

# CHANGES IN CONSTRUCTION CONTRACT SELECTION CRITERIA IN POLISH CONDITIONS

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## **Abstract**

The most popular procedure of contract awarding in Poland is open tendering. The Act of 29 January 2004 Public Procurement Law, allowed to use price as the sole contract award criterion that has caused frequent problems with the execution of the construction contract. The changes in the Law in 2014 restricted that possibility to the situation in which the subject matter of a contract is commonly available and has established quality standards. Further changes are planned in this area as well. In the paper, basing on contract notices of open tendering, the criteria of construction contract selection will be analyzed. Especially the effectiveness of changes in the Procurement Law will be researched. On the basis of other countries' experience, the possibility of changes will be proposed.

## **Key words**

Construction contract; Open tendering; Price; Public Procurement Law; Selection criteria.

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## **1 INTRODUCTION**

Competitive tendering is the conventional method for procuring major construction projects in Poland as well as in other countries. At the same time there are more and more procedures in which the decisive criterion of choosing a tender is the price [1 – 3]. This method provides the best motivation for project cost reduction [4, 5] but the research results show that the cheapest tenderers often have problems with completing the project [6, 7].

In Poland, awarding public procurement is regulated by the Act of January 29, 2004, Public Procurement Law (PPL) [8] and its implementing acts. Public Procurement Law has frequently been changed and the most important amendments, concerning the process of tender evaluation, are described in this paper.

The current regulations in Poland remain under a huge influence of the European Union law. On March 28, 2014 new Directives concerning public procurement were published: the Directive of the European Parliament and of the Council 2014/24 /EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC; the Directive of the European Parliament and of the Council 2014/25/EU of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services, and repealing Directive 2004/17/EC and the Directive of the European Parliament and of the Council 2014/23/EU of 26 February 2014 on the awarding of contracts. The Directives came into force on the twentieth day following their publication in the Official Journal of the EU. As of April 18, 2016 the deadline was set for the implementation of directives into the legal systems of EU Member States [9].

Both the EU Directives and the conditions on the market have impact on the legal provisions on the criteria for the evaluation of tenders. The recent changes in the regulations introduced the obligation for contracting non-price criteria. The aim of this paper is to analyze the efficiency of putting these regulations into practice.

## **2 CRITERIA FOR TENDER EVALUATION IN THE LIGHT OF LAW**

As of June 10, 1994, Public Procurement Law was enacted (and came into force in January 1, 1995), thus introducing a public procurement system in Poland. One of the elements of the Act was the specification of the criteria that public purchasers should use when selecting a tender. At the beginning the rules for criteria selection were rather random and the purchaser could employ both the subject criteria (related to the qualities of the contractor) and object ones (related to the project).

The year 2001 was crucial for the legal system of public procurement in Poland. Two extensive amendments and a government project introduced vital regulations. Since October 26, 2001 a ban on the use of subject criteria for the evaluation of tenders has been in effect. As stated in the Public Procurement Law amendment, “The criteria for the evaluation of tenders may not affect the properties of the contractor, and in particular their economic, technical or financial credibility.”

In March 2004 a new Public Procurement Law came into force. Article 91 of the original text of Public Procurement Law stated that “The evaluation criteria are price or price and other criteria relating to the object of the contract, in particular the quality, functionality, technical

parameters, use of the best available technologies in terms of environmental impact, operating costs, service, influence of the way the contract executed has on the job market at the place of contract execution and the term of contract execution.” This meant that it was the purchaser’s decision whether a tender with the lowest price is chosen or other evaluation criteria are used. The provision prohibiting the use of subject criteria remained. Despite the changing conditions, the subsequent amendments sustained the rules for the application of the evaluation criteria.

The practical application of the evaluation criteria is depicted in Tables 1 and 2. Table 1 presents the percentage of procedures in which the purchasers decided to choose a tender on the basis of the lowest price in each year [10]. The tenders included only public procurement for construction works.

