



**SIGMA**

**Support for Improvement in Governance and Management**

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# **PUBLIC PROCUREMENT REVIEW**

## **ACCEDING COUNTRIES (8)**

### **CENTRAL & EASTERN EUROPE**

**Poland: June 2003**

This document should be read together with the *Consolidated Report*

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## 1. Executive Summary

- Poland has around 62 700 contracting entities and in 2002 31 785 contracts above the threshold value of €30 000 were awarded with a total value of 23 065 million PLN.
- The current Law is based on the UNCITRAL Model Law but has been amended many times and is moving ever closer to the provisions of EU procurement legislation. Some outstanding differences between the Act and the EU Directives still remain, however. A further amendment currently before the Parliament seeks to minimise the differences; but some differences will remain even after the amendments. The PPO has begun work on a completely revised Act.
- The PPL appears to be quite rigid and the main purpose of the Act seems to be to combat corruption. The Law is applicable down to quite a low value with the unlimited procedure being the main one used and justifications needed for the use of other procedures. There are quite extensive requirements on administrative measures and the PPL does not seem to provide sufficient flexibility to enable the contracting entities always to make sensible procurement decisions. Examples of such measures are exclusion based on arithmetical price errors, excessive requirements of documents to prove financial and technical capacity, public opening of tenders, and maximum validity of a tender, the requirement of at least two tenders for the awarding of a contract, the obligatory request for tender securities, and the mandatory requirement of tender committees.
- With respect to the central procurement organisation the Public Procurement Office, this seems well positioned to pursue its tasks, i.e. drafting of legislation, supervision, publication of the procurement bulletin and providing support. It is staffed by officers who are obviously competent. A conflict of interest though might arise with having many different functions within one organisation. Some of these functions, i.e. the giving of approvals can undermine confidence in the system and the independence and unbiased position of the PPO may be brought into question.
- The system for procurement dissemination and statistical sampling needs to be improved in order to fulfil the requirements of the EU Directives.
- The contracting entities seem to be sufficiently familiarised with the PPL and are in a position to apply the rules and procedures set out correctly therein. The suppliers also appear to be familiarised with procurement procedures and the participation rate in procurement is quite high; though many suppliers reiterate the same problems faced by contracting entities — namely, the overly rigid nature of the Act. The principle of public access to documents related to the procurement procedure introduces a measure that increases transparency and confidence in the system.
- The complaints review mechanism is adequately regulated by the Act and carried out through the arbitration system, which appears to operate effectively. The considered amendment that all arbitrators will be appointed by the Chairman of the PPO might, however, give rise to a conflict of interest.

## **PART I — PROCUREMENT REVIEW ANALYSIS**

### **2. Country Background and Data**

Poland covers 312 685 km<sup>2</sup> and has a population of some 38.6 million. GDP in 2001 was approximately €197 billion, with a per capita income of €5 100, and inflation rate of about 5.6%.

There are about 62 700 contracting entities in Poland, 31 785 contracts above the threshold value of €30 000 were awarded in 2002 with the total value of €35 000 million. The total value has been constantly growing for the last three years. The majority of these both in value and number adhere to regional and local authorities with a contract value of 21 000 million PLN and the number of contracting entities 57 530. Central government entities amount to 5 240 and the awarded contracts to a value of 8 000 million PLN.

The most commonly used procurement method is the unlimited tendering (39 000 procedures with a value 22 000 million PLN). Other procedures used, in descending order of frequency, are the single source procurement, (number of contracts 10 000 and contract value 9 000 million PLN); request for quotations (number of contracts 2 148 and contract value 365 million PLN); negotiations with retaining competition (number of contracts 1 167 and contract value 763 million PLN); and two-stage tendering (number of contracts 525 and contract value 1 222 million PLN). The pre-qualification was used 71 times and the limited tendering procedure was carried out 69 times.

### **3. Legislative Framework**

The current Law, Act of June 10, 1994, on Public Procurement (Journal of Laws of 2002 No. 72, item 664, later amended), which currently regulates public procurement in Poland, is based on the UNCITRAL Model Law and has been amended many times as it comes ever closer to the provisions of EU procurement legislation. Notwithstanding these numerous amendments, there remain some outstanding differences between the Act and the EU Directives. A further amendment proposed by the Office seeks to minimise these differences even further. Some of the amendments are also on specifically Polish concerns. These amendments are currently before the Parliament and are subject to their first reading. It is hoped that the Parliamentary process will be completed by the end of June and that the amendments will be in force well before the end of the year. In addition, there are other draft amendments being prepared by the Parliament and some of the proposed provisions appear not to be compatible with the EU legislation. Some differences with the EU Directives are likely to remain even after the amendments and the Law may not be fully compliant.

In addition, the PPO has also begun work on a completely revised Act designed as a replacement for the existing and many times amended Act. The purpose of such an Act is to align the legislation fully with that of the EU by adopting an Act based more explicitly on the EU Directives rather than on the UNCITRAL Model; and making the Act clearer and more user-friendly. According to the PPO, the draft of the law is now subject to preparation of the government.

Some of the changes considered concern the raising of thresholds for the application of the Law (from €3 000 to €6 000), a change of procedures and stricter rules for very high value contracts funded from the structural funds.

The formal responsibility for the drafting of legislation and policy making within public procurement lies with the Public Procurement Office. All the ministries and the Government's centre for legislation are consulted in connection with the preparation of legislative text.

The civil code applies to actions taken by procuring entities or suppliers in the procurement proceedings.

#### ***Secondary Legislation***

Order of the Minister of Internal Affairs and Administration of 19 July 2002 establishing the Statute of the Office of Public Procurement.

Ordinance of the Minister of Internal Affairs and Administration of 14 June 2002 on the amount and detailed rules of collection of the entry fee for reviewing appeals filed in procurement proceedings.

Ordinance of the Council of Ministers of 4 June on detailed rules for appointing members of the tendering committee, and its working procedure.

Ordinance of the Council of Ministers of 16 April 2002 on the conduct of procurement proceedings under special rules.

Ordinance of the Council of Ministers of 28 December 1994 on the application of domestic preferences in the award of public procurements.

Ordinance of the Ministers of Internal Affairs and Administration of 24 June 2002 on documents which may be required by the procuring entity from suppliers or contractors for the purpose of confirming the fulfilment of the conditions allowing participation in procurement proceedings.

Ordinance of the Council of Ministers of 29 October 2002 on the scope of creative designs and the procedure for conducting contests for creative designs and works in the field of creative activities with respect to culture and the arts.

Ordinance of the Minister of Regional Development and the Construction Sector of 26 September 2000 on cost calculation norms for material inputs, unit prices of construction works and prices of production factors for the purposes of drawing up the investor's cost calculation.

Ordinance of the Minister of Internal Affairs and Administration of 23 March 1998 on the detailed scope and procedure for dispatching price information concerning public works procurement proceedings and the copy of the most advantageous tender.

Ordinance of the Minister of Internal Affairs and Administration of 26 February 1999 on the methods and bases for preparing an investor's cost calculation.

Ordinance of the Minister of Internal Affairs and Administration of 14 June 2002 on the book of instructions for proceeding with the review of appeals related to the award of public procurements.

Ordinance of the Minister of the Internal Affairs and Administration of 14 June 2002 on the amount of the fees for actions taken by arbiters.

Ordinance of the Minister of Internal Affairs and Administration of 24 June 2002 defining the patterns of public procurement notices published in the Public Procurement Bulletin and additional information included in these notices.

Ordinance of the Minister of Internal Affairs and Administration of 16 July 2002 on securities on due execution of public procurement contracts.

### ***Main Composition and Structure***

The PPL is divided into the following chapters:

Chapter 1 — General Provisions.

Chapter 2 — The Office for Public Procurement.

Chapter 3 — Principles of Awarding of Public Procurement Contracts.

Chapter 4 — Unlimited Tendering.

Chapter 4a — Restricted Tendering.

Chapter 5 — Two-Stage Tendering.

Chapter 6 — Other Public Procurement Procedures.

