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The Polish Supreme Court in the Public Procurement Procedure

Sąd Najwyższy w procedurze zamówień publicznych

ABSTRACT

The Polish public procurement procedure currently includes the following elements: the proceeding in cases for the award of a public contract, the appeal proceeding in cases for the award of a public contract, the grievance proceeding in cases for the award of a public contract, and the amicable proceeding in cases for the award of a public contract. Naturally, the element all these proceedings have in common is their subject-matter, which covers a public procurement case, but they clearly differ as regards the status of the adjudicating entity. Consequently, the public procurement procedure turns out to be a hybrid procedure, since it assumes combining separate proceedings from the point of view of their nature. Moreover, the public procurement procedure must also be regarded as a regulatory procedure, as it is characterised by properties typical of the regulatory function of the public administration. The Polish Supreme Court effectively exercises judicial supervision over adjudication in public procurement matters.

Keywords: hybrid procedure; regulatory procedure; Polish Supreme Court; public procurement

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INTRODUCTION

The new statutory regulation on public procurement needs reflection, including on the public procurement procedure.[1] The findings made so far must be reviewed to allow their conceptual assumptions to be updated.[2] First of all, it should be pointed out that there is a need to continue the systemic approach which allows us to grasp the links between the constituent proceedings. It should therefore be first noted that the public procurement procedure includes currently the proceeding in cases for the award of a public contract, the appeal proceeding in cases for the award of a public contract, the grievance proceeding in cases for the award of a public contract, and the amicable proceeding in cases for the award of a public contract. This is always about a specific stage of the public procurement procedure, rationally sequenced, with that sequence being essentially unchangeable. Naturally, the element all these proceedings have in common is their subject-matter, which covers a public procurement case, but they clearly differ as regards the status of the adjudicating entity. The differentiation in public procurement procedure is therefore not determined by the case mentioned above, but by the specific legal-systemic status of the entities formally competent to decide the case.[3] This certainly requires further detailed analysis in order to conclude on the current position of the Supreme Court in the public procurement procedure.

OBJECT OF THE PUBLIC PROCUREMENT PROCEDURE

The concept of case for the award of a public contract is a concept developed by legal practice, although both its constituent parts are legal concepts.[4] This is so because both "case" and "the award of a public contract" are legal terms (concepts used and defined in legal provisions).[5] Moreover, it should be added at this point that "case" in the general sense does not have its own legal definition, but specific definitions of a case emerge, which have clear connotations in individual branches of

[1] See Act of 11 September 2019 – Public Procurement Law (Journal of Laws 2019, item 2019, as amended [hereinafter: PPL]), which entered into force on 1 January 2021 pursuant to Article 1 of the Act of 11 September 2019 – Introductory Provisions to Public Procurement Law (Journal of Laws 2019, item 2020, as amended).

[2] See J. Niczyporuk, *Procedura zamówień publicznych*, "Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu" 2017, no. 497, p. 64 ff.

[3] Idem, *Sprawa udzielenia zamówienia publicznego*, [in:] *Procedura zamówień publicznych*, ed. J. Niczyporuk, vol. 1, Lublin 2018, p. 84.

[4] *Ibidem*.

[5] See Article 45 (1) of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, no. 78, item 483, as amended); Article 1 PPL.

law. Specifically, it is appropriate to refer here to the legal definition of "civil case" and the legal definition of "administrative court case".[6] In this context, it is also important to note the lack of legal definitions of "administrative case" and "public case". No attempt has so far been made to develop a legal definition of "case" in the general sense, which would be common to these three branches of law. On the other hand, there have been more than one attempt to formulate a legal-practice definition of "case" in individual branches of law. Most often, the focus was then on linking cases in particular branches of law with: the relevant legal relationship, the subject matter of the relevant legal regulation, and the jurisdiction of the entities entitled to settle disputes. Finally, it must also be stated that the legal concept of the award of a public contract is based on the legal definition of "public contract". In any case, a public contract must then constitute a contract for pecuniary interest entered into between the contracting entity and the economic operator, the object of which covers the acquisition by the contracting entity of works, supplies or services from the selected economic operator.[7]