*Tab. 1: Percentage of tenders with the lowest price criterion*

Year	% of tenders with the lowest price criterion
2002	39%
2003	51%
2004	80%
2007	91%
2009	94%
2011	95%
2013	84%

Table 1 reveals that with each year the number of tenders with the lowest price was increasing. This can be explained by the fact that the provisions concerning the control of public procurement became stricter. The price criterion is for sure the most transparent and the easiest to evaluate. The purchaser, being often afraid of the obligation to justify the choice of other criteria, tended to select the simplest solution, that is, the cheapest tender. Table 2 presents the results of a study concerning the number of tender evaluation criteria when the purchaser decided to use non-price criteria. The data include 355 notices of open tenders published in the Public Procurement Bulletins in December 2004 and contain the results for tenders with both the price and non-price criteria [11].

*Tab. 2: Percentage of tenders with criteria other than price according to notices in 2004*

Number of criteria	Number of tenders	% of tenders with criteria other than price
two	48	69,56
three	16	23,19
four	3	4,35
five	-	-
six	-	-
seven	2	2,90

Table 2 reveals that the purchasers, even introducing additional criteria, tended to limit their number. Two criteria were considerably more frequent, namely the price and only one non-price criterion.

Soon after the introduction of the Public Procurement Law in 2004, adverse effects of using the lowest price criterion began to be noticed, namely:

- The contractor's problems with the execution of the investment within the assumed costs which, in turn, caused delays in commissioning of the project or its discontinuation.
- Understating costs often leads to lower quality, which means additional expenditures on repairs.
- The generally difficult situation of the construction market, including numerous companies going bankrupt, which was frequent in Poland, for example in 2012.

Noticing the negative effects of employing the lowest price criterion resulted in the search for more effective methods of tender evaluation, such as introducing a statutory duty to use other criteria, apart from the price one.

### **3 AMENDMENTS OF THE RULES IN 2014 AND THEIR CONSEQUENCES**

The amendment of the Public Procurement Law of 2014 includes a new article, the Art. 91 paragraph 2a, whereby in proceedings instituted after October 18, 2014 purchasers are obliged to use non-price tender evaluation criteria. This does not apply to contracts whose subject is widely available and has established quality standards. These contracts are understood by the availability of the same or similar benefits for everybody concerned and meeting the established quality standards understood as types or standardized species, corresponding to the average ones, offered as a universal standard offer, not as any specific requirement of the purchaser.

However, the Public Procurement Law does not indicate the extent to which the choice of the best offer is to be decided on the basis of the price or other criteria. The decision in this respect has to be made by the purchasers themselves, considering the specifics of the order and their own needs. The price can, and even should, remain the basic criterion for the awarding of a public contract.

In order to identify whether changes have met the purpose for which they were introduced, research was performed. The subject of concern included open tenders, the results of which were published in the Public Procurement Bulletins in March 2016 [12]. The study embraced 250 tenders. Announcements of the analyzed tenders were published in the period from April 1, 2015 to March 10, 2016, that is, during the term of the Act imposing the need for additional non-price criteria. The greatest number of announcements appeared in February 2016.

The purchasers were mainly the local government. The participation of the units which were the purchasers in the analyzed tenders is depicted in Figure 1.

The subject of the order is presented in Figure 2, which reveals that it was typically related to road works.

The lowest value of the order was 6 170,00 PLN and concerned the order "Hall (corridors) repair in the sports hall of the Sports and Recreation Centre in Suwałki." The highest value of the order amounted to 17 620 367,00 PLN for an order in Giżycko: „Construction maintenance and technical inspections of military railroad siding No. 156 in Szeroki Bór.”

