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Public procurement Law – Civil Law under „Coercion" of Administrative Law or Administrative Law on the basis of Civil law? Comments on the Method of Its Regulation and the Nature of Legal Norms*

What appears repeatedly in business practice is the issue of assessing the legal character of contracts concluded under public procurement procedures. There is an unanimous opinion among the representatives of the doctrine that these agreements are purely civilian. The problem related to the current nature of legal contracts concluded under public procurement procedures concerns the actual freedom in shaping their content, the possibility of contractual modification of contract provisions, the effects of the conclusion of the contract and terms of the contract itself. Authors ask the question whether public procurement law is a civil law under "coercion" of administrative law, or administrative law on the basis of civil law. The dogmatic research method, the analytical research method and case law analysis were used to elaborate this issue.

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Key words:
public procurement, contract, contractual freedom, contractor

https://doi.org/10.36128/priw.vi31.125

Introduction

Public procurement law is the basic legal regulation concerning the disposal of public funds. The Act defines precisely, who, under what circumstances, and subject to what terms, is obliged to apply it. According to the glossary contained in art. 2 of the public procurement law [ppl] the contracting party may be a natural person, legal person or organizational unit without legal personality obliged to apply the Act. The subjective and objective scope of application of the Act is specified in articles 3 - 4d ppl. This necessitates

* The present publication is an article from the series entitled Charakter prawny i znaczenie umów handlowych w obrocie gospodarczym [Legal nature and significance of commercial contracts in business transactions].

us to perform an analysis for each respective case, whether the ppl applies thereto, due to the subject of the contract, or the application of the Act is not required. It should be emphasized at the outset that even if the Act does not provide for the obligation to apply the principles contained therein, the parties are still entitled to use the procedures indicated by the ppl.

Public procurement law is widely regarded as a law of the branch of civil law, as indicated, among others, by the principles for concluding and the freedom to shape the content of contracts. This freedom is understood as a consistent statement of will regarding the conclusion of the contract and its content.

On the other hand, there are numerous instances in business practice, where the issue of assessment of actual legal character of contracts under public procurement law arises. There is a unified opinion among the representatives of the doctrine that these agreements are purely civilian. There is no need to argue with this view, because such a polemic could not be supported by any substantive arguments. The contract for the performance of a public contract is a civil law relationship concluded in order to meet the obligation of the contractor to the entitled entity. The parties shape this relationship by submitting coherent declarations of their will.

The problem related to the current nature of legal contracts concluded under public procurement procedures concerns the actual freedom in shaping their content, the possibility of contractual modification of the provisions of the contract, the effects of the conclusion of the contract and the terms of the contract itself.

The hypothesis of present article is the question whether public procurement law is a civil law under „coercion" of administrative law, or administrative law on the basis of civil law. When looking for the right relationship, we should ask some auxiliary questions. Which law is the more general law concerning public procurement law? What courts settle disputes between principals and contractors? What are the characteristics of contracts concluded under public procurement law procedures? What is the scope of application of the principle of freedom of contract? What are the circumstances for implementation of the subject of a public contract?

The dogmatic research method, the analytical research method and case law analysis were used to elaborate the issue. The dogmatic method was applied to analyze the regulations of the Polish civil code, and the public procurement law in the scope of the discussed issues. The analytical method consisted in reviewing scientific elaborations and analyzing the views of representatives of the doctrine regarding the issue in question. The review of case law was based on selected settlements of civil court disputes.

Features of contracts concluded under public procurement law procedures

The features of a contract concluded under public procurement law procedures are basically the same as the features of professional contracts. These features can be directly indicated by analyzing the provisions of the Polish civil code. This possibility arises in connection with art. 14 ppl, where the legislator directly indicates when the application of the civil code is required. Pursuant to the content of the said provision, the provisions of the Act of 23 April 1964 – civil code (Journal of Laws of 2017, items 459, 933 and 1132) shall apply to the activities undertaken by the contracting authority and contractors in the procurement procedure, unless the Act provides otherwise.

It should be noted that such contracts are concluded in the offer mode. Tender participants submit an offer to tender for the subject of the contract, indicating the price and guaranteeing quality.[1] References of entities submitting the offer are important in this respect and it can be indicated as a distinguishing feature of public procurement law. Depending on the value of the subject of the contract or its specificity, the ordering parties have the right to select the contractor holding specific experience[2]. Such an offer is regulated by the provisions of the Polish civil code.