In the above-mentioned context, it should also be pointed out that a case for the award of a public contract always concerns the contracting entity's actions generally undertaken in a public procurement procedure, but may sometimes also take place outside of it.[8] This is so because other actions of the contracting entity undertaken as part of a proceeding for the conclusion of a framework agreement, dynamic purchasing system, economic operator eligibility system or competition procedure, including the draft provision of the contract, must be concurrently taken into account. Furthermore, one must also take into account the failure to act by the contracting entity in a proceeding for the award of a public contract, a proceeding for the conclusion of a framework agreement, dynamic purchasing system, economic operator eligibility system or a competition procedure, and failure to perform the contracting entity's obligation to conduct a proceeding for the award of a public contract or organise a competition as set out in the law. Such an approach results directly from the scope of jurisdiction of the National Appeals Chamber, but it has a much wider meaning, as it also determines the objective scope of the public procurement procedure. After all, the objective scope of the first proceeding directly affects the objective scope of the final proceeding, since the procurement procedure is essentially an inseparable and interconnected whole. Naturally, the objective scope of proceedings other than the first one may then be subject to an appropriate modification, which, however, does not change the generally adopted assumption.

[6] See Article 221 of the Act of 17 November 1964 – Code of Civil Procedure (Journal of Laws 2020, item 1575, as amended), hereinafter: CCP; Act of 30 August 2002 – Law on Proceedings before Administrative Courts (Journal of Laws 2019, item 2325, as amended).

[7] See Article 7 (32) PPL.

[8] See Article 513 PPL.

As a consequence, the scope of the public procurement procedure is obviously broader than the proceeding in cases for the award of a public contract. At this point, it is worth noting that the proceeding for the award of a public contract is a legal concept with a legal definition assigned to it, as the proceeding for the award of a public contract now means a proceeding initiated by serving or posting an announcement, the service of an invitation to negotiate or an invitation to tender, conducted as an ordered sequence of activities based on the public procurement conditions set by the contracting entity, leading to the selection of the best offer or negotiation of terms of the public procurement contract, ending with the conclusion of a public procurement contract or its annulment, however, the conclusion of a public procurement contract never constitutes an act in this proceeding.[9] As a side note it should also be stated that, unfortunately, we do not have legal definitions of the appeal proceeding in cases for the award of a public contract, grievance proceeding in cases for the award of a public contract and amicable proceeding in cases for the award of a public contract. However, noteworthy is the legal meaning given to the concepts of appeal proceeding and grievance proceeding.[10] Undoubtedly, the amicable proceeding in cases for the award of a public contract is also an example of out-of-court dispute resolution.[11]

SUBJECT OF THE PUBLIC PROCUREMENT PROCEDURE

On the other hand, the concept of adjudicating entity is also a legal practice-derived term, but it has no explicit legal reference. Although the entity itself should then be treated as a typical legal practice-derived concept. It can therefore be assumed in these considerations that "entity" is a concept reproduced from the meaning of a legal norm and the other determinants allowed by that norm, including, in particular, declarations of intent, administrative decisions, judicial decisions, non-legal norms.[12] The proceeding for the award of a public contract is always adapted for the purposes of the entity that is considered to be the contracting entity. According to the legal definition, the contracting entity is a natural person, a legal person or an organizational unit without legal personality, obliged under the Act to apply it.[13] Since the definition is of a technical nature, the status of contracting entity must be determined by an interpretation which takes into account the rules

[9] See Article 7 (18) PPL.

[10] See the titles of Section IX chapter 2 and 3 PPL.

[11] See the title of Section X PPL.

[12] See J. Frąckowiak, *Jednostka organizacyjna jako substrat osoby prawnej i ustawowej*, [in:] *Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana*, eds. L. Ogiegła, W. Popiołek, M. Szpunar, Kraków 2005, p. 900.

[13] See Article 7 (31) PPL.

of EU law. Thus, the contracting entity may be classified as a contracting authority or even be identified as a public entity.[14] Where reference is further herein made to the legal definition of contracting authorities in EU law, these are only understood as the State, regional and local authorities, bodies governed by public law, or associations composed of one or more such institutions or one or more such public law entities.[15] This also concerns the bodies adjudicating in cases of the award of a public contract, including, of course, the bodies settling legal disputes arising out in cases of the award of a public contract.

