

Legal Alert

Amendments to the Public Procurement Law: Implementation of the Defence Directive and new solutions for classic procurements

November 2012

On 6 November 2012 the President of Poland signed into law the Act of 12 October 2012 Amending the Public Procurement Law and the Act on Concessions for Construction Works and Services. The main goal of this extensive amendment is to implement into the Polish legal system the Defence Procurement Directive (2009/81/EC). Other notable innovations include the introduction of technical dialogue and a system for qualification of contractors in utilities procurements. For contracting authorities, technical dialogue will make it easier to obtain market information prior to formal commencement of the procurement procedure, and for contractors it will minimize the risk of exclusion from the procedure because of participation in preparation of the tender. The qualification system will allow for more flexible cooperation between contracting entities and contractors, saving contractors the time and expense of submission and verification of documents during the tender. The amendment will come into force on 20 February 2013 ie. three months after publication in the Journal of Laws.

The new rules for procurements in the area of **defence and security** are introduced in a new Chapter 4a of the Public Procurement Law and address in detail procurements for supply of goods, services and construction works in the area of defence and security.

With respect to classic procurements, the amendment provides for:

- The ability of the contracting authority to conduct **technical dialogue**, in which, prior

to formal commencement of a proceeding for award of a public contract, the contracting authority may obtain advice and information from contractors necessary to describe the subject of the procurement, the terms of reference or the contract terms

- Clarification of the rules for **exclusion of unreliable contractors**, i.e. contractors who have caused a loss by failure to perform other contracts properly or who have been required to pay contractual penalties (in either cause equal to 5% or more of the value of the procurement and confirmed by a ruling by the court)
- A new basis for exclusion of contractors belonging to the same **capital group**, if they have filed separate bids or applications for admission to participate in the same proceeding, unless they demonstrate that the ties between them will not upset fair competition
- A **qualification system** for contractors in the case of utilities procurements.

New institutions

• **Technical dialogue**

This enables the contracting authority to identify and learn more about innovative technical or organizational solutions before beginning the procurement proceeding—thus helping it prepare the tender documentation in a way that avoids doubts and heads off inquiries by contractors (as well as potential appeals at a later stage). The law does not specify in detail how technical dialogue should be conducted. This is expected to be filled in through practice and case law in the near future.



- **Qualification system**

The amendment also introduces an important change in utilities procurements, giving the contracting entity the option of establishing a system for qualification of contractors.

The system will involve a list of contractors maintained by the contracting entity, based on previous qualification for specific categories of contracts. This is expected to expedite proceedings because the listed contractors will be released from the obligation of filing the same documents in successive procurements covered by the system, and, in turn, the contracting entity will have a group of contractors at its disposal who are known to meet the predetermined conditions.

What to watch out for?

- **Contracting entities**

Contracting entities should pay particular attention to the manner in which information about the influence of the technical dialogue on the description of the subject of the procurement, the terms of reference or the terms of the contract is stated in the record of the procurement proceeding—in order to avoid the risk of an accusation of violating the principles of fair competition and equal treatment of contractors.

- **Contractors**

Introduction of the qualification system in utilities procurements means that contractors will need to carefully monitor, on an ongoing basis, the status of the qualification system and the conditions required to take part in the system at the relevant time.

More information about specific issues under this amendment is available at our procurement blog [EuroZamówienia](#).



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