Chapter 7 — Public Procurement Contracts.

Chapter 8 — Protests, Appeals and Complaints.

The PPL is not divided into separate chapters for the different areas of procurement or for the different sectors (classical and utilities). There are only a few specific provisions concerning the utilities sectors. Several of the provisions valid for the unlimited procedure are also valid for the other procedures and there are cross-references in each chapter. Some of the provisions in the Act stem from the UNCITRAL Model Law.

**Commentary:**

Many of the provisions differ in the EU Directives for the utilities and classical sectors, which is partly due to the attempt to draft provisions which appear in the EU Directives on to an UNCITRAL based law. The system with cross-references for applicable provisions, whilst necessary where provisions have simply been added in, does not make the Law very user-friendly. One of the conspicuous elements of the Law is that the rules it imposes are quite strict even for rather low value contracts. This is a similar approach to that taken in other acceding countries and imposes similar difficulties on contracting entities and tenderers, who, even for small value contracts, are obliged to follow rules designed for large or complex projects. Many of those interviewed indicated that the main purpose of the Act is to combat corruption. The TI rating is 4.0 (see Section 11. below)

**Coverage**

The PPL includes all areas of procurement; it covers all public sector entities, which are recipients of public budget funds, including central, regional and local authorities, public associations disbursing public funds and public undertakings in the utilities sectors. Private undertakings operating a public service are included starting from January 2003. The Utilities Directive is not yet fully transposed. Framework agreements, pre-qualification systems, etc. have yet to be included into the PPL.

The EU Directives oblige contracting entities to behave in a certain way when carrying out public procurement. Some provisions in the PPL are also regulating the behaviour of the suppliers. (Tender securities).

**Exemptions**

The list of exemptions does not appear to fully correspond with the EU Directives. As an example of exemptions that cannot be found in the EU Directives the PPL excludes contracts for fuel coupons for agricultural needs and procurements by foreign establishments of Poland performed outside the borders of Poland. The PPL is however applicable to some types of contracts which are excluded from the scope of the EU Directives; i.e. contracts which are declared secret, contracts covered by Article 296 of the EC Treaty, etc. Special rules shall apply to these contracts meaning that some of the PPL's provisions are not applicable, i.e. the publication of notices, time-limits and requests for approval from the PPO regarding the use of any procedure other than the unlimited. The whole procurement procedure up to the award of contract is covered. The execution of the contract is partly covered.

B-services are exempted from some of the provisions in the Law, i.e. publication of PIN, time limits, security deposits, premises to choose procedures and prohibition against determining evaluation criteria on the characteristics of contractors.

**Thresholds**

The PPL is applicable to public contracts above the threshold value of €3 000.

For private undertakings operating in the utilities sectors the PPL is applicable when the contract value is equivalent to or exceeds €400 000 (€600 000 within the telecommunications sector) for supplies and services, and €5 000 000 for works.

The unlimited tendering procedure shall be applied to all contracts above €30 000; and other procedures can be used only under certain conditions specified in the PPL. The request for quotation may be applied when the procurement is for readily available goods or supplies up to €130 000. The single source procedure may be used under certain conditions up to €20 000 — above that value, approval from the PPO is needed.

**Commentary:**

The Law is applicable down to a quite low value and although the request for quotation can be applied for readily available goods and services, the unlimited tendering procedure is the main procedure applied for all values. Since the vast majority of all contracts falls below the EU thresholds, contracting entities are required to apply the EU rules designed for high value contracts also on much lower value contracts. Given the burden this places in terms of time and cost on both the contracting entity and the tenderers there is room to consider the issue of proportionality and to question the balance struck between administrative procedure and the cost implied by every proceeding. At the same time, that unlimited tendering is applied to low value contracts; the request for quotations procedure is also applied to rather high value contracts. It can be questioned whether the request for quotations procedure is appropriate for contracts of such high value. At the relevant value of €130 000, the procedures applied must necessarily satisfy the principles of the Treaty in terms of transparency and non-discrimination. It is doubtful that the RFQ (request for quotation) procedure would meet these conditions. There is, therefore, a rather curious situation in which two contradictory procedures co-exist, albeit for contracts of a different nature: unlimited tendering for relatively low value contracts and RFQs for relatively high value contracts. It is conceivable that, in practice, this would result in a rush towards the RFQ procedure, which imposes fewer requirements even where that is not properly justified. The examples of other acceding countries show that, where there are strict rules for low value contracts, contracting entities tend to favour the less transparent negotiated procedures as a means of avoiding the unrealistically onerous open procedures. The same danger exists here.

Similarly, having very strict rules down to a low value might have the effect of the PPL not being applied at all; the negotiated procedure being used to a greater extent than normal (as elsewhere); or that contracts are divided into smaller lots with a view to avoiding the unlimited tendering procedure.

**Procurement Procedures**

The PPL provides for the following procedures:

- Unlimited tendering.
- Restricted tendering.
- Two-stage tendering.
- Negotiations with retaining competition.
- Requests for quotations.
- Single-source procurement.

*The unlimited tendering* is the preferred procedure and all other procedures may be used only under the conditions stated in the PPL (Article 14). Private undertakings in the utilities sectors may also use the restricted procedure and the two-stage tendering procedure without limitations.

The application of procedures other than the unlimited procedure above the threshold value of €200 000 is subject to the approval of the Chairman of the PPO (€20 000 in case of single source procurement).

The unlimited tendering procedure corresponds to the open procedure. The difference is that it can be used with and without pre-qualification (Article 14).

*The restricted tendering* procedure can be used only when the contract value is below €30 000 or there are a limited number of suppliers available on the market (Article 52a–52g). It is a two-step procedure with pre-qualification and an invitation to tender for the selected suppliers. A minimum of 5 and a maximum of 20 pre-qualified tenders must be invited for tendering, if available. The procedure differs from the restricted procedure in the EU Directives as there is some restriction on its use and it is directed at another situation than that of the EU Directives. Indeed, the conditions for its use are almost identical to those provided for in the UNCITRAL Model.

*Two-stage tendering* is a two-stage procedure where the first step implies the submission of preliminary offers with the conducting of technical and commercial consultations and the second step

includes the submission of a final technical proposal (Article 53-62). The price may not be included in the first stage. Two-stage tendering may be used only under certain conditions as for example when it is not possible to determine the technical specifications in advance: when the objective is research and experiments, etc. There is no equivalent procedure in the current EU Directives. In the opinion of the PPO two stage tendering corresponds to negotiated procedure with prior publication.

*Negotiations with retaining competition* may be used under certain conditions that mostly correspond to the EU Directives. The invitation shall be sent to at least three, or if justified, two suppliers (Article 63).

*Request for quotations* may be used when the procurement is for readily available (off the shelf) supplies and services and when the threshold value does not exceed €130 000. Not less than four suppliers must be addressed. Price is the only award criteria. Negotiations are not allowed.

*Single source procurement* is a procedure where a contract is awarded after negotiations with only one supplier (Article 70). The procedure can be used under certain conditions partly corresponding to the negotiated procedure. Above the threshold value of €20 000 the use of the procedure requires the approval of the Chairman of the PPO (Article 71).

**Commentary:**

The procedures in the PPL do not fully correspond to the EU Directives. The open procedure contained in the EU Directives does not provide for pre-qualification and unlimited tendering is different in that respect. Use of unlimited tendering with pre-qualification resembles the restricted procedure in the EU Directives and, to this extent, would appear to provide an EU-compatible restricted procedure given that the “restricted” procedure of the Polish Act itself is based not on the EU Directives but on the UNCITRAL Model Law.

The EU Directives do not require any justifications for the use of the restricted procedure, which is mainly aimed at situations when the contracting entity is faced with many tenderers; this would make the task of selecting tenderers and evaluating tenders a rather long and costly exercise. Based as it is on the UNCITRAL Model, the restricted procedure in the PPL covers the situation where there is a limited number of suppliers available in the market or where the value of the contract is particularly low. This, of course, makes the requirement in the Law for publication of a notice redundant, since if there is only a limited number of possible tenderers, then publication is superfluous: they are already known. It also makes the pre-qualification procedure unworkable. If there are only a small number of tenderers, there is no need to reduce that number through pre-qualification. The fusion of the UNCITRAL inspired provision with the EU requirements is simply not feasible and it comes as no surprise that it has hardly been used at all (see Section 8 below).