Therefore, these proceedings, except the first one, ensure the participation of entities resolving disputes in the public procurement procedure. In any case, the resolution of a legal dispute should be understood broadly here, and therefore it must also include an amicable settlement of the dispute, the best example of which is mediation. All legal dispute resolving entities do not then become public procurement subjects, since they are third parties to particular public contracts, but they are also external to contracting entities and economic operators[16]. The status of legal dispute resolving entities in procurement cases is undoubtedly clearly diverse, but this must not raise a systemic controversy.[17] It is necessary to distribute the acts of resolving in the case for the award of a public contract between various bodies of public authorities.[18] This is in line with the constitutional regulation, because it does not govern "directly the question of the number of authorities conducting proceedings to resolve the case and does not prohibit (…) either the assignment of actions taken for the purposes of the examination of the case by various public authorities, or the differentiation of rules of conduct for various authorities. From the perspective of the Constitution, it is important that the final and binding decision should be the responsibility of the court (…) [and] according to the established constitutional case law, it is sufficient that the final verification of the decision of a non-judicial body is the competence of the courts".[19]

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[14] See resolution of the National Appeals Chamber of 17 June 2014, KIO/KD 9/14; resolution of the National Appeals Chamber of 10 October 2014, KIO/KD 91/14; resolution of the National Appeals Chamber of 3 March 2015, KIO/KD 9/15.

[15] See Article 2 (1) (1) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94/65, 28.3.2014).

[16] See M. Szydło, *Prawna koncepcja zamówienia publicznego*, Warszawa 2014, p. 130.

[17] *Ibidem*, p. 131.

[18] See M. Romańska, *Skarga do sądu na orzeczenie Krajowej Izby Odwoławczej w systemie środków zaskarżenia. Kontrola instancyjna orzeczeń Krajowej Izby Odwoławczej*, [in:] *X-lecie funkcjonowania Krajowej Izby Odwoławczej*, eds. M. Stręciwilk, M. Rakowska, Warszawa 2017, p. 60.

[19] See judgment of the Constitutional Tribunal of 12 May 2011, P 38/08, OTK-A 2011, no. 4, item 33.

The National Appeals Chamber is therefore competent for appeal proceedings in cases for the award of a public contract.[20] Definitely, the National Appeals Chamber must be considered one of the executive bodies and a public administration body. Since the National Appeals Chamber exercises administrative jurisdiction, it is then appropriate to consider it as an adjudicating authority of the public administration. But it is not an organ of central-government administration, as it is outside the centralised and hierarchical structure of the central government administration.[21] Due to its independent status in the field of administrative law, it is therefore a decentralised personal form of exercising public administration other than a corporate (self-government) one.[22] On the other hand, the grievance procedure in cases for the award of a public contract is inconsistent, since the competent body is first the District Court in Warsaw – the public procurement court, and then the jurisdiction of the Supreme Court is revealed. This always concerns bodies of the judiciary, with the District Court in Warsaw – the public procurement court being a specialised common court, whereas the Supreme Court is the supreme authority of the judiciary. Finally, the jurisdiction for public contract award cases is exercised by the Arbitration Court at the General Counsel to the Republic of Poland as a permanent arbitration court of a nature of public law body outside the judiciary.[23]

THE DIVERSE NATURE OF THE PUBLIC PROCUREMENT PROCEDURE

From the perspective of the differentiation of the public procurement procedure, it must therefore first be stated that the case for the award of a public contract constitutes an additional precondition for its differentiation. While it is true that a case for the award of a public contract must, by its nature, be treated uniformly, this does not, at the same time, preclude a differentiated approach to it on substantive and formal levels.[24] This differentiated approach means considering a case for the award of a public contract to be at the same time an administrative case, a civil case and a public-law case. In the public procurement procedure, therefore, we are

[20] For more details on this issue, see J. Niczyporuk, *Koncepcja postępowania odwoławczego w zamówieniach publicznych*, [in:] *Prawo administracyjne wobec współczesnych wyzwań. Księga jubileuszowa dedykowana Profesorowi Markowi Wierzbowskiemu*, eds. J. Jagielski, D. Kijowski, M. Grzywacz, Warszawa 2018, p. 685 ff.

