

## MARKET INTELLIGENCE

# Poland aims to crack the code of procurement modernisation



0560975

BY undertaking to observe the EU Code of Conduct on Defence Procurement, the Minister of National Defence of Poland, Radek Sikorski, is probably hoping that the Ministry of Defence's (MoD's)

military procurement procedures will become more transparent, since the presence of foreign contractors in Poland is already well established.

Sikorski had been under heavy pressure from Polish defence companies not to sign the code because they believe that the competition from deep-pocketed foreign defence contractors will damage them at a time when Polish defence companies still struggle with the switch from Soviet-designed equipment to a more modern mix of products and technologies.

## Two legal regimes

The MoD is acting in its purchasing capacity under two legal regimes: one applicable (broadly speaking) to non-arms purchases under the Polish Public Procurement Law and another applicable to (again, broadly speaking) arms purchases and based on the so-called Decision 88 of the minister of national defence and the Polish Civil Code.

The Polish Public Procurement Law, in theory more transparent and efficient because it is derived from EU Public Procurement Directives, has been shown in practice to be plagued by excessive formality and the ability of the government bodies to manipulate tenders, often to the disadvantage of foreign bidders.

The legislative changes enacted this year were intended to lessen the ability of state bodies to exclude bidders on formal grounds, and at the same time to eliminate the ability of losing bidders to drag on the protest process for years, which often caused large tenders to remain unresolved for very long periods.

While it is clear that changes to the Polish

### KEY POINTS:

- Poland was reported to have been close to joining Hungary and Spain in opting out of the EDA's Code of Conduct. An 11th-hour change of direction, however, led Warsaw to accept the code, which aims to open up the EU's defence market through a voluntary, non-binding agreement.
- The decision to take part could contribute to existing moves towards greater transparency of the Polish defence procurement system and act as a catalyst for change, argues Władysław Rzycki, Partner, Hogan & Hartson law firm (left).

Public Procurement Law are needed, the legislation is deficient in many ways. Only time will tell if this year's changes have the intended effect and actually improve the tendering process.

One change, requiring government bodies to ask the bidder for any missing formal documents, could have a beneficial impact.

In the past, a large number of bidders were excluded on the basis of a missing document (such as an excerpt from the Companies House-type corporate register) and often the best (or lowest price) was not even considered.

Some other changes are, however, fairly controversial.

An example is the ability of bidders to side with the governmental body in the protest process. In many cases the review of tender specifications leads to the suspicion

## Only time will tell if this year's changes have the intended effect and actually improve the tendering process

that the particular tender rules have been manipulated in favour of one particular company, while the ability of this most 'favoured' bidder can support the position of the government.

The result of this can be that losing bidders simply conclude that it does not make any financial sense to protest.

## Code of Conduct

With respect to the arms-related purchases of the Polish MoD, the efforts of Sikorski and his transparency tsar Maciej Wnuk have increased the clearness and fairness of

the tendering process.

Signing of the Code of Conduct is a logical step in the same direction to ensure that this legacy of increased transparency will survive the future changes of government and that the legal system will be also changed.

The actual legal regime will at some point need tweaking to ensure that some of the existing weak points are fixed, such as excessive formalities and the lack of clear rules on how to comply with the tender requirements.

The lesson that can be drawn from the current state of the law is that each foreign bidder preparing a defence-related bid in Poland should start with a detailed dissection of the tender requirements, and if any formal/legal issue is uncertain or unclear, foreign bidders should aggressively seek clarifications or protest the unclear requirement.

## Offset revision

On the offset front, the Ministry of Economy is preparing a draft of the revised Offset Law. Press reports indicate that some of the issues in relation to foreign defence contractors performing offset programmes in Poland will be addressed to make it easier to manage obligations, and at the same time make the programmes more interesting from the government's perspective.

Again, Polish defence companies are battling to maintain their grip on the offset projects because the current state of the law in this area forces foreign offsetters to direct most offset projects to the existing and mostly unreformed Polish defence companies, with inefficient cost structures and Soviet-style management.