The negotiated procedure with retaining competition resembles the negotiated procedure without prior publication in the EU Directives.

There is no equivalent procedure to two-stage tendering in the current EU Directives, although it is widely used in international practice and is not, therefore, objectionable, at least below the EU thresholds. Following the expected adoption of the new EU legislative package, it is likely that it will be largely compatible with that package’s “competitive dialogue”.

As a matter of practice, the requirement that all procedures other than unlimited tendering be subject to the approval of the PPO’s Chairman is problematic since it amounts to a further layer of bureaucracy in applying an unnecessary *ex ante* control. It is unnecessary because the conditions for the use of the alternative procedures are set out in the Act itself. If there is a problem with the correct application of these conditions, then the tenderers are given the right to challenge. Prior approval merely adds a further time delay. From a legal perspective, it also ensures that the PPO is itself implicated in the procurement decision-making process. It will, in fact, have made a decision which should be open to challenge (and will certainly be open to challenge once Poland has acceded). If that approval has been given incorrectly and if the consequent decision of the contracting entity is challenged, then it is conceivable that the PPO would itself become a party to any dispute as a defendant. Its own reputation and standing may thus be directly challenged and undermined.

To this scenario must be added the possibility that the Chairman of the PPO may be given the right to appoint all three Arbitration Panel members, as is the proposal. In these circumstances, a potential defendant would be selecting and appointing its own judges. This is not a potential conflict of interest but a breach of natural justice.

### **Organisation of Tender Proceedings**

#### *Tender Committee*

Above the threshold of €30 000 a tender committee has to be appointed and below this threshold a committee *may* be appointed (Article 20a). Only members of the contracting entity may be members. It is not stated in the PPL how many members are required; but according to an Ordinance on detailed rules for appointing members of the tendering committee and its working procedure there shall be a chairman and at least 2 members. The committee proposes the best tender and the head of the contracting entity selects the best tender accepting the proposal. According to the Ordinance the tender committee shall be modified when a new procedure is launched because the Head refused to accept the suggestion and invalidated the tender proceedings, i.e. the contracting entity failed to comply with the act or there was a flaw in the proceedings. The tender committees can be formed ad hoc or permanently.

One of the contracting entities expressed concern about the fact that the Head or the authorised person had to accept the suggestion by the tender committee: although they had not been involved in the procurement proceedings and had no opinion whether it was the best tender awarded they were still personally liable for the procurement.

#### **Commentary:**

The obligatory forming of tender committees may be considered in the light of administrative costs and rational processes. There is also, however, the very real question of accountability. According to the PPL the head of the contracting entity or an authorised person shall accept the tender committee's proposal and he/she will have no opportunity to reject that proposal. Nevertheless, it will be the Head that is held personally responsible for the procurement and who can be penalised by the disciplinary committee. The members of the committee are not personally liable. This has the effect of removing responsibility from those who actually make the decision and placing it on the shoulders of someone who has no control over the decision. Apart from blurring the lines of responsibility in the eyes of the tenderers (which will act as a disincentive to challenge), this would also allow incompetent or unscrupulous members of the tender committees to make potentially damaging or biased decisions without any fear of accountability.

Where tender committees are formed ad hoc there is a risk that there will not be enough competence and relevant knowledge on the part of the persons carrying out the procurement. Some of the contracting entities might not have sufficient employees to form a tender committee.

#### **Records**

During the procurement procedure the contracting entity will prepare an official record of the procedure. Below €30 000 the contracting entity will keep a record of the basic activities specified in the Law. The record of the basic activities is not as extensive as the official record. The record is kept for three years and is open to the suppliers taking part in the procurement. Information that might violate the State interest or the commercial interest of the parties may not be disclosed.

#### **Opening of Tenders and Public Documents**

The opening of tenders is public (Article 43). There are also requirements regarding the public access of documents relating to the procurement proceedings. Currently, the documents are available above € 30 000 both before and after the conclusion of the proceedings for the tenderers. According to the proposed amendments all documents, i.e. tenders, certificates, official records, etc. will be available to the tenderers upon request after the opening of tenders; and the contracting entity has to render the documents accessible prior to the end of the proceedings.

After the conclusion of the proceedings all documents, including contracts are accessible to the public. Information representing business secrets within the context of combating unfair competition — bank statements on financial credit available and specific technology used — can be kept secret.

Concern has also been expressed that the contracting entities do not disclose enough information and that there is no uniform application of the provision.

There seems to be no consistency in the decisions whether documents are made public or not and that to a large extent information is not disclosed and documents are kept secret.

Below the threshold value of €30 000 the requirements are less extensive.

***Commentary:***

Public opening of tenders is a good way of ensuring transparency. The administrative costs might, however, be taken into consideration in the case of procurements of lower value. It is certainly doubtful that a public opening adds any value at all for contracts worth €30 000.

If all tenders and all documents are revealed from the time of the opening of tenders it might be a problem if there is a need to proceed with the negotiated procedure.

The principle of public access to official documents entitles the suppliers to acquaint themselves with the contents of the official documents and is an excellent way of safeguarding transparency. Care has, however, to be taken not to give up information that might violate State interest or commercial interest. If the interests of the suppliers are not safeguarded it will discourage participation. The principle of public access to public documents is quite new in Poland and with time a uniform practice/interpretation will develop. Meanwhile there might be a need for guidelines on how to apply the provisions.

***Publication Rules and Time Limits***

The provisions in the PPL regarding publication follow the EU Directives closely for above the EU thresholds. The thresholds determining the publication of notices in the Official Journal of the European Communities are the following. Regarding the prior information notice (PIN) the threshold values are €750 000 for supplies and services and €5 000 000 for works. The threshold values for the publication of a contract notice and a contract award notice are €130 000 for supplies and services and €5 000 000 for works (Article 14b).

Above the threshold value of €30 000 notices shall be announced in the Bulletin of Public Procurement (Article 15). Above the value of €3 000 the contracting entity shall post the notice of unlimited tendering at its site and on an Internet site.

The threshold values determining the obligation to publish a notice of planned procurements in the Public Procurement Bulletin are €500 000 (aggregate annual value) for supplies and services and €500 000 (each contract) for works (Article 14d).

A contract award notice (CAN) shall be published in the Public Procurement Bulletin for all contracts exceeding the threshold value of €30 000 (Article 15).

The minimum time limits for the submission of applications and tenders are from date of publication:

- Invitation to tender in the restricted procedure: 4 weeks;
- Pre-qualification: 4 weeks;
- Submission of tenders in the unlimited and restricted procedures: 6 weeks;
- Preliminary offer in the two-stage tendering procedure: 6 weeks.

PPO is obliged to publish the notice within 10 days from its receiving.

Below the threshold value of €130 000 for services and supplies and €5 000 000 for works the time limits may be shortened to three weeks when certain conditions are applicable, e.g. a procurement is prevented from being executed within a budgetary year.

The deadlines can be extended (Article 39) to enable consideration of clarifications of tenders or if a supplier is not able to submit a tender in the assigned time due to circumstances beyond its control.

The minimum requirement of the unlimited tendering notice and the essential provisions of the specifications are specified in the PPL (Articles 30 and 35).

The PPO checks that the notices comply with the requirements of the PPL and can refuse to publish the notice if it doesn't comply.

***Commentary:***

The time limits are not identical to the EU Directives. According to the Directives time is calculated from the dispatch of the notice, whereas the PPL calculates time limits from the announcement of the tender. It is always the contracting entities that are responsible for the procurement and the PPO needs to observe that its action on the publication of notices does not create confusion on where the responsibility lies. The possibility of extending deadlines for tenders, i.e. upon the request of a supplier may in some situations be contrary to the principle of equal treatment. The possibility of shortening the time limit for submission of tenders, if it prevents the procurement from being executed within a budgetary year, might cause complications. The possibility of carrying out a procurement beyond the limit of the fiscal budgetary period could be considered.