[21] Cf. E. Norek, *Prawo zamówień publicznych. Komentarz*, Warszawa 2009, p. 329.

[22] See H. Izdebski, M. Kulesza, *Administracja publiczna. Zagadnienia ogólne*, Warszawa 2004, pp. 140–142.

[23] Cf. P. Janda, *Teza 3 do art. 185*, [in:] S. Babiarz, Z. Czarnik, P. Janda, P. Pełczyński, *Prawo zamówień publicznych. Komentarz*, Warszawa 2010, p. 646.

[24] See J. Niczyporuk, *Sprawa udzielenia…*, p. 84; idem, *O hybrydowości procedur regulacyjnych*, [in:] *Fenomen prawa administracyjnego. Księga jubileuszowa Profesora Jana Zimmermanna*, eds. W. Jakimowicz, M. Krawczyk, I. Niżnik-Dobosz, Warszawa 2019, p. 622.

always dealing with a case for the award of a public contract, which is classified differently in its successive stages. The order of the classification is not accidental, as an administrative case must first appear according to the substantive legal criterion, which then becomes a civil case according to the formal legal criterion, to be finally considered as a public-law case according to the formal legal criterion. Initially, the case for the award of a public contract should of course be an administrative case, but it can still be referred to derivatively as a civil case or a public-law case. After all, the substantive legal criterion that touches directly on its essence must take precedence, while the same cannot be said of the formal legal criterion. However, the formal legal criterion is a necessary complement, which only allows the fulfilment of the substantive legal claim.

According to the substantive legal criterion, an administrative case can be defined in legal terms as a question of the existence of a factual state, defined in the descriptive part of a legal norm, which requires authoritative concretisation in the form of an act issued by a competent public administration body in order to release its binding force.[25] On the other hand, the substantive law criterion of a civil case is reflected in the legal definition, as civil cases cover exclusively matters of civil law, family and guardianship law, and labour law.[26] Therefore, it can be conclusively established that civil cases in substantive-law perspective are those cases in which the legal relations between the parties are arranged on the basis of equality of parties and equivalence of benefits, and consequently they are already civil cases by their very nature.[27] Such meaning of a civil case does not result from the will of the legislature, because cases under civil law, family and guardianship law and labour law will also remain civil cases without a legal definition. At the same time, a civil case should therefore be understood, according to the formal-legal criterion, as judicial proceedings governed by the Code of Civil Procedure in the matters of civil law, family and guardianship law and labour law, as well as social security matters and in other matters to which the provisions of that Code apply under specific laws.[28] On the other hand, a public-law case means, according to the formal-legal criterion, judicial proceedings under public law.[29]

Certainly, the case for the award of a public contract as an administrative case is heard and decided by the contracting entity and the National Appeals Chamber. This concerns both an administrative case according to the substantive legal criterion

[25] See T. Kiełkowski, *Sprawa administracyjna*, Kraków 2004, p. 35.

[26] See Article 1 CCP *in principio*.

[27] See J. Bodio, *Teza 1 do art. 1*, [in:] *Kodeks postępowania cywilnego*, vol. 1: *Komentarz do art. 1– 729*, ed. A. Jakubecki, Warszawa 2017, p. 37.

[28] See Article 1 CCP.

