


COMMENT

Polish Government Amends Procurement Law as Euro 2012 Approaches

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 Poland; Public procurement; Tenders

Over a year has passed since the President of the Republic of Poland signed the Act on the conduct of the UEFA Euro 2012 (Euro 2012) in October 2007. The Act, which accelerates administrative procedures, simplifies the construction process and allows for establishing target companies responsible for the implementation of investments associated with Euro 2012, was expected to have a positive influence upon the investment processes associated with the preparation of Euro 2012 in Poland and the Ukraine. According to the estimated figures, the value of the development of a road network in Poland up to 2012 will amount to PLN 121 billion (approx. €33 billion), not to mention the value of the investments in the aviation and tourism sectors. Building Polish stadiums from scratch will cost several billion zlotys.

Euro 2012 investments require tender procedure

The UEFA report, which was prepared in March 2008, after Michel Platini's visit to Poland and the Ukraine, highlighted numerous factors which affect the preparation for infrastructure projects. Apart from the obvious advantages of the Act, it did not solve all problems; in fact it created new ones. For example, the procurement of services, supplies and construction work by target companies was, according to the Act, possible without a tender. This provision turned out to contradict national laws and EU Directives.

In particular, it is obvious that without announcing tenders, it would be impossible, based on EU and domestic laws, to run larger projects. The problem is particularly pertinent regarding preparations for Euro 2012, with little more than three years remaining to finalise the construction of stadiums, motorways, airports and hotels. At present, only one of four Polish stadiums is a fully functioning stadium under development, others exist only on paper.

The award of public procurements is regulated in Poland by the Public Procurement Act, operational since 2004. It is agreed that the adjudication period for tenders is far too long, and it is necessary to change the restrictive regulations. Until now, the regulations allowed a bid, which can comprise several dozen volumes and thousands of pages, to be rejected if there is even one minor error.

The New Public Procurement Act (NPPA) amending the Public Procurement Act came into force in October 2008. The amendment's purpose is to adjust Polish regulations in order to conform with EU laws, but it is primarily aimed at simplifying the tender process and reducing the number of rejected bids and invalidated tenders.

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Tenders in Poland last longer than investments

Prolonging the tender process has become routine procedure for the companies participating in Polish tenders. This delay is often forced in order for the companies to complete another contract. Typically, this is achieved by sending queries to the investor asking for clarification on the tender specifications. A good example is the tender for the construction of a road in southern Poland, which was delayed by more than four months. The contractors sent 700 questions to the procuring party, although the project was only for a 5 km stretch of the road.

There are innumerable examples of invalidated tenders. One of the most discussed cases was undoubtedly a mistake made by a bidder in the tender for the construction of a ring road around Wrocław. This mistake caused the investment to come in PLN 124 million (approximately €33 million) more expensive. The company, which had initially won the tender for the investment, estimated the cost of lamps, but omitted the cost of eight lampshades, which are valued at less than PLN 50. The bid was therefore rejected. Following that, the bid from a second company in contention for the contract was accepted at an additional cost of PLN 124 million.

The procedure must be changed

The amendment has introduced changes concerning the way which corrections of, or allowances for, obvious typing and accounting errors are made. It should now be possible for the procuring party to correct errors, both in its own documents as well as in submitted offers, at its own discretion, without following the formal procedure. It should help to eliminate situations whereby a cheaper bid is rejected owing to minor editorial irregularities.

Another important change in the NPPA outlines that contractors can lose a bid deposit in the event that they fail to supply certain documents or statements required by the procuring party. Previously the provisions on supplying documents were used for tactics in the tender process. Companies purposefully did not submit the required documents or statements early on, so that after viewing the bids of their competitors, they could withdraw from the tender without any adverse consequences.

The NPPA also implements new rules to change the wording of the tender announcement and permits the making of changes referring to material requirements by the procuring party without the need to announce new tenders, provided the procuring party will be able to extend the deadline for bid submissions if the changes are significant. Such amendments should reduce the number of invalidated bids and facilitate the award of public procurements.

The NPPA also stipulates changes advantageous to entrepreneurs, in particular in respect to the extension of the terms for filing protests and appeals from seven days by up to 10 days. Although at first glance it seems that such change will extend the procedure, it should be advocated. Filings of appeals previously had to be received within seven days, which was a tight timeframe to ensure all points were covered, including the preparation of the appeal document and delivering the appeal to the procuring party. For foreign contractors, this timeframe also had to take into account time for relevant translations. Therefore it was often very difficult to adhere to this deadline.

Will there be enough time?

In practice, there will inevitably be a lapse of time from the date that the changes came into force to when one can see them fully functioning. There is no time for mistakes, especially given the deterioration of the global economy. Although Poland appears to be less impacted by the effects of the crisis, it is noticeable already that the market conditions have changed, and the access to funding has become more restricted, therefore delays caused by tenders are just one of the many obstacles facing the constructors in building facilities in time for Euro 2012. It may appear that it is too late for changes, despite the good will of the politicians and the willingness to create an environment to facilitate developing infrastructure in Poland. Experts emphasise that the plan for all investments, in particular those associated with road projects and airport construction, is very unrealistic as it currently stands.