***Validity of a Tender***

The maximum period of a tender's validity may normally not exceed 45 days, but can be extended for an additional period of time.

***Commentary:***

It is questionable whether any tender validity period should be made mandatory since it will almost always depend on the nature and scope of the contract in question. Certainly, the time period set out in the Act might be too short when procuring complicated supplies, services or works. The fact that it may only be extended once also makes it rather rigid and potentially fatal to any given procedure. It is for the contracting entity to decide how much time will be needed for the evaluation and awarding of the tender.

***Qualification and Participation***

Above the threshold of €30 000 the contracting entities shall ask the suppliers to confirm that they have fulfilled the requirements in the PPL regarding the technical and financial capacity of the tenderer. The documents that can be required to prove the technical and financial capacity are specified in an ordinance. Some of the documents must obligatorily be asked for; and some may be asked for.

The requirements below the threshold of €30 000 are not as high as above and it is not obligatory for a contracting entity to ask for all of the documents specified in the PPL.

The conditions for exclusions follow the EU Directives but do not correspond exactly, i.e. a tenderer shall be excluded if, the period is within three years of the execution of a failed contract or of a procurement not executed with due care.

***Commentary:***

The EU Directives provide a list of the documents that may be asked for to prove technical and financial capacity; and it is the contracting entity that decides what is necessary for each procurement. Making it obligatory to ask for all documents may be a hindrance particularly for small and medium-sized companies taking part in the procurement. This is particularly so in the case of small value procurements which are often conducted on a recurrent basis. It will also mean high administrative costs for every procurement, which might not be in proportion with the value of the

procurement. The documents are only the means of proving whether the supplier can execute the contract.

According to the EU Directives suppliers can only be excluded on certain conditions. Taking into account the principle of equal treatment a supplier cannot automatically be excluded on the performance of earlier contracts.

Only if it is considered a crime according to Polish Law to fail the execution of a contract or to fail to execute procurement with due care can it be used as a reason for exclusion. When it is left to the judgment and discretion of the contracting entities to decide what due care is unequal treatment of tenders can result. Such blacklisting is just as open to abuse as is biased selection. If there are no guarantees regarding the conditions for exclusion, it will be just as easy for a biased or corrupt official to unfairly exclude a competent tenderer as it is to deliberately select an incompetent (but bribe paying) tenderer. Both cases are contrary to good procurement practice and to the Law but both need to be subject to verifiable procedures and not left to the discretion of individual officers.

### ***Tender Securities***

A tender security will be required above the threshold of €30 000. The tender security will be within the range of 0.5% to 3% of the contract value. The PPO may give consent to the renouncement of providing tender securities when the cost of the proceedings is not significant. Below €30 000 tender securities may be required.

### ***Performance Securities***

Securities for due execution of the contract may be asked for (Article 75). The security may not exceed 10% (5) of the contract value.

### ***Commentary:***

The obligatory request for tender securities might well affect participation in procurement proceedings and restrict competition. Particularly small and medium sized companies will be discouraged. Even if, in high value contracts the obligatory request can be a useful tool (although this is arguable), for procurements of lower value it can be disproportional, since the obtention of a tender security is both costly and difficult for tenderers, who will also have to put up collateral. In many cases, only well established and well connected tenderers (usually those which are former State owned companies) will be in a position to obtain the required securities, thus effectively preventing competition from other less established (and more private) tenderers.

### ***Tender Documents***

Fees covering the cost for printing and distributing may be charged.

### ***Technical Specifications***

The provisions regarding technical specifications appear to correspond to the EU Directives. Technical specifications shall be drawn up with reference to Polish standards implementing European standards; or European standards if no Polish standards are available.

### ***Evaluation of Tenders and Award Criteria***

The award criteria is the best offer which means the lowest price or the tender that is most advantageous economically, which provides the best balance between price and other factors.

Alternative tenders can be allowed.

### ***Domestic Preferences***

The contracting entity can apply a domestic preference in the evaluation of tenders in certain cases. The intended application of domestic preference must be mentioned in the tender documents. The provision will be removed upon accession to the EU.

### *Invalidation of Procedure*

At least two tenders need to be received for the awarding of contract (Article 27b). A tender proceeding can also be cancelled on the basis that the price of the best tender is too high or that unforeseeable circumstances have occurred.

It appears that this has been a problem and 20% of all proceedings have had to be cancelled because of less than two valid tenders.

### *Arithmetical Price Error*

Tenders must also be rejected where they contain arithmetical errors. There is no room for correction.

### **Commentary:**

It appears that the lowest price criterion is mostly used. The domestic preferences are incompatible with the EU Directives but the provision will be removed upon accession. Regarding the requirement that at least two tenders need to be received for the awarding of contract, it is the opinion of the Review that competition is usually safeguarded through the publication of notices or through other measures and that although only one tender is received it does not automatically mean that it is not a competitive tender. It is publication which invites competition; the contracting entity cannot force tenderers to tender. All they can do is provide the opportunity and it is the providing of the opportunity that equates to competition.

There is no logical reason why tenders should be rejected when they contain an arithmetical error. Correcting that error does not change the price offered, it merely expresses the tendered price accurately. Clerical or arithmetical errors are frequent since tenderers are rarely mathematicians, and there is nothing opaque or subjective in making such corrections. It is another example of the excessive rigidity of the rules applicable to procurement, which replaces the making of procurement decisions with the ability to comply with superfluous rules.

### **Notification of Award**

The contracting entity shall notify all tenderers of the election of the best tender and shall put a notice in a public place at the site of the procuring entity.

### **Execution of Contracts**

The Civil Code and the Civil Procedure Code apply to public procurement contracts.

The PPL partly regulates the execution of a contract. According to the PPL a contract is invalid if during the proceedings there was a violation of the PPL: in particular when the contracting entity has failed to publish a notice; has awarded the contract without obtaining the necessary administrative decision; or has signed the contract without approval before the final resolution of a protest. A contract shall also be considered null and void when parts extend beyond the tender invitation or specifications.

It is also forbidden to change the procurement contract, where the modification would change the content of the tender that was the basis for selection and would increase the cost for the procuring entity, unless the change is based on a circumstance that could not have been foreseen at the moment of signing the contract.

The Chairman of the PPO may seek the Court's decision upon determination of the contract's invalidity in part or in full. The Chairman of the PPO may also motion to the Court to state the invalidity of a modification in breach of the PPL.

Maximum contract period is three years. Longer contract periods require the approval of the approval of PPO. It is stated in the PPL that unlimited contract periods are not allowed.

**Commentary:**

An invalidation of the contract might result in the suppliers not being able to trust and rely upon the result of the procurement procedure and the actual carrying out of the contract. It is a rather drastic remedy in cases where the contract has been partially executed. In practical terms, it would require significant consideration of compensation for tenderers whose contracts are terminated after work has been performed. It may be that amendments, which will need to be made to the Law following accession and as a result of the Alcatel judgment, may improve this situation.

**4. Central Public Procurement Organisation (PPO)**

The Office for Public Procurement was set up on January 1, 1995 and it presently consists of 70 persons. The PPO was previously directly answerable to the Prime Minister; it now depends for its day-to-day functions on the Minister for Public Administration and Internal Affairs. The Chairman of the PPO is appointed by the Prime Minister. If the latest amendments are adopted in Parliament the Deputy Chairman will be appointed by the Ministry for Administration and Internal Affairs. Within the Office there is a special advisory body, the Council. The members of the Council are appointed and dismissed by the Minister of Internal Affairs and Administration; they are composed of Members of Parliament, contracting entities from central and local administration, associations of suppliers, State review institutions and procurement experts. The Council usually meets every two or three months. The PPO is organized into the following departments, Legal (18 persons), Training (3 persons), Publications (10 persons), Analyse and Control (10-12), European Integration and International relations (4 persons), the Chairman's Secretariat, the Organisation and Finance Bureau, and the Bureau of Appeals (8 persons). The tasks and mandate of the PPO are regulated by the PPL. The PPO has a broad range of responsibilities and tasks.