[29] See J. Niczyporuk, *Sprawa publiczna*, [in:] *Jednostka wobec władczej ingerencji organów administracji publicznej. Księga jubileuszowa dedykowana Profesor Barbarze Adamiak*, eds. J. Korczak, K. Sobieralski, Wrocław 2019, p. 388.

and an administrative case according to the formal legal criterion. On the one hand, it should be noted that the administrative classification of public procurement was directly determined by the public status of the contracting entity and the National Appeals Chamber. On the other hand, it still needs to be pointed out that the administrative classification of public procurement is based on the nature of the case of the award of a public contract. In particular, by defining the legal form of the selection of the best tender, since it determines not only the nature of the proceeding in cases for the award of a public contract but also the nature of the appeal proceeding in cases for the award of a public contract.[30] The legal form of the selection of the best tender should be determined from the point of view of the administrative act.[31] Administrative act means a sovereign, unilateral declaration of intent by a public authority, based on the provisions of administrative law, specifying the legal situation of a specific addressee in a particular case.[32] The constituent elements of the concept of administrative act are, after all, characterised by the selection of the best tender when awarding a public contract. Moreover, the appeal may systematically be available only against an administrative declaration of intent of the contracting entity, such as the selection of the best tender, and never against a civil one.

Of course, the case remains an administrative case according to the substantive legal criterion when it is subject to further examination and resolution in the context of legal remedies by the District Court in Warsaw – the public procurement court, or as part of the supervision of legal remedies, exercised by the Supreme Court. At the same time, it becomes a civil case according to the formal legal criterion, when the grievance proceeding in cases for the award of a public contract is conducted by the District Court in Warsaw – the public procurement court. On the other hand, it is regarded, according to the formal legal criterion, as a public-law case where a grievance proceeding of a cassation or extraordinary nature in cases for the award of a public contract reaches the Supreme Court. From this perspective, it should be established that there is no change in the mode of proceedings at that time, as there is a change in completely separate proceedings,[33] if it is considered that administrative proceeding is not one of the modes of civil proceedings, nor should it be assumed the other way round.[34] Moreover, there is a construct of temporary inadmissibility of judicial proceedings, since a specific case for the award

[30] For more details on this issue, see idem, *Forma prawna wyboru najkorzystniejszej oferty*, [in:] *Funkcjonowanie systemu zamówień publicznych – aktualne problemy i propozycje rozwiązań*, eds. M. Stręciwilk, A. Panasiuk, Warszawa 2017, pp. 81–86.

[31] *Ibidem*.

[32] See M. Wierzbowski, A. Wiktorowska, *Prawne formy działania administracji*, [in:] *Prawo administracyjne*, ed. M. Wierzbowski, Warszawa 2009, pp. 270–272, 275–280.

[33] Cf. A. Walaszek-Pyzioł, W. Pyzioł, *Prawo energetyczne. Komentarz*, Warszawa 1999, p. 93.

[34] See H.E. Zadrożniak, *Postępowanie w sprawach z zakresu regulacji energetyki – wybrane dylematy oraz postulaty de lege ferenda*, "Energetyka" 2011, no. 6, p. 3.

of a public contract must first be examined and resolved by the contracting entity and the National Appeals Chamber.[35] A completely separate issue is the case for the award of a public contract before the Arbitration Court at the General Counsel to the Republic of Poland, which is originally an administrative case according to the substantive legal criterion and a civil case according to the formal legal criterion.

CONCLUSIONS

Consequently, the public procurement procedure turns out to be a hybrid procedure, since it assumes combining separate proceedings from the point of view of their nature. The hybrid procedure is usually understood as a procedure based on a mixed administrative-judicial system.[36] One may even conclude that the public procurement procedure is a kind of the mechanism of operation of the so-called "in-between procedure", which shows elements typical of public law but also uses elements typical of private law.[37] Moreover, the public procurement procedure must also be regarded as a regulatory procedure, because it is characterised by properties specific to the regulatory function of the public administration. In this context, one may only say that the current position of the Supreme Court must be redefined in the public procurement procedure, especially in view of the now broadly-shaped right to a trial.[38] First of all, it should be stressed at this point that the Supreme Court then administers justice, which is to ensure the legality and uniformity of the case law, as well as the rule of law and social justice.[39] This view demonstrates a special role for the Supreme Court, whose primary task is not to resolve disputes, but rather to review decisions made so far from the perspective of the most important values that should accompany and guide the earlier proceedings in the public procurement procedure.[40]

This is the rationale behind covering cases for the award of a public contract by the jurisdiction of the Chamber of Extraordinary Control and Public Affairs of the Polish Supreme Court, which is generally competent for public matters of a regulatory nature.[41] Therefore, it should be noted that the judicial supervision of the Supreme

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[35] Cf. K. Gajda-Roszczynialska, *Sprawa o ochronę indywidualnych interesów konsumentów w postępowaniu cywilnym*, Warszawa 2012, p. 197.