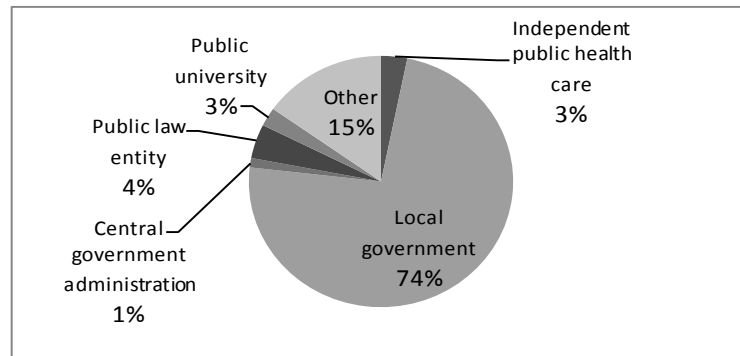


Fig. 1: The participation of the units which were the purchasers (March 2016)

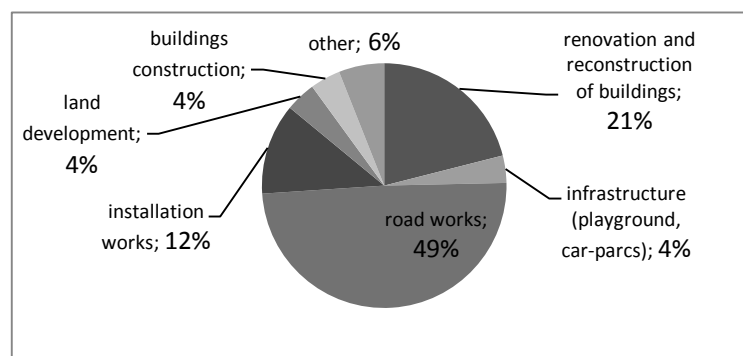


Fig. 2: Subject of the orders (March 2016)

In 8 cases (3% of the analyzed tenders) the only criterion was the price, fewer than 5% concerned tenders with 3 criteria, and a vast majority (92%) used 2 evaluation criteria.

Figure 3 depicts which non-price criteria were additionally used by the purchasers when two evaluation criteria were applied.

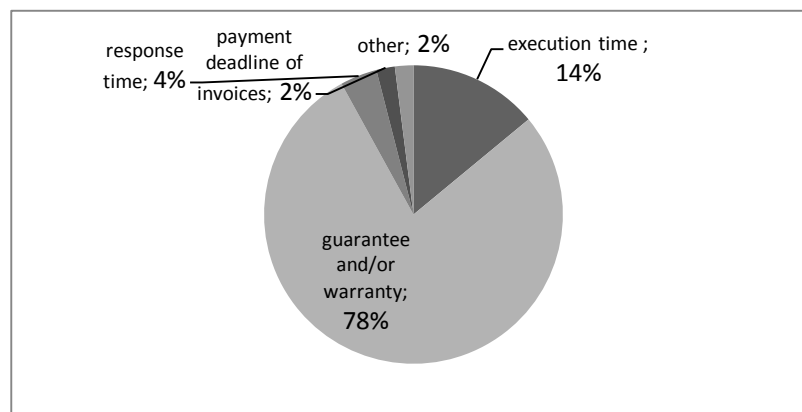
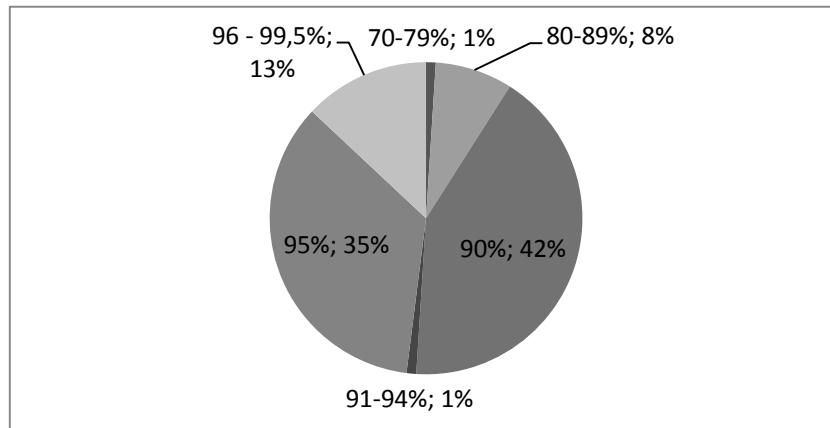


Fig. 3: Non-price criteria (March 2016)

As Figure 3 shows, the most frequent additional criterion was the one related to guarantee and/or warranty (78% of the analyzed tenders). The next most common criterion was the execution time (14%). Other criteria were rare. It can be assumed that these two criteria

appear most frequently due to the simple and transparent way of determining their evaluation (quantification).

