Polish Public Procurement: A Reality Check

by *Wladek Rzycki*

Wladek Rzycki is a Partner of Hogan & Hartson in Warsaw. He discusses the consequences of recent changes in procurement law in Poland in the bid to establish a fair and incorrupt procurement system.

The Polish Parliament has, for the second time in a year, debated the changes to the Polish Public Procurement Law. The need for further changes, after the fairly extensive modifications enacted in the first half of 2006, is explained by the politicians and the Government by a couple of factors. The foremost of them is the perception that the current litigation-prone system slows down the absorption of the EU funds that are badly needed to upgrade the inadequate infrastructure of Poland. The need for changes is also explained by the never-ending protests of losing bidders, which often make it impossible to finish the procurement process and start the projects.

The modifications enacted in 2006 limit the possibility of filing protests in smaller tenders, and make a rather clumsy attempt at consolidating various protests filed, endlessly, by various bidders in one procurement proceeding. At the same time, the modification attempted to eliminate another commonly recurring problem, namely the fact that, in many procurement proceedings, bidders were eliminated because various official documents were missing from the submitted offer – relying on the old rules which allowed such behaviour by the customer. From June 2006, the customer has been required to ask a bidder whether some official documents are missing from the submitted offer.

The current round of revisions to the Polish Public Procurement Law attempts to tackle yet another set of perceived problems. The main revision is the proposed change of the appeal system – such appeals are currently reviewed by an ad-hoc arbitration tribunal. The ad-hoc arbitration tribunal system has been heavily criticised because the rulings issued often disregard the Law itself, and the ruling in particular is often inconsistent with rulings of another tribunal, with regard to the same procedure. The proposal is to set up a permanent appeal chamber in the hope that the permanent arbitrators will eliminate many shortcomings of the ad-hoc system.

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The proposed modification will allow the customer to conclude a contract in a particular proceeding, even if the appeal has been filed, and to increase the costs of, first, filing an appeal, and then litigating in a court. The proposal also attempts to limit the operation of a rule introduced last year, which requires the customer to ask for any missing official documents, by limiting the cases to which it applies.

It is a well-known fact that the Polish procurement system needs changes but, while some positive changes have been introduced and/or proposed during the last year, it should be noted that none of the changes address or remove the reason why the losing bidders file endless protests and often tie down the projects (particularly the infrastructure projects where significant amounts of money are at stake) – namely the faulty architecture of the Law. The buzz among practitioners in this area is that the Law is intentionally vague about tenders written to the benefit of the party favoured by the customer. The arbitration system of the past failed to address this issue and was not professional enough to deal with large tenders where decisions were more often political than legal. Indeed, the courts deciding such cases on appeal from arbitration, have also been hesitant to second-guess the customer's decision and, one suspects for mainly political reasons, have almost never changed the decision of arbitrators.

An example of the arbitrary vagueness of the Law that pays lip service to the rules of objectivity forced upon Poland by the EU Directives on Public Procurement, is the frequent use of formal requirements (e.g. the lack of the proper documentation from the country of origin of a foreign bidder) to exclude any bidders not favoured by the customer. Likewise, under the Law, the tender specification should state the objective criteria of the offer evaluation. The Law also mandates that the ordering party shall reject any offers not complying with the specification, but not with the criteria of offer evaluation. This seemingly small inconsistency, given the fact that specifications are often several hundred pages long, allows almost unlimited discretion in rejecting the offers that are not favoured by the customer.

Therefore, the Law needs a bottom-up revision and restructuring to remove the areas of vagueness. It is not enough to limit the losing bidders' right to file protest, but it is necessary to create a system that is fair to all parties and leads to the efficient and uncorrupt use of EU and public funds. History is a great teacher in this regard – EU member states that have failed in the creation of a fair and uncorrupt system, for example Greece, still languish with regard to infrastructure and overall economic development, while countries like Spain, which succeeded in establishing a fair system, lead the EU tables on all fronts of economic development. Poland indeed is facing a serious task ahead and the decision made now in the area of Public Procurement will determine the future of this country. ■