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POLISH PUBLIC PROCUREMENT AND THE MOD

The EU Code of Conduct for Defence Procurement intends to improve equality for companies bidding in other EU member states' arms procurement markets. Wlodek Rzycki of Hogan & Hartson explains how changes to Poland's Public Procurement Law will result in a greater transparency of the MoD's procurement procedures.

The Minister of National Defence of Poland, Mr. Sikorski, continues to put his signature on the operations of the Ministry of National Defence (the MoD) and the Polish Army.

By undertaking to observe the EU Code of Conduct on Defence Procurement intended to grant EU defence companies fair access to other EU member states' markets in the area of arms procurement, Minister Sikorski is probably hoping that the MoD's procurement procedures with regard to the arms purchases will become more transparent, since the presence of foreign contractors in Poland is already well-established.

companies not to sign the Code of Conduct since they believe that the competition from deep-pocketed foreign defence contractors will damage them at a time when they are still struggling with the switch from Soviet-designed equipment to the more modern mix of products and technologies.


POLISH PUBLIC PROCUREMENT LAW

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 as it is derived from the EU Public Procurement Directives, has shown in practice to be plagued by the excessive formality and the ability of the ordering governmental entities to manipulate the tenders, often to the disadvantage of foreign bidders.

"Only future practice will show if this year's changes will have the intended effect."

The legislative changes enacted this year were intended to lessen the ability of the ordering governmental entities 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, not only the MoD tenders but also tenders in the area of national security and large and needed infrastructure-related tenders, to remain unresolved for years.



Wlodek Rzycki, a Partner at Hogan & Hartson, Poland.



The Polish Public Procurement Law is derived from the EU Public Procurement Directives.

THE BIDDING PROCEDURE

While the changes to the Polish Public Procurement Law and the protest procedures are clearly needed since the law is deficient in many areas, only future practice will show if this year's changes will have the intended effect and actually improve the tendering process.

One change, if properly implemented, requiring the ordering governmental entity to ask the bidder for any missing formal documents can have a beneficial effect. In the past in a large number of bidders were excluded on the formal ground of a missing document (such as the excerpt from the Companies House - a type of corporate register) and often the best or lowest prices were not even considered.

Some other changes are fairly controversial, as the ability of bidders of siding with the position of the governmental entity in the protest process. In many cases the review of tender specifications leads to the suspicion that the rules have been manipulated in favour of one bidder.

While the ability of this most 'favoured' bidder can support the position of the governmental entity, hiring good lawyers to support their position can have the effect of actually reducing the efficiency and transparency of tenders since the losing bidders can simply conclude that it does not make any financial sense to participate in the protest process.

TRANSPARENCY AND EQUALITY

With respect to the arms-related purchases of the Polish MoD, the efforts of Minister Sikorski's and his transparency tsar Mr. Wnuk have largely increased the transparency 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 the governments and that the legal system will be also changed.

The actual legal regime will indeed at some point need tweaking to ensure that some of the currently existing weak points will be fixed, such as the 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 the detailed dissection of the tender requirements.

If any formal / legal issue is uncertain or unclear, foreign bidders should aggressively seek clarifications or protest against that particular unclear requirement.

THE OFFSET LAW

On the offset front, the Ministry of Economy is preparing a draft of the revised Offset Law. The press reports indicate that issues will be hopefully addressed to make it easier to manage the offset obligations in Poland, and at the same time, make the offset programs more interesting from the Polish Government's perspective.

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

OFFSET REVISIONS

"Will this legacy of increased transparency survive the future changes of the Government?"



The Ministry of Economy is preparing a draft of the revised Offset Law.



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 program as an opportunity to upgrade the production and technology base to the 21st century.

"The current Offset Law needs revisions in order to bring genuine benefits to the Polish economy."

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

While based on good intentions, the penalties system paradoxically causes foreign off-setters to look for projects with the lowest risk of non-performance and thus preventing the offset programs from helping Polish defence companies to upgrade the products and technology base.

The Government so far has been trying to steer offset obligations to 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 breed of efficient private companies operating in the sector.

STEPPING TOWARDS THE FUTURE

The procurement and offset law-related changes are hopefully the first step toward the modernisation of the Polish defence sector and procurement. Competition is always good, even if it is unpleasant for the old operators.

Wlodek Rzycki, Partner, Hogan & Hartson, Poland

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