In respect to legal matters functions include: drafting legislation, elaborating standard procurement documentation, giving opinions on other legal draft laws, and interpreting and explaining the PPL's provisions. The PPO is involved in the procurement proceedings when giving approval to the contracting entities for the use of procedures other than that of unlimited tendering, and whether or not to apply domestic preferences. The official time limit for the delivery of approvals is one month. This time limit can in certain cases be extended to two months. In 2000 the PPO made 15 673 administrative decisions. The majority of these decisions (51 %) related to the approval by the Chairman of the PPO of the choice of the procedure other than unlimited tendering. In 2002 there were 18 815 administrative decisions. The majority (82 %) concerned the application for approval of the choice of the procedure other than unlimited tendering.

The PPO is also responsible for providing the administrative measures needed under the arbitration procedure, i.e. maintaining the list of arbiters, providing the services for the arbitration hearings, designating one of 3 arbiters for the hearings, maintaining archives, monitoring the execution of the arbitration verdicts, and reviewing public procurement proceedings.

Other tasks carried out by the PPO are training, preparing reference books on public procurement, disseminating public procurement information from abroad, analysing the functioning of the PP system and preparing annual reports, maintaining international relations, and managing an information centre.

As part of its support function, the PPO publishes the Bulletin of Public Procurement and following a compliance examination it places therein the procurement notices provided for in the Act.

The PPO has two educational programs planned for the next three years with a total budget of €4 million. The PPO will also take part in a twinning programme for the purposes of creating a new information system, including an e-procurement.

The PPO can also exercise review of the procurement procedure.

The PPO can require the procuring entities to provide information about the proceedings and to disclose documentation concerning public procurement. In the event of a violation of the public finance system being discovered the PPO can refer to an appropriate disciplinary commission with requests for punishment of the person responsible for violating the public procurement regulations,

and can refer to a court with a request for invalidation of public contracts concluded inconsistently with the Law. The PPO undertook 460 investigation proceedings in 2000 and drew up a notification of the violation in 28 cases. According to the GRECO the PPO exercised control over 670 procurement proceedings in 2001.

**Commentary:**

With 70 staff and a relatively long history, the Office is well positioned to prepare legal drafts. It is staffed by evidently competent officers who are fully aware of all the actions needed to implement new legislation in due time. It is also well positioned to give support; and although the PPO has not prepared many guidelines, standard documents or carried out much training in the last few years, there are extensive activities planned for the near future.

The PPO has the power to give approval to the contracting entities when using the PPL. According to the EU Directives and to judgments of the European Court of Justice it is the contracting entities that are responsible for their actions and who carry out the procurements. It is the Courts that decide whether a procurement procedure has been carried out in accordance with the Law or not. It could cause problems for the PPO if it issued a consent that did not correspond to that of the Court. This could result in the contracting entity being obliged to pay damages to a supplier due to wrongful consent on the part of the PPO or it could be that the PPO is found responsible for the issuing of a wrongful consent.

As the PPO has many decisions to take and a relatively short time to consider each request it is not feasible to have extensive investigations for possibly very complicated cases.

The PPO exercises control over all contracting entities including the Ministry of Administration and the Interior, which might be a problem as they can also control their supervisor.

A conflict of interest might arise with having many different functions within one organisation. Some of these functions may undermine confidence in the system and the independence and unbiased position of the PPO may be brought into question.

**5. Central Institutional Capacity**

**a. Procurement Statistics**

The statistical information that is available is based on the Procurement Bulletin. There is a requirement for publication of notices above €30 000 and the available statistics concern contracts above this value. There is no separation of values above and below EU thresholds. The statistics below €30 000 are based on estimates. The system does not allow for the collection of separate statistics for the utilities sectors. The public utilities are included in the general statistics and the private entities were covered by the Law at the beginning of 2003. However the PPO has started to plan for the development of a new information system that will support the sampling of statistics and a specific system enabling contracting entities to send information regarding their procurements below threshold values.

**Commentary:**

There appears to be a need for further improvement of the collection of statistics and the system in order to fulfil the requirements of the EU Directives.

**b. Common Procurement Vocabulary (CPV)**

There is now a General Statistical Classification in use. The Common Procurement Vocabulary has still to be translated and adopted. The PPO would like to wait for the new updated CPV to appear.

**c. Training and Information**

The PPO plans and implements training in the field of public procurement. At the time the PPO was first established an extensive training program was developed and implemented. Over the last few years the PPO has organised training sessions and also taken part in meetings arranged by other organisations; but the private companies or contracting entities also take a big role in carrying out

training. From the beginning of 2003 PPO has been actively engaged in training activities in the field of public procurement- see below the strategy for training.

The contracting entities often organise their own training and invite lecturers from the PPO, or arbitrators. Training is also organised by private training institutes and according to private companies active in this area there is competition for organising training in public procurement.

The PPO has recently prepared a strategy for training from 2003-2005 and received a fillip in this regard with the imminent receipt of PHARE funds destined for further training initiatives.

The training provided appears to be focussed on the application of the Law.

The contracting entities confirm there is a need for training.

The PPO provides around 2000 written opinions a year. The contracting entities can ask the PPO for a general interpretation on public procurement procedures and the PPL. A hotline (five hours a day) is provided to answer questions from contracting entities or suppliers.

Since April 1998 the PPO has published an Information Monthly, the Public Procurement Newsletter, which are placed on the web site and contain information about amendments to the law, interpretations and summaries.

In the past the PPO has prepared 20 books on different aspects of procurement, such as, interpretation of decisions of the arbitration panel, comments to the Law, a guide to the GPA, a description of the PPO, etc.

There are several publication houses publishing books and guidelines. Monthly magazines devoted to public procurement can also be found.

***Commentary:***

Following a strong initial period of training when the Office was first established, training aspects appear to have been somewhat neglected in the last few years by the PPO. However, there is now a strategy for training and training activities have been planned. There are also many private companies offering the service, which appear to be rather active in providing training courses as well as general materials of interest to procurement professionals.

***d. Model Tender and Contract Documents***

Contracting entities appear to have developed their own standard documents and until now not many model tender or contract documents had been developed by the PPO. There is, however, the standard official record of public procurement proceedings which was introduced by means of the ordinance of the Minister of the Internal Affairs and Administration of June 5, 2003.

The PPO has obtained a grant from the World Bank on developing standard forms for use in public procurement procedures, i.e. standard tender specifications and standard contracts. The PPO is now carrying out procurement for consultants to assist in this work.

***Commentary:***

It is regrettable that there has not been, to date, any centrally coordinated model documents. Particularly where the Law imposes such complicated rules concerning low value contracts and requires so many documents and such perfection; it may have been useful to have had some guidelines and models to facilitate the process.

***e. Development Areas***

There is no system available for accreditation of procurement professionals.

According to the Law (Article 5) there is the possibility that if a number of government administration units or municipal units are in need of the same subject matter the Council of Ministers may assign an administrative unit to award a joint procurement. The consent can be granted for a specific procurement or for a specific period of time.

Based on interviews with contracting entities and the PPO it is the perception that the possibility of coordinated purchasing is rarely employed. There is no central purchasing agency.

At the moment though there are some attempts being made to coordinate purchasing, i.e. the fire and police departments are now preparing for a joint procurement of cars.

There is no possibility for framework agreements in the PP Law.

Environmental and social criteria are rarely used.

## **6. Procurement Dissemination**

The PPO is responsible for the publishing of the Bulletin of Public Procurement in which Public procurement notices are published. The Bulletin is published daily and it has around 3 700 subscribers. The present system for dissemination of procurement information is published on the web but it is not a fully developed database and the search mechanisms could be improved. Besides the publication of a notice in the Bulletin the contracting entities will place a notice on their site and on their web site.