During the bid preparation process, the parties have the right to submit questions clarifying the subject of the public procurement, as well as further specifying its subject. If new circumstances arise during the submission of tenders, depending on the adopted rules and the selected tendering mode, the offer may be altered. In this respect, the basic regulation is also the art. 66 and subsequent articles of the civil code.

When it comes to the offer, it should also be noted that the parties, when selecting the best offer, often negotiate[3]. Negotiations are a purely civilist method of concluding contracts, as they are intended to create an optimal legal bond. This method is closest to the principle of freedom of contract, it can even be said that it forms its manifestation. The purpose of negotiation is to reach a consensus between the expectations of the contracting authority and the contractor's capabilities. During negotiations, the parties also have the opportunity to get to know each other and gain trust. In professional

1 cf. Iwona Kowalczyk, „Pozacenowe kryteria oceny ofert" *Finanse Komunalne* No. 1/2, 2016: 113-125.

2 cf. Agata Jurkowska-Gomułka, „Konkurencja a przetargi – konieczność wielowymiarowego podejścia" *Przegląd Ustawodawstwa Gospodarczego*, No. 1, 2017: 2-10.

3 cf. Magdalena Grabarczyk, „Negocjacyjne sposoby kontraktowania w zamówieniach publicznych w nowym ujęciu" *Prawo Zamówień Publicznych*, No. 2, 2016: 57-65.

business practice, trust, although not a paradigm for a legal relationship, is conductive to creating lasting and solid economic relations.

Agents may appear after both the contractor and the client. And here again – all matters and legal issues regarding their power of attorney were regulated in the civil code. The basic scope of regulation starts from art. 98 of the Polish civil code.

If one mentions acting through proxies, it is impossible not to notice that the validity of legal acts, invalidity of legal acts or defectiveness of legal acts is also examined through the prism of the provisions of the civil code. Similarly, the form of legal transactions, which is governed by the provisions of the civil code starting from art. 73 inclusive, is also assessed through the prism of civil law. Public procurement law does not have separate legal regulations or tools to assess the issues discussed herein, according to its own standards.

Another argument for the fact that public procurement law forms part of the civil law is the principle of service, which is regulated in art. 61 of the Polish civil code. Pursuant to the content of the aforesaid provision, a declaration of intent to be submitted to another person is considered effective as soon as it occurred in such a way that the said person could become familiar with its content. The cancellation of such a declaration will be effective, if it reaches the addressee at the same time as the declaration or earlier. A declaration of intent expressed in electronic form is submitted to another person as soon as it has been input into the electronic means of communication in such a way that the other person could become familiar with its content.

Due diligence is yet another similar situation[4]. The subject of the public procurement should be carried out by a professional with due diligence. Due diligence is understood here as a higher standard of diligence. Despite the fact that the contract for the implementation of a public procurement specifies what is meant by due diligence, in case of doubt, the provisions of the civil code are utilized as the interpreting directive. In the event of failure to exercise due diligence, or other breach of contract, the contractor or the contracting party may be exposed to the need to pay contractual penalties[5].

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4 cf. Adrian Niewęgłowski, „Note to the Supreme Court judgment of 12.12.2007, V CSK 333/07" *Ius Novum*, No. 1, 2011: 187-192.

5 More: Justyna Nowak, „Kara umowna a rozwiązanie umowy" *Edukacja Prawnicza*, No. 3, 2015/2016: 14-17; idem, „Roszczenie o zapłatę kary umownej po rozwiązaniu umowy a przesłanka ważnego zobowiązania" *Przegląd Prawa Handlowego*, No. 7, 2016: 39-43; Andrzej Śmieja, „Odpowiedzialność z art. 471 k.c. a kara umowna. Wady i zalety z punktu widzenia przedsiębiorcy" *Acta UWr. Przegląd Prawa i Administracji*, No. 103, 2015: 277-288; Rafał Adamus, „Kara umowna w umowie o zamówienie publiczne" *Prawo Zamówień Publicznych*, No. 3, 2015:

This institution is also sourced from civil law. What is worth stressing here, is that in normal business practice, there are often situations where any breach of contract is considered failure to exercise due diligence. This means that due diligence is interpreted extensively, i.e. not only in relation to the subject of the public procurement, but also, e.g. method for its performance, deadline, quality.