[36] See R. Stankiewicz, *Likwidacja procedur hybrydowych – krok w dobrym kierunku czy szkodliwy dogmatyzm?*, [in:] *Aktualne problemy rozgraniczenia właściwości sądów administracyjnych i powszechnych*, eds. M. Błachucki, T. Górzyńska, Warszawa 2011, p. 160.

[37] *Ibidem*, p. 161.

[38] Cf. W. Dzierżanowski, *Prawo do sądu w zamówieniach publicznych*, Warszawa 2018, pp. 153–157.

[39] See K. Szczucki, *Ustawa o Sądzie Najwyższym. Komentarz*, Warszawa 2021, p. 38.

[40] *Ibidem*.

[41] See Article 26 § 1 of the Act of 8 December 2017 on the Supreme Court (Journal of Laws 2021, item 1904, as amended), hereinafter: ASC.

Court over the case law concerning the award of public contracts is becoming much more actual. Thus, the possibility of ensuring the legality and uniformity of case law in public contract award improves, which is most true for judicial disputes. This also includes extraordinary review of final court rulings in order to ensure their compliance with the principle of a democratic state ruled by law implementing the principles of social justice by hearing extraordinary actions. At the same time, the right to a trial in public procurement cases was extended, because a cassation appeal may be brought to the Supreme Court not only by the President of the Public Procurement Office, but also by a party to the grievance proceedings before the District Court in Warsaw – the public procurement court.[42] And an extraordinary action in cases for the award of a public contract may be additionally filed with the Supreme Court by the Public Prosecutor General, the Commissioner for Human Rights and, within defined jurisdiction, the President of the Office of the General Counsel to the Republic of Poland, the Ombudsman for Children, the Commissioner for Patients' Rights, the Chairman of the Financial Supervision Authority, the Financial Ombudsman, the Ombudsman for Small and Medium Enterprises and the President of the Office of Competition and Consumer Protection.[43]

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[42] Cf. A. Banaszewska, *Skarga na orzeczenie Krajowej Izby Odwoławczej jako środek ochrony prawnej w systemie zamówień publicznych*, Warszawa 2018, p. 471; Article 590 PPL.

[43] See Article 89 § 2 ASC.

Niczyporuk J., *Koncepcja postępowania odwoławczego w zamówieniach publicznych*, [in:] *Prawo administracyjne wobec współczesnych wyzwań. Księga jubileuszowa dedykowana Profesorowi Markowi Wierzbowskiemu*, eds. J. Jagielski, D. Kijowski, M. Grzywacz, Warszawa 2018.

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ABSTRAKT

Procedura zamówień publicznych obejmuje dzisiaj: postępowanie w sprawach o udzielenie zamówienia publicznego, postępowanie odwoławcze w sprawach o udzielenie zamówienia publicznego, postępowanie skargowe w sprawach o udzielenie zamówienia publicznego oraz postępowanie polubowne w sprawach o udzielenie zamówienia publicznego. Te wszystkie postępowania łączy oczywiście wspólny przedmiot, który obejmuje sprawę o udzielenie zamówienia publicznego, natomiast różnią się one wyraźnie statusem podmiotu rozstrzygającego. W konsekwencji procedura zamówień publicznych okazuje się być procedurą hybrydową, ponieważ zakłada mieszanie odrębnych z punktu widzenia charakteru postępowań. Ponadto trzeba procedurę zamówień publicznych uznać zarazem za procedurę regulacyjną, ponieważ można w niej doszukać się cech właściwych dla funkcji regulacyjnej administracji publicznej. Sąd Najwyższy efektywnie sprawuje w niej nadzór judykacyjny nad orzecznictwem w sprawach o udzielenie zamówienia publicznego.

Słowa kluczowe: procedura hybrydowa; procedura regulacyjna; Sąd Najwyższy; zamówienia publiczne