The present system does not enable notices to be sent to the TED.

The PPO will take part in a twinning program with Italy with the purpose of introducing e-procurement. It is envisaged that e-procurement will be introduced for the type of purchases that are currently carried out by request for quotation (low value supplies).

The PPO is responsible for the provisions regarding the procurement notices to be published in the Official Journal. This provision will enter into force upon Poland's accession to the EU.

### ***Commentary:***

There appears to be a further need for the development of the information system for dissemination of procurement information. The present system contains few search possibilities. There is also a need for a system that enables the sending of notices to the TED.

In view of the fact that it will be the PPO who will be responsible for the provisions regarding the procurement notices to be published: it can be observed that according to the EU Directives it is the contracting entities that are responsible for the content of the notices and for the sending of notices at the right time.

## **7. Procurement Operations and Practice Standard**

### ***a. Contracting Entities***

The main purchasers are identified. There is a general ordinance by the Council of Ministers on which departments each Ministry shall and may have. Each entity has its own internal regulations. The big entities have units specialised in public procurement. Most contracting entities seem to have internal regulations on how to handle procurement. Many contracting entities have developed their own model documents.

The main procedure applied is unlimited tendering. There is very little use of two-stage tendering or the restricted procedure. The purchasers expressed concern that the PPL is too detailed and rigid.

Tender committees are mandatory for all tenders above the contract value of €30 000. The tender committee prepares suggestions for the awarding of contracts but the final decision on the award of the contract is taken by the Head of the contracting entity or equivalent. It is, however, always the Head of the contracting entity that is responsible for the procurement.

Tender securities are usually asked for. There appears to be a problem with tenderers offering too low tender prices and as a consequence with the fulfilment and the execution of contract.

Contracting entities may apply to the Budget reserve for more resources for certain purposes. Decisions are taken in October/November and there is not much time to carry out procurement. If the

money is not spent it will be withdrawn. It is possible to get approval from the PPO for the use of the negotiated procedure without prior publication but it is not often granted.

The value of the offer compared at the evaluation stage is the price with VAT. A current Law on VAT does not contain a precise interpretation and this often leads to the rejection of offers on formal grounds.

Purchasing officers do not have a professional association.

**Commentary:**

Purchasers seem to be sufficiently familiarised with the Act and are in a position to apply the rules and procedures correctly. The Act is, however, overly rigid and bureaucratic and does not provide sufficient flexibility to enable these entities always to make sensible procurement decisions. This view is shared by the majority of entities and suppliers interviewed. It is not shared by the Office, which considers this rigidity necessary for the fight against corruption, whether real or imagined.

**b. Suppliers**

The participation rate in public procurement appears to be quite high and this is expressed by both the contracting entities and the suppliers. The regional authorities expressed concern that there was not enough competition for smaller tenders. The contracting entities' conclusion was that possibly the requirements were too high for many small companies and the procedures too complicated for the low value of the contract.

The suppliers expressed some concern about unbiased tender specifications and the fact that the PPL in some respects left too much to the discretion of the contracting entities. Some provisions were interpreted in different ways.

Among the self-governing entities there was a problem with funding and the suppliers were not sure if they were awarded the contract whether it would be carried out or only partly carried out.

The suppliers, especially the small and medium-sized companies, also expressed concern about all the documents required to prove their financial and technical capacity; such as excerpts from the commercial register, a consortium agreement, copies of licenses, written confirmation of any qualification quoted in the offer, information from the National Criminal Registry, statements from the Social Security institutions and the Tax Office. The documents could not be older than 6 weeks but in many cases it would take a month to receive them. Foreign suppliers are only obliged to provide a statement of commercial eligibility and a statement that they are not subject to bankruptcy proceedings. The contracting entities also expressed concern that there is not enough time to check all the required documents. Although not required to by the Law an example of a detailed requirement on the part of the contracting entities is that every page of the offer needs to be signed. If a page was not signed it could be a reason for exclusion.

Contracts are usually not concluded for more than one year, which was also seen as a hindrance.

The occurrence of anti-competitive behaviour, though existing, does not appear to be significant. There seems to be a problem in the Construction and IT sectors.

**Commentary:**

Companies appear to be familiarised with procurement procedures though many reiterate the same problems faced by contracting entities; namely the overly rigid nature of the Act.

The requirements of the PPL are quite strict as regards qualification and documents needed; then the contracting entities ask for all kind of documents not required by the PPL. They do so, so as not to be accused of omissions and not for genuine needs related to the subject of the procurement. Detailed requirements such as the signing of every page can seem unnecessary when public opening is practised.

The position of Polish firms in respect of their ability and capacity to enter the EU procurement market is difficult to gauge. Whilst a number of companies already provide services internationally,

this is done largely as joint venture partnerships with European or other partners. It is to be expected that such forms of cooperation as well as sub-contracting are likely to offer the greatest possibilities for Polish firms in the early stages of integration.

## **8. Procurement Market Functioning**

The PPO estimates that public procurement amounts to 4.5% of GDP for contracts above €30 000. No figures are available below the thresholds so the global value is unknown.

There are about 62 700 contracting entities in Poland; 31 785 contracts above the threshold value of €30 000 were awarded in year 2002 with the total value of €35 000 million.

The public contracting entities are included in the statistics and there are no separate statistics available for these entities. The private entities operating in the utilities sectors have been covered by the Law since the beginning of 2003.

The majority of these both in value and number adhere to regional and local authorities with a contract value of 21 000 million PLN, and the number of contracting entities as 57 530. The Central government entities amount to 5 240 and the awarded contracts to a value of 8 000 million PLN. According to the statistics 4 087 contracts were also awarded by other bodies to a value of 6 000 million PLN, but there is no data available for the total number of other bodies.

The most commonly used procurement method is the unlimited tendering (40 000 procedures, value 22 000 million PLN). Other procedures used, in descending order of frequency, are the single source procurement, (number of contracts 11 000 and contract value 9 000 million PLN), request for quotations (number of contracts 2 148 and contract value 365 million PLN), negotiations with retaining competition (number of contracts 1 167 and contract value 763 million PLN), and two-stage tendering (number of contracts 416 and contract value 1 222 million PLN). Pre-qualification was used in 71 procedures and the limited tendering procedure was carried out 69 times.

The two-stage tendering procedure appears to be used for high value contracts.

The statistics available for the different categories of supplies, services and works demonstrate the following: 68% of value of contracts in public procurement are works (47.6% of procedures), supplies 19% (32% of procedures) and services 12% (20.4% procedures).

Almost all contracts are awarded to companies registered in Poland.

The participation rate is 5.08 for works, 3.66 supplies and 4.36 for services, in 2002.

According to the PPO most awarded contracts are below the threshold of €30 000, but the statistics are incomplete. It should be noted, however, that PPO has the statistics for works also below the threshold of €30 000. According to them: 65% of contracts are below 30 000 but they consume only 10% of the value. The average value of a contract is slightly above 300 000 PLN and the average in contracts above the threshold of €30 000 is more than 1 million PLN. Slightly over 7% of the contracts are above €200 000 and they consume 65% of value of all contracts in works.

### **Commentary:**

The use of the unlimited procedure greatly exceeds the other procedures, which is unsurprising since it is generally obligatory. However, the use of non-competitive procedures, i.e. the single source procurement and the negotiated procedure with retaining competition, is relatively high compared to the use of other procedures which although they may not be as transparent as the unlimited procedure can still be a more competitive means to carry out procurements than the above procedures. There has also been a slight increase in the use of requests for quotations. This is consistent with a dislike (expressed frequently by those interviewed) for the overly rigid rules applicable to low value contracts: there is the expected flight towards simpler procedures, whether properly justified or not. It is advisable to simplify the open procedure rather than to encourage, implicitly, the use of less transparent procedures.

## 9. External Audit

The Supreme Chamber of Control (SCC) operates on a collegiate basis and is managed by a president. The institution has been significantly reformed during the last decade. In 1994 a new SCC Act was adopted, which strengthened the independence of this body, and in 1997 the new Constitution confirmed the important role and position already given to the SCC in strengthening public accountability.