As it was already stated, the Law does not impose any weight for the criteria applied. The weights of the price criterion in tenders in which two criteria were used are illustrated in Figure 4.



*Fig. 4: The weights of the price criterion in tenders in which two criteria were used (March 2016)*

The lowest criterion weight amounted to 70%, where only 1% of tenders included the price criterion with a specified weight between 70 and 79%. In the greatest number of tenders (42%) the price criterion reached 90%, which means that the additional criterion weighed 10%. What is worrisome, 13% of tenders included the price criterion weighing 96-99.5%, which indicates that the weight of other criterion ranged from 4 to 0.5%. This means that purchasers consider the introduction of an additional criterion as a mere necessity dictated by the regulations in force but do not wish it to change tender results in any way.

In a vast majority of tenders in which the purchasers decided to use three criteria, the additional non-price criteria included guarantee and execution time. The application of three criteria did not influence the weight of the price criterion in any significant way too. The weight ranged between 70 to 90%.

One of the conditions that might indicate the effectiveness of the use of non-price criteria could be the number of procedures in which the offer with the lowest price was not selected. In the analyzed tenders there were 36 of such procedures, which represented 14% of all procedures. Yet taking into account the tenders in which bids with the lowest price were rejected by the purchaser, one finds only 5 procedures in which the result was influenced by the non-price criteria. In two cases the decisive criterion was the guarantee one, in the other two it was the execution time one and in one case – two criteria, both guarantee and execution time. It might be concluded then that the application of the non-price criteria does not significantly change the results of procedures; in the vast majority of them bids with the lowest price were selected.

#### **4 POSSIBLE CHANGES**

Since the effectiveness of the amendments to the Public Procurement Law concerning tender evaluation criteria has been rather low, the following modifications were suggested. In March

24, 2016 a draft law on the amendment of the Public Procurement Law was submitted to the Parliament. According to the current draft, the price criterion may be used as the sole criterion for evaluation of tenders or a criterion of a weight exceeding 60% if the object of the contract has established quality standards. An important change involves the introduction of the possibility for the purchaser to establish a fixed price or cost: then the evaluation criteria have to be other than price.

It needs to be noted, though, that the problem of selecting a tender for construction works only on the basis of the lowest price criterion was emphasized in Poland a couple of years before the amendment. For example, in the speech of the construction industry organizations to the President of the Public Procurement Office on February 17, 2011, the introduction of the obligation to use non-price criteria for tender selection procedures in public procurement was postulated. It was also considered whether from the non-price criteria one could exclude those which had no impact on the differentiation of offers, as a result of which only the price remained the decisive criterion. Another issue under consideration was the question of excluding from non-price criteria those that have no impact on the differentiation of tenders, in which case price would remain the only decisive factor.

Unfortunately, as the result of the study above reveal, the sole introduction of the obligation to use additional criteria has not changed the situation in any significant way. A considerable obstacle proves to be the purchasers' mental barrier and a conservative approach to tender evaluation criteria. Their defensiveness and stricter inspections increase the fear against using non-price criteria as they are less objective and transparent than the price criterion.

The basic issue then is the education of the purchasers, the controlling institutions and inspectors that supervise the execution of public procurement in relation to the prospects and profits resulting from the application of non-price criteria.

The purchasers, in most cases, limit the scope of non-price criteria to virtually two: guarantee and execution time, giving them weights that in fact do not change the results of the procedure. They should receive more information about multiple other options. Public Procurement Law alone suggests a number of applicable criteria. It needs to be remembered that they do not form a closed set and that their selection can change depending on the subject of the order. Therefore, the purchasers have to decide on the feature which in a given procedure is the most appropriate (for instance, specialized nature, components or the maximum time allowed for implementation) and consider their condition (such as their obligations, possessing or expecting the funds allocated for the implementation of the contract, having professional human resources or being able to hire specialists to evaluate technologically advanced solutions).

