamówień publicznych. Komentarz*, C.H. Beck. Legalis/el, Warsaw.
- Granecki P., Granecka I. (2021b), *Komentarz do art. 84 ustawy Prawo zamówień publicznych* [in:] P. Granecki, I. Granecka, *Prawo zamówień publicznych. Komentarz*, C.H. Beck. Legalis/el, Warsaw.
- Jaworska M. (2021a), *Komentarz do art. 17 ustawy Prawo zamówień publicznych* [in:] M. Jaworska (ed.), D. Grześkowiak-Stojek, J. Jarnicka i A. Matusiak, *Prawo zamówień publicznych. Komentarz*, C.H. Beck. Legalis/el, Warsaw.
- Kania M. (2020), *Zasada efektywności w nowym Prawie zamówień publicznych*, "Prawo Zamówień Publicznych" No. 1.
- Matusiak A. (2021), *Komentarz do art. 83 ustawy Prawo zamówień publicznych* [in:] M. Jaworska (ed.), D. Grześkowiak-Stojek, J. Jarnicka i A. Matusiak, *Prawo zamówień publicznych. Komentarz*, C.H. Beck. Legalis/el, Warsaw.
- Nowak H., Winiarz M. (2021) (eds.), *Prawo zamówień publicznych. Komentarz*, Urząd Zamówień Publicznych, Warsaw.
- Nowicki P. (2013), *Efektywne zamówienia publiczne jako rezultat stosowania nowego podejścia do zamówień publicznych*, Polska Agencja Rozwoju Przedsiębiorczości, Warsaw.
- Pieróg J. (2020), *Czy warto udzielać efektywnych zamówień?* "Zamówienia Publiczne. Doradca" No. 1, Legalis. CH. Beck/el.
- Urząd Zamówień Publicznych (2021), *Sprawozdanie Prezesa Urzędu Zamówień Publicznych o funkcjonowaniu systemu zamówień publicznych w 2020 r.*, www.uzp.gov.pl access as of 12 December 2021.
- Urząd Zamówień Publicznych (2020), *Sprawozdanie Prezesa Urzędu Zamówień Publicznych o funkcjonowaniu systemu zamówień publicznych w 2019 r.*, www.uzp.gov.pl, access as of 12 February 2021.
- Uzasadnienie do rządowego projektu ustawy – Prawo zamówień publicznych, Sejm VIII kadencji, Druk nr 3624, www.orka.sejm.gov.pl, access as of 15 December 2021.
- Winiarz M. (2018), *Efektywność finansów publicznych a efektywne zamówienia publiczne* [in:] M. Stręciwilk, A. Dobaczewska (eds.), *Potrzeby i kierunki zmian w Prawie zamówień publicznych*, Urząd Zamówień Publicznych, Warsaw.

List of Legal Acts

- Act of 27 August 2009 on public finance, the uniform text Journal of Laws of 2021, item 305, later amended.
- Act of 11 September 2019 on public procurement law, Journal of Laws item 2019, later amended.