The SCC is headed by the President, who is accountable before the *Sejm* (Parliament) for its activity. The SCC Council consists of the SCC President, the Vice-Presidents, the Director-General, and 14 other members in a Council, (of whom seven are directors of organisational units or advisers to the President of the SCC and seven external scholars of law or economics). The SCC has 14 departments at its headquarters in Warsaw and 16 regional offices.

The Constitution and the SCC Act still provide a solid and detailed base for the work of this Supreme Audit Institution. The SCC audit area covers the activities of government administration organs, the National Bank of Poland, state legal entities, and other state structural units (from the viewpoint of legality, economic diligence, integrity, and efficacy). The SCC can audit the activities of local government structural units, local government legal entities, and other local government organisational units (from the viewpoint of legality, economic diligence and integrity). The SCC can also audit from the point of view of legality and economic diligence the activities of other structural units and economic entities to the extent they make use of public property or resources, including resources allocated on the basis of international agreements. The SCC Act contains a clear right of this institution to audit the final beneficiaries of EU funds. The SCC has full rights to audit state-owned companies, and even to audit companies with one per cent of shares owned by the state.

The external audit of local government finances is under the responsibility of the Regional Accounting Chambers (RAC) for regularity aspects as well as some performance aspects. The regions and the counties are audited each year. The municipalities should be covered at least every fourth year. Co-operation and co-ordination, including in training matters, between the SCC and the RAC are based on an agreement concluded in February 2002.

Public procurement procedures are subject to the audit by the SCC and the Regional Audit Chambers.

According to the Regional Audit Chamber it appears as if there are many breaches of the Law when looking at the statistics; but the majority of these are minor. The PPL leaves no leeway for the purchasers and it is the opinion of the Regional Audit Chamber that the PPL may be too detailed and strict. There will be a minor mistake and a breach of the PPL in almost every procurement proceeding. Examples of common mistakes/breaches are: documentation is incomplete, and an arithmetical price error has been made.

Disciplinary committees can penalise and impose fines on the procurer. A civil servant who has violated the Public Finance Law can be prohibited from taking part in procurement procedures for 1-5 years. This measure has never yet been executed.

### **Commentary:**

There are three institutions carrying out audit and control on the contracting entities. It appears as if the audit is very detailed and mostly based on compliance with the Law. It might impose an unnecessary burden on procuring entities by ensuring continued control and audit of their activities in a way that is likely to prevent efficiency. The SCC, however, clearly recognizes that many of the problems are caused by the rigidity of the Law and are, for the most part, innocent breaches of unnecessary provisions. This may serve to at least palliate this additional layer of control.

## 10. Complaints and Remedies

Above the threshold value of €30 000 the review procedure consists of three stages. The first stage is the filing of a protest to the contracting entity, the second to an arbitration committee and the third to the court. A protest shall be filed within seven days from the day the suppliers learnt about the

circumstance giving grounds for its filing and only prior to the awarding of the contract. The contracting entity must review the protest within seven days of its filing and suspend the tender proceedings during the review. The Chairman of the PPO may permit conclusion of the contract in certain circumstances.

After the decision of the contracting entity the supplier, can appeal against the resolution or the dismissal of a protest and against the failure to review a protest within the assigned time period to the arbitration panel, which is a complaints review mechanism administered by the PPO. The review body consists of a panel of three independent "arbitrators", two of whom are appointed by the parties (complainant and defendant contracting authority) with the third arbitrator appointed by the Chairman of the PPO. The selection of the arbitrators is made from a closed list of arbitrators, which was established in 1995. They received training at the outset but continuing education and training has been lacking although periodic workshops for arbiters in connection to legislative changes and for discussion of other issues have been carried out.

Of the 650 arbitrators on the list, about 130 are actively used. The arbitration panel is administered by the Bureau of Appeals, which is a unit within the PPO. The Bureau of Appeals do all the tasks needed for the functioning of the arbitration panel such as maintaining the list of arbitrators, publication of verdicts, supervision of the execution of verdicts, collection of fees.

The arbitration panel can, by means of its decisions, request the contracting entity to reverse a proposed award decision, to cancel the procurement procedure and to re-tender. Decisions must be rendered within 14 days.

The decisions of the arbitration panel are not regularly published. Extracts of a few of them are published in the Monthly Newsletter of the PPO.

Associations of suppliers and employers can, prior to the expiry of the deadline for submitting tenders, also file a protest to the arbitration committee.

The tender proceedings are suspended during the review period and contracts may not be concluded until afterwards, either by the non-appealed resolution of the procurer or by the decision of the arbitration panel. The Chairman of the PPO may permit the conclusion of the contract in certain circumstances.

An entry fee, which must not exceed the cost of the proceedings, is collected.

There has been an increase in the number of complaints submitted to the Panel of Arbitrators. In 2000 there were 1 565, in 2001, 1 687 and in 2002 there were 1 936 complaints submitted. Of these, 49% were rejected and 51% accepted.

Complaints are lodged in 5% of all awarded contracts of a total of 31 785 above the €30 000 threshold.

Since October 2001, decisions may be appealed to the District Court in Warsaw. The complaint shall be filed via the Chairman of the PPO. In 2001 there were 9 appeals and in 2002 there were 187 appeals to the District Court in Warsaw. Until now there have been 79 cases dismissed and 59 verdicts, of which 49 were rejected and 10 accepted.

In 2001 the possibility of claiming reimbursement for justified participation costs was inserted in the PPL: in particular the costs of preparing the tender when procurement proceedings were invalidated due to the fault of the contracting entity, i.e. when a significant change of circumstances has occurred or the proceedings were conducted with some other defect, etc. After the contract has entered into force a claim can be submitted to a court in accordance with the provisions of the Civil Code and the Civil Procedure Code. This possibility is not specific to public procurement. There are no statistics available regarding claims for damages.

Below the estimated contract value of €30 000 only ordinary legal remedies for civil cases are available.

Among the amendments currently discussed in the Parliament there is a change of the procedure of registering arbiters where the Chairman of the PPO will have full competence for registration on the list; and periodic evaluations concerning the level of jurisprudence and knowledge of arbiters will be introduced.

A modification of the system for nominating the arbitrators is also being considered. It is intended to replace the existing system with a system under which the Chairman of the Office nominates all three arbitrators.

***Commentary:***

The complaints review mechanism is adequately regulated by the Act and carried out through the arbitration system; it appears to operate effectively. There seems to be confidence in the arbitration system although some concerns were expressed on the part of contracting entities and suppliers that the decisions of the arbitration committee depended on the arbitrators that participate in the specific case. The arbitrators are sometimes treated by the parties as their representatives, and that it can be difficult for arbitrators to remain unbiased and not to take the side of the parties that have chosen them.

Given the fact that the arbitration proceedings take place within the PPO, although in a separate unit, and also that it is built on a temporary composition for each case, it is not clear that the arbitration panel is an independent body — at least in the eyes of some tenderers. Provided there is clear separation which is seen as such by the tenderers, this should not prove too much of an obstacle.

The considered amendment that all arbitrators will be appointed by the Chairman of the PPO might give rise to a conflict of interest although the purpose of the amendment is to guarantee the independence of the arbitrators. Considering that the PPO holds many functions — such as advice-giving, consent to procedure and control over the appointment of arbitrators from the PPO — there will be a risk that the arbitrators are seen as taking the view of the PPO and of the public sector. There is also a risk of a direct political influence in judgments considering that the Chairman of the PPO is appointed by the Prime Minister, and that the PPO is directly subordinated to the Ministry of the Interior.