Each dispute between the contracting authority and the contractor regarding improper performance of the obligation or non-performance of the obligation, the subject of which was a public contract, is settled by common courts, which forms further indication that this law is of a civil nature[6]. It should also be noted that the legal bond is formed on the basis of equality of parties, and thus the parties are equal in terms of both substantive, and procedural law.

The freedom of contract principle is another interesting, albeit contentious, issue of public procurement law. The dispute manifests itself in practice, and the practice makes it reflect in judicial decisions. In accordance with the consistent view of the representatives of the doctrine, the principle of freedom of contract also applies to public procurement law. The parties are free to arrange the legal bond in such a way, as to guarantee the implementation of the public contract. In view of the examples of civil code institutions already mentioned in public procurement law, it should be clearly stated that this is a manifestation of the principle of the unity of civil law. Thus

3-11; Tomasz Bojkowski, „Dochodzenie należności z tytułu kar umownych jako przykład prawidłowej oraz nieprawidłowej gospodarki finansowej jednostek sektora finansów publicznych" [in:] *Dyscyplina finansów publicznych. Narzędzia prawidłowej gospodarki sektora publicznego*, ed. Marcin Smaga, Mateusz Winiarz (Kraków: Wydawnictwo Publicus: Wydział Prawa i Administracji Uniwersytetu Jagiellońskiego, 2013), 45-52; Zbigniew Gordon, „Kara umowna jako instrument stymulujący realne wykonanie zobowiązań w systemie zamówień publicznych" [in:] *Zamówienia publiczne jako instrument sprawnego wykorzystania środków unijnych. Materiały konferencyjne (Sopot, 17-18.09.2012 r.)*, ed. Elżbieta Adamowicz, Jacek Sadowy (Gdańsk-Warszawa: Urząd Zamówień Publicznych, 2012),181-191; Jacek Jastrzębski, Karolina Pasko, „Odstąpienie od umowy a dochodzenie kar umownych" *Przegląd Prawa Handlowego*, No. 1, 2015: 4-18.

6 cf. Konrad Różowicz, „Charakter prawny wyroków wydawanych przez Krajową Izbę Odwoławczą" *Studia Prawa Publicznego*, No. 2, 2016: 147-167.

the problem is not in the law itself, but in its interpretation, or perhaps, even more so, in its application[7].

The principle of freedom of contract in professional trade

Pursuant to article 353[1] of the civil code, parties concluding a contract may arrange their legal relationship at their discretion, as long as its content or purpose does not contradict the properties (nature) of the relationship, law or the principles of social coexistence. This means that the parties are the entity having the discretion to make the decision on the subject of obligation, first by indicating its type. In its content the parties then specify whether the contract will relate to performance, act, donation, or omission. In professional trading contracts for acting or performing are the most popular. This is a consequence of the fact that professional trading is primarily focused on profit, so that the parties conclude a contract to obtain a gain in their assets or rights. It should be noted that the link between the subject of the contract and the type of business activities conducted is characteristic for professional contracts. The contract is concluded in order to achieve acquisition, but in connection with the conducted business activity. That is why contracts consisting in donating or omission are not used so often. *Essentialia negotii* of these contracts is not the natural method of acquisition. Indeed, bearing in mind all kinds of donations or founding activities, as well as the cessation of violations of the subjective rights of entrepreneurs, there are cases where such agreements result in an acquisition. However, such an acquisition is then the result of a most often unilateral declaration of intent or unilateral actions aimed at protecting subjective rights.

The principle of freedom of contract in the case of contracts in professional trading has a significant impact on the nature of the contract itself, because in non-professional trading contracts are concluded primarily to ensure the implementation of the subject of the contract, and to determine the conditions for its implementation. The objective of these contracts is selected as a one-off event that is not related with the profession of parties thereto. Such a contract is not a tool to ensure profit, but serves, e.g. to improve the quality or comfort of life. It is concluded in the terms of consumer contracts. A contract in public procurement law is always directly linked to the economic objectives of the contractor[8]. Thus we can even observe situations, in which the

7 cf. Anna Korzeniak, „Relacja przepisów ustawy – Prawo zamówień publicznych oraz Kodeksu cywilnego dotyczących umowy o podwykonawstwo w zakresie robót budowlanych" *Monitor Prawniczy*, No. 8, 2016: 407-417.