What is also worth noticing is that using non-price criteria involves the necessity on the part of the purchaser to indicate the methods of tender evaluation by means of the individual criteria and, if possible, a specific definition of what the contracting authority will award points for and in what amount. The method of tender evaluation of should be described in such a way that an objective assessment of the submitted bids is guaranteed, which might prove problematic for the purchasers when put into practice. Thus they should be aided by, for example, publications of model descriptions of criteria.

## 5 CONCLUSION

The amendment to Public Procurement Law which enforced the application of non-price criteria for tender evaluation aimed at the ensuring the selection of a bid more adapted to the needs of the purchaser and not necessarily the cheapest. There is no denying that preparing a tender that assumes many criteria is more time-consuming as it requires an appropriate calculation of various factors and their proper balancing. The result of the increased number of procedures using non-price criteria may ensure greater competitiveness and the possibility of submitting tenders involving innovative solutions, thus implementing the principles of public finance for economical, rational and efficient spending of public funds.

The results of the studies presented in this paper show that so far the changes in the law have not been sufficient. It is vital that law changes should be widely accompanied by educating the purchasers about the opportunities and profits provided by the application of non-price criteria.

## REFERENCES

- [1] Waara, F. and Bröchner, J. (2006). Price and nonprice criteria for contractor selection. *Journal of Construction Engineering and Management*, **132**(8), pp. 797–804.
- [2] Wang, W.-C., Wang, H.-H., Lai, Y.-T. and Li, J.C.-C. (2006). Unit-price-based model for evaluating competitive bids. *International Journal of Project Management*, **24**(2), pp. 156–66.
- [3] Mitkus, S. and Trinkūniene, E. (2007). Analysis of criteria system model for construction contract evaluation. *Technological and Economic Development of Economy*, **13**(3), pp. 244–252.
- [4] Bajari, P. and Tadelis, S. (2001). Incentives versus transaction costs: a theory of procurement contracts. *The Rand Journal of Economics*, **32**(3), pp. 387.
- [5] Ballesteros-Pérez, P., Skitmore, M., Pellicer, E., and Zhang, X. (2016). Scoring Rules and Competitive Behavior in Best-Value Construction Auctions. *Journal of Construction Engineering and Management*, 10.1061/(ASCE)CO.1943-7862.0001144, 04016035.
- [6] Plebankiewicz, E. (2010). Construction contractor prequalification from Polish clients' perspective. *Journal of Civil Engineering and Management*, **16**(1), pp. 57-64.
- [7] Williams, T.P. (2003). Predicting final cost for competitively bid construction projects using regression models. *International Journal of Project Management*, **21**(8), pp. 593–9.
- [8] Act of 29 January 2004 - Public Procurement Law (Journal of Laws of 2015, item 2164).
- [9] Kozik, R. and Karasińska – Jaśkowiec, I. (2016). Green public procurement – legal base and instruments supporting sustainable development in the construction industry, 2016, Wydawnictwo Instytutu Zrównoważonej Energii, SEED 2016 Conference on the Sustainable Energy and environment Development 17-19 May 2016, Book of abstracts, p. 165
- [10] Public Procurement Office, “Public Procurement Office Reports from 2002 -2013” [in Polish] Warszawa. <http://www.uzp.gov.pl>
- [11] Plebankiewicz, E. (2005). Kryteria oceny ofert przetargowych stosowane przez inwestorów polskich i niemieckich, [in Polish] Konferencja naukowo- techniczna Budownictwo polskie w rok po wstąpieniu do UE Gdańsk 9-11 czerwca 2005 r. s. 199-204.
- [12] The Public Procurement Bulletin, [www.uzp.gov.pl](http://www.uzp.gov.pl)