

Amendments to the Public Procurement



1/2010

Advance payment for the contractors

Since 22 December 2009, the ordering party is entitled to grant an advance payment for the execution of public procurement, if the contractor has provided such possibility in the tender announcement or in the Specification of Essential Terms of an Order (hereinafter: SETO) and if:

- construction works constitute the subject of the order, or
- the order is financed:
 - ▶ from the budget of the European Union
 - ▶ from the non-recoverable sources from the aid of EFTA members,
 - ▶ from other non-recoverable sources from foreign sources.

The contractors chosen in negotiations without an announcement or in the procurement by a single-source procedure are not entitled to receive an advance payment.

Conveniences for the contractors who employ disabled people

Since 22 December 2009 the ordering party may provide in a tender announcement that only the contractors who employ 50% of disabled employees within the meaning of applicable law may compete for awarding the contract.

Time limit of bid bond repayment

Since 22 December 2009 the ordering party is obliged to return the bid bond to all contractors immediately after the selection of the most profitable offer or after the cancellation of the procedure. The bid bond paid by the contractor whose offer has been selected as the most profitable shall be returned after conclusion of the public procurement contract and after

We would like to present the essential changes to the public procurement act of 29 January 2004 (hereinafter: "Public procurement law"). New provisions amended by the act of 5 November 2009 amending the act – Public procurement law and the act on court costs in civil cases (which are in force since 22 December 2009) and by the act of 2 December 2009 amending the act – Public procurement law and some other acts (which are in force since 29 January 2010) implement essential changes in the area of the procedure on awarding public procurement contracts. The purpose of those amendments is the implementation of the EU provisions regarding the improvement of the effectiveness of the appeal procedures within the public procurement to the Polish law.


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providing the performance bond, if the ordering party has required such performance bond.

Use of the experienced subcontractors by the contractors

Since 22 December 2009, the contractor who intends to perform a public procurement contract with subcontractors, is entitled to invoke to the subcontractors' knowledge, experience, technical, personal and financial potential, if he provides the ordering party with a written commitment of the subcontractor to support the contractor within the period of realization of the public procurement contract.

Change of a public procurement contract

Since 22 December 2009, the ordering party is entitled, with no limitations, to introduce inessential changes to the public procurement contracts. In the event of essential changes, the change of a public procurement contract is admissible only if such possibility is provided in SETO.

Fee for a complaint against a decision of the National Appeal Chamber

Since 22 December 2009, a fee for a complaint against a decision of a National Appeal Chamber (hereinafter: "NAC") shall amount to:

- 5% of the value of the object of the contract, however not more than PLN 5,000,000.00 – if the complaint concerns the actions performed by the ordering party after the opening of the offers,
- quintuple of the fee paid for the appeal – if the complaint concerns the actions performed by the ordering party before the opening of the offers.

Time limits for explanations of the contents of SETO

Since 7 December 2009, the ordering party is obliged to provide the contractors immediately with explanations of the contents of SETO, however not later than:



- 6 days before the deadline of submitting the offers,
- 4 days before the deadline of submitting the offers – in a restricted tender and in negotiations with an announcement, if there is an urgent necessity of awarding a public procurement contract.
- 2 days before the deadline of submitting the offers, if the value of the object of the contract is lower than the threshold set out in directives on public procurement.

Legal protection

Since 29 January 2010, the appeal to NAC will be the first remedy to which the contractors will be entitled in cases concerning the actions contrary to regulations performed by an ordering party or the abandonment of an action to which the ordering party is obliged to perform.

The appeal will be possible, if the value of the object of the contract is equal or higher than the threshold set out in directives on public procurement. In the event of a lower value of the object of the contract, the appeal will be possible only towards the following actions:

- selection of a mode of negotiations without an announcement, in the procurement by a single-source procedure or a request for quote,
- description regarding the way of evaluation of the fulfillment of the conditions of participating in the procedure,
- exclusion of the appealing party from the procedure on awarding public procurement,
- refusal of the offer of the appealing party.

The deadlines for lodging the appeals will be varied, due to the following: e.g. value of the object of the contract, the way of gaining, by a contractor, the information on an action or an abandonment performed by an ordering party, constituting the basis to lodge an appeal, content of appeal.

The following new solutions concerning the appeals should be mentioned:

- admissibility of lodging appeals via e-mail provided with an advanced electronic signature verified by a valid, qualified certificate,
- suspension of the possibility of concluding a contract on awarding public procurement up to the NAC decision regarding the appeal,
- admissibility of lodging by an ordering party or an appealing party an opposition against the joining of another contractor to the appeal



proceeding;

- admissibility of including in the protocol, in writing or verbally, a reply to the appeal by an ordering party,
- cognizance of an appeal by NAC composed of one person and by NAC composed of 3 persons only on the request of the President of NAC due to a complicated or precedential character of a case,
- in the event of taking the appeal into consideration by NAC, if the public procurement contract has been concluded, and there are some grounds to cancel it, the possibility of:
 - ▶ invalidation of a contract,
 - ▶ invalidation of a contract within the non-performed obligations and imposition of a financial penalty in justified cases, in particular if the return of performance fulfilled under the invalidated contract is impossible,
 - ▶ imposition of a financial penalty or a decision on the reduction of the term of the contract in case of finding that continuing the contract is in important public interest.

Reduction of minimal time limit for lodging the offers

Since 29 January 2010, if the value of the object of the contract is lower than the threshold set out in directives on public procurement, the minimal time limit for submitting a tender offer regarding the construction works will be reduced from 20 to 14 days.

If the value of the order is equal or higher than the threshold set out in directives on public procurement, in cases provided in relevant provisions, the time limit for submitting the offers shall be not shorter than 22 days (instead of 29 days) from the date of submitting the tender announcement to the European Union Official Publications via e-mail or 29 days (instead of 36 days) if the tender offer is submitted otherwise.

Terms of conclusion of a public procurement contract

Since 29 January 2009, the ordering party is obliged to conclude a public procurement contract not earlier than:

- If the value of the object of the contract is equal or higher than the threshold set out in directives on public procurement:



- ▶ 10 days from the date of a notification on selection of the most profitable offer sent via e-mail or facsimile,
- ▶ 15 days from the date of a notification on selection of the most profitable offer delivered otherwise.
- If the value of the object of the contract is lower than the threshold set out in directives on public procurement:
 - ▶ 5 days from the date of a notification on selection of the most profitable offer sent via e-mail or facsimile,
 - ▶ 10 days from the date of a notification on selection of the most profitable offer delivered otherwise.

Return of the offer submitted after the deadline

Since 29 January 2010, the ordering party will immediately return the offer submitted after the deadline, if the value of the object of the contract is lower than the threshold set out in directives on public procurement. If the value of the order is equal or higher than the threshold set out in directives on public procurement, the ordering party will immediately notify the contractor about the fact of submitting the offer after the deadline and will return it after the expiration of the appeal deadline.

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Extension of the list of prerequisites for invalidation of the public procurement proceeding

Since 29 January 2010, the ordering party may invalidate the public procurement proceeding, if the sources from the EU budget or the non-recoverable sources from the aid of EFTA members have not been awarded to him for realization of the public procurement, provided that he stipulated such possibility in the tender announcement, invitation to negotiations or invitation for bids.

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We hope the above information proves useful. It should not be construed as legal advice or opinion. If you wish to obtain further information or legal advice, please do not hesitate to contact us.

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