8 More: Marek Potyraj, „Umowa o roboty budowlane w zamówieniach publicznych" *Acta Iuris Stetinensis*, No. 15, 2016: 58-86; Joanna Florecka, „Przyczyny fali upadłości firm budowlanych w obliczu zamówień

ordering party enters the role of a consumer, because the contract may be concluded outside its statutory objectives, e.g. renovation of a voivodeship office. The contractor is a professional performing the subject of a public contract in order to make a profit.

At this point, the aforementioned legal issue appears. We already indicated above that the contracting principles are derived from the civil code, and in particular that the negotiations allow to form a legal bond that is adequate to the needs of both parties. In public procurement law, however, the situation is less obvious than presented above.

The contracting party has the upper hand in deciding to conclude the contract for the performance of public procurement. It is primarily within the scope of its competence to select the best offer, conclude a contract with the contractor, and supervise the implementation of the public procurement by the contractor. However, the contracting is also not free to make its decisions. Each contracting authority is required to submit financial statements to the appropriate supervisory entity, whether directly or indirectly[9]. As a consequence, the contracting authority arranges its obligation relationships in such a way that the supervisory entity does not accuse it of improper performance of obligations or mismanagement in the use of public funds[10].

One should agree with the thesis that the principle of freedom of contracts also exists in public procurement law, however, this principle is limited by the principles of expected financial results or subjective obligations[11].

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publicznych w sektorze infrastruktury (zagadnienia wybrane)", [in:] *Problemy prawa polskiego i obcego w ujęciu historycznym, praktycznym i teoretycznym. Part 6*, ed. Beata T. Bieńkowska, Dariusz Szafrański (Warszawa: C. H. Beck, 2015), 31-43.

9 cf. Krzysztof Horubski, „Kontrola udzielania zamówień publicznych a nadzór w materialnym prawie administracyjnym" *Studia Prawa Publicznego*, No. 4, 2015: 95-122.

10 cf. Mariola Lemonnier, Szymon Kisiel, „Odpowiedzialność za naruszenie dyscypliny finansów publicznych w zakresie zamówień publicznych – uwagi interdyscyplinarne", [in:] *Meandry prawa karnego i kryminalistyki. Księga jubileuszowa prof. zw. dra hab. Stanisława Pikulskiego*, ed. J. Kasprzak, W. Cieślak, I. Nowicka (Szczytno: Wydawnictwo Wyższej Szkoły Policji, 2015), 725-737.

11 More: Andrzej Borowicz, „Ilościowe i jakościowe problemy zamówień publicznych w procesie inwestycyjno-budowlanym", [in:] *Aktualne problemy samorządu terytorialnego po 25 latach jego istnienia*, ed. Ryszard P. Krawczyk, Andrzej Borowicz (Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2016), 195-208.

This limited freedom of contract forms the basic problem in the rationalized functioning of contracts in public procurement[12]. The parties may not modify the provisions of the contract if they did not indicate such a possibility in the original contract, indicating precisely what circumstances may form the basis for such a modification[13]. Furthermore, it should be noted that the offer procedure is also not as free as provided for in the provisions of the civil code. After submitting the offer, its alteration is practically impossible. Contracting parties are afraid of such situations, due to the fact that these could form the basis for an allegation of abuse in the tender procedure[14]. Despite the fact that on numerous occasions the specification of the essential terms of the contract does not contain all the necessary information to come with a precise offer, and frequently the awarding entities fail to further elaborate these terms, being afraid to be accused of „rigging" the tender.

Therefore, the basic question is, whether in public procurement law one can speak of the same principle of freedom of contract as in the case of *pure* civil law contracts? Uniform interpretation of this issue already appeared in the jurisprudence of the National Appeal Chamber[15]. Pursuant to it, the parties concluding the contract, in principle, may arrange their legal relationship at their discretion, as long as its content or purpose does not contradict the properties (nature) of the relationship, law or principles of social coexistence. While the principle of freedom of contracts requires a consensus of both parties, in public procurement it suffers from a threefold limitation: firstly, the contracting authority cannot freely select its contractor, secondly, the contracting authority determines the principles on which it wishes to conclude the contract, thirdly, the parties cannot freely change or amend a contract already concluded. The second of these restrictions is related to the regulation of art. 36 s. 1 point 16 of the public procurement law, according to

12 cf. Daniel Kolasa, Tomasz Walach, „Prawo opcji w zamówieniach publicznych" *Finanse Komunalne*, No. 3, 2016: 41-49.