The current Offset Law needs revisions in order to bring genuine benefits to the Polish economy and to those Polish defence companies that are capable and willing to use the offset programme as an opportunity to upgrade the production and technology base to 21st century standards.

Christopher F. Foss/Janes's: 0018598



■ The T-55 main battle tank was among the Warsaw-pact era equipment in Poland's inventory.

One area in clear need of change is the penalties system for non-performance of offset obligations, with the penalties potentially exceeding 100 per cent of the value of such offset obligations.

While based on good intentions, the penalties system paradoxically causes for-

breed of efficient private companies operating in the sector.

### Healthy competition

The procurement and offset law-related changes are hopefully the first step towards

### The actual legal regime will at some point need tweaking to ensure that some of the existing weak points are fixed

eign offsetters to look for projects with the lowest risk of non-performance, thus preventing the offset programmes from helping Polish defence companies to upgrade the products and technology base.

The government has so far been trying to steer offset obligations to those Polish companies in poor shape, thus picking losers instead of winners.

The new government is trying to change this situation and also to help the new

the modernisation of the Polish defence sector and procurement. Competition is always good, even if not pleasant to the old operators. ■

#### ABOUT WLADYSLAW RZYCKI:

*Wladyslaw Rzycki's experience spans a full range of transactional and corporate work both in Poland and the US. He has particular experience in M&A, private equity, public procurement, offset law, and international and US tax.*

### ... background

THE Polish Ministry of National Defence said it would spend PLN3.71 billion (USD1.16 billion) in 2006 on military equipment, up 6.5 per cent on 2005.

"The main aim of this expenditure is to improve command systems, to further integrate detection and electronic combat systems with those of NATO and to increase transport capacities," Deputy Defence Minister Marek Zajakala said.

Increased Polish expenditure on defence bucks the recent trend across much of eastern and central Europe, where cuts have been reported for 2006.

Bulgarian Deputy Defence Minister Simeon Nikolov said that the armed forces' budget for 2006 will be less than in the previous year.

He added that it will account for 2.44 per cent of GDP and not 2.6 per cent (representing a drop of USD42.57 million) as announced by Bulgarian Prime Minister Sergei Stanishev in November 2005. Stanishev previously said that BGN1.12 billion (USD684.92 million) had been allocated.

Similarly, in the Czech Republic the army is bracing itself for significant budget cuts between 2006 and 2008.

Funding will be reduced by CZK2.6 billion (USD109 million) in Fiscal Year 2006 (FY06), by CZK3 billion in 2007 and CZK4.4 billion in FY08, according to Lieutenant General Pavel Stefka, Chief of General Staff of the ACR.

Modernisation of the armed forces has been the chief concern for the vast majority of Eastern Europe's larger countries. Replacement of legacy Soviet equipment with NATO-compatible materiel has been a priority in bringing their armed forces up to NATO standard. **James Murphy** ■

## Boeing appoints head of new European business unit

BOEING has appointed Henryka Bochniarz to run its business interests in the emerging central and eastern European markets, the US defence and aerospace corporation announced on 4 July.

Bochniarz — a former Polish cabinet minister and presidential candidate — is currently vice-president of Boeing's international department.

She will "develop and integrate an integrated company-wide strategy that will focus on business-growth opportunities in this important market", said Jim

McNerney, group chairman, president and chief executive officer.

As president of a new business unit, Boeing Central and Eastern Europe, Bochniarz will be responsible for co-ordinating civil and defence business activities in Bosnia, Bulgaria, Croatia, the Czech Republic, Hungary, Kosovo, Montenegro, Poland, Romania, Serbia, Slovakia and Slovenia.

The US group is just one of several multinational defence contractors seeking to elevate their presence in former Soviet-bloc countries; BAE Systems, Finmec-

canica, Thales and General Dynamics (through subsidiary companies Mowag and Steyr-Daimler-Puch) have all established subsidiaries or joint ventures in the region.

Most of the countries in Bochniarz's area of responsibility are new NATO members (having joined either in 1999 or 2004) or prospective applicants.

As such, they are required to spend two per cent or more of gross domestic product on defence and modernise their equipment base to meet the alliance's requirements.

**Ben Vogel** ■