The list of arbitrators, which is maintained by the PPO, dates from 1996 and has not been updated since then. Training following the initial start-up phase would appear to be less than systematic. The number of registered arbitrators exceeds 630 but the number of frequently appointed arbitrators equals about 130. One consequence of having an extensive list of arbitrators might be that only a few arbitrators will gain enough experience and knowledge in investigating the complaints. It would be beneficial not only to update the list of arbitrators to ensure that they all remain properly qualified and to admit new arbitrators, but also to provide systematic continuing education for the arbitrators (both on developments in procurement Law and in methods of dispute resolution — notably the handling of witnesses and evidence and the conduct of hearings).

There has been some concern over the processing time of the appeals by the court; but judging from the statistics of delivered decisions it appears to work within reasonable time.

The publishing of the court cases on the web page is recommended.

**11. Ethics in Procurement**

The Polish government has declared the fight against corruption to be one of its highest priorities. Fraud and corruption is not specifically addressed in the PPL but one of the main purposes of the current act is to prevent corruption. The Law is therefore very strict and detailed. Suppliers can be excluded on minor mistakes.

There are however some provisions relating to the prevention of fraud and corruption in the PPL. According to the PPL persons with some kind of connection to any of the suppliers are forbidden to take part in any activity relating to the procurement (Article 20): public procurement contracts are public (Article 74a), there is a public opening of tenders, and the verdict of bribery in a court of law and unfair competition constitute reasons for disqualification. There are also extensive requirements

for the keeping of records and the principle of public access to public documents that applies to all documents related to the procurement procedure.

There is a code of ethics in Poland. Some regulations concern the civil servants while employed, but there are no regulations that are applicable after the civil servant has left his position.

Transparency International gives Poland 4.0 on its corruption perception index (2002). Corruption is seen as a problem by the administrative authorities and is generally discussed in the media.

***Commentary:***

The principle of public access to public documents can be a very efficient tool with which to combat corruption. It is also a measure that creates confidence in the procurement procedure, as the suppliers can see the results of the procedure.

## **PART II — FINAL CONCLUSIONS AND RECOMMENDATIONS**

SIGMA would recommend the Commission to consider the following actions as a result of the Procurement Review of Poland:

- a. The Commission may wish to express an opinion to Poland on the importance of implementing procurement legislation that allows public purchasers to operate efficiently and effectively in order to contribute to sustainable growth in accordance with the fundamental objectives of the European Union; thus, if in agreement, express concurrence with the findings and recommendations for amendments to the public procurement law proposed by the Review.
- b. The Commission may wish to express an opinion to Poland on the importance of possessing adequate central procurement organisation and institutional capacity to support effectively the implementation of public procurement legislation in accordance with EU legislation and with a view to operating in the Single Market; thereby mentioning the concerns raised on the issue of a conflict of interest with respect to the PPO, the need to prepare effectively the procurement community to operate in the Single Market, and to organise its central advisory and review functions for the purposes of efficiency and credibility.
- c. The Commission is recommended to ask for clarifications on the status of the preparations for the managing of the pre- and post accession funds.

### **Input to the Monitoring Report**

For the specific inclusion of wordings into the Monitoring Report, the Commission may wish to consider certain conclusions and recommendations made by SIGMA in the section of country recommendations. However, for the purpose of facilitating this input, SIGMA would propose the following recommendations with regard to the position of Poland.

It is found that the public procurement system of Poland needs to be improving, having a number of weaknesses and deficiencies, in particular as regards the legal framework and to some extent within the central institutional operations. PPO has the capacity to implement EC legislation effectively. The Government of Poland is recommended to consider the following actions with a view to improving the public procurement system, principally in the national interest, but also to enable Poland to meet its obligations as a Member State.

- Alignment is not yet complete, and the PPL needs further revision in the interests of simplification, user-friendliness and recognized international good practice.
- Institutional arrangements and capacity are generally good, but the consent procedure exercised by PPO needs attention. Efforts should be devoted to the strengthening of good practice support for public purchasers and economic operators, and to focus stronger than being the case today external audit towards economic outcomes rather than strict regulatory compliance

### **13. Recommendations to the Country**

In brief, the Review of Poland indicates the following main findings and conclusions on the state of the public procurement system:

#### ***Strengths***

- A well-positioned and experienced Public Procurement Office, fully informed about the main purchasers.
- Low thresholds for the application of the PPL.
- A well-developed procurement information system on the web site.

- A procurement market functioning well, with satisfactory participation rates and market competition.
- Contracting entities as well as economic operators appear to be well familiarised with the public procurement legislation.
- Public accessibility to documentation.
- An effective and credible complaints and remedies system.

### **Weaknesses**

- More or less identical procedures apply above as well below the EC thresholds.
- The need for justifications for all procedures other than unlimited tendering.
- The restrictive and unclear implementation of the restricted procedure, including the prequalification proceeding permissible under unlimited tendering.
- The high threshold for the use of request for quotations.
- Non user-friendly law with a terminology applied to the procurement methods which are based on the UNCITRAL Model Law.
- Formalistic application of the qualification and eligibility rules.
- The predominant use of lowest price criterion, only.
- The mandatory requirement of tender securities above €30 000.
- The involvement of the PPO in the procurement process by issuing consent to request for approvals.
- Time limits which appear to be incompatible with the EC Directives.
- Maximum tender validity periods.
- Mandatory use of tender committees.
- Invalidation of tender proceedings because of few tenders.
- Insufficient central support in the areas of training and capacity building.
- Insufficient central support for the provision of operational tools, such as guidelines and model tender and contract documents.
- The focus on compliance audit rather than performance audit in the context of external audit.

### **Recommendations**

A number of serious issues has been raised with respect to the standard of the legal and institutional framework of Poland that require serious contemplation on the part of the Government. For the purpose of the future improvement of the system, Poland is recommended to consider the following actions.

#### *The Legal Framework*

- A revision of the PPL should be initiated with the aim of providing a strong legal basis, built on the Directives and good international practice, which optimally promotes efficient and sound public procurement in accordance with the principles of the EC Treaty. SIGMA would recommend the following main amendments to the PPL:
  - to make a clear distinction between contracts governed by the EC Directives and other national procedures;
  - introduce procedures above the EC thresholds using the same denominations and being fully compliant with the EC procedures;
  - introduce simplified competitive procedures below EC thresholds; consider to replacing the request for quotation procedure with a selective simplified competitive procedure, and to abolish the unnecessary justifications for the use of certain procedures;

- remove certain provisions or practices adversely affecting market access and competition, such as tender securities and the rigid application of qualification and eligibility rules;
- remove provisions and conditions that adversely affect the operational efficiency of contracting entities, such as maximum tender validity periods, invalidation of tender proceedings, consent procedures;
- introduce procedure and rules that promote efficient procurement taking into account modern practice and new technologies, such as framework agreements and collaborative arrangements.

#### *Central Institutional Set-up and Capacity*

Poland has a well-positioned central procurement organisation, with a lot experience and capability, which over the years has contributed considerably to the successful establishment of public procurement in the country. It has in general the experience and capacity to implement procurement legislation effectively. However, a number of problems which need to be tackled and, in particular, the following actions are recommended to be taken in the short or medium-term perspective:

- The system of prior approvals for certain procurement decisions exercised by the PPO is highly questionable as clearly indicated above and should be removed.
- Organise and build-on the future PPO with the object of establishing a “Centre of Excellence” in public procurement. This would mean a shift of direction from control to monitoring the effectiveness of the policy and legal framework and investing more in areas such as capacity building, the procurement information function, the provision of efficient operational tools and, more generally, the development of a modern public procurement system as skills develop.
- Organise the PPO in taking into account its new role in an Internal Market context, including the need to establish a point of first call with the European Commission.
- Take measures on the organisation and employment of EU funds after accession.
- Adopt a strategy and action plan on public procurement with the following main ingredients:
  - the creation of a nationwide training and information programme for the procurement community — contracting entities and the private sector — on the new EC-based procurement legislation and how to operate in the Single Market;
  - increase operational support to contracting entities by the provision of operational guidelines, model tender documents, and general conditions of contracts using international models;
  - the creation of a quality assurance system for contracting entities, including systems for accreditation of procurement professionals;
  - plans on how to support long-term capacity building in procurement, in particular on how to strengthen