13 cf. Wojciech Robaczyński, „Umowna modyfikacja zamówienia publicznego. Nowe rozwiązania ustawowe" *Kontrola Państwowa*, No. 6, 2016:103-121.

14 More: Andrzela Gawrońska-Baran, „Fakultatywne podstawy unieważnienia postępowania o udzielenie zamówienia publicznego" *Prawo Zamówień Publicznych*, No. 1, 2016: 38-46; Henryk Nowicki, „Środki ochrony prawnej w systemie kontroli zamówień publicznych" *Studia Iuridica Toruniensia*, Vol. 17, 2015: 163-180; Łukasz Pasternak, „Przestępstwo nadużycia zaufania w postępowaniu o udzielenie zamówienia publicznego" *Przegląd Sądowy*, No. 7/8, 2016: 48-58.

15 Judgment of the National Appeal Chamber of 25 October 2013, case file KIO 2397/13; see the judgment of the District Court in Wrocław of 14.4.2008, case file X Ga 67/08

which the contracting authority is obliged to include, within the content of the Terms of Reference, provisions relevant to the parties, which will be included in the content of the concluded public procurement contract, general terms of the contract or a model contract, if the contracting authority requires the contractor to conclude the public contract subject to such conditions. This also results in the contracting party's right to shape the provisions in accordance with its needs and requirements related to the purpose of the contract, which it intends to award. It can therefore be said that the contracting party has the right to unilaterally determine the terms of the contract that will secure its interest in the performance of the subject of the contract, in accordance with its legitimate needs. In the practice of business transactions, in particular in the practice of public procurement, the contractor is frequently the weaker party of the obligation relation, as it does not influence the content of the contract, has no right to modify it, still bears the full, unilateral responsibility for performing the obligation. The unilateral responsibility consists in that the contracting party usually interprets each breach of contract in its favor. The contracting party is also responsible for the performance of the obligation, but in relation to the relevant body supervising its activities. If this responsibility was correlated with the contractor's responsibility, then the contract would be of pure civil law nature. Here, however, the rules of civil law are confused and the administrative law is enforced. The awarding entity is always, at least to some extent connected with public entities and, as a consequence, always manages public funds or a part thereof. It seems that as long as the contract will concern the disposal of public funds, it will not be possible to speak about the principle of freedom of contract in the meaning of civil law. This rule is administratively limited to the interest of public entities, and in particular to the disposal of public funds.

Conclusion

In summarizing, the analysis of the material in the discussed area demonstrates that public procurement law is civil law under the "coercion" of administrative law. It is common ground that public procurement law demonstrates the principle of the unity of civil law. This is reflected in the lack of specific regulations under the public procurement law Act, and its direct reference to the content of the Polish civil code. When answering additional questions put at the beginning, it should be noted that the civil code is the general law in relation to public procurement law. In situations not covered by public procurement law, the provisions of the civil code apply directly. This also manifests itself in the formulation of claims that result from the content of a public procurement contract, where the source of entitlement is found in substantive law – the civil code, e.g. a claim for compensation for damage due to default. It should be noted that disputes between the contracting authority and the contractor are settled by common courts, which indicates that

these contracts are subject to the general principles of civil law. Their conclusion is not the result of exercising administrative authority, but a consistent statement of will of the parties thereto. The features of public procurement contracts are identical to those of civil law contracts, so it makes little sense to make a distinction between them according to the subject of regulation, or entities that are parties thereto. Their distinguishing feature is in the way, in which the provisions of the contracts are interpreted, or the earlier freedom to shape the content. The principle of freedom of contract is subject to limitation in public procurement contracts. The contractor is not able to freely negotiate the terms, because the basic limit is set by the provisions of the specifications of the essential terms of the contract. In principle, neither the contractor nor the contracting authority may go beyond it in shaping the provisions of the final agreement. Therefore we can not say that they are free to shape the content of the contract. Undoubtedly, in the process of creating the legal bond, there is much greater freedom on the part of the contracting authority. A kind of legal paradox is created, where the contractor as a professional can only accept the content of the contract, and the contracting party basically presents the template of the contract. Although the contractor performs the contract in connection with the economic objective it has adopted in its business and is the professional party of this legal relationship, its participation is limited only to the diligent performance of the obligation. Public procurement law is accompanied by circumstances related to the disposal of public funds, and as a consequence of this, as long as we think primarily about the origin of funds, the principle of freedom of contract in public procurement law will be a friendly directive. The question arises, is all money equally valuable? It depends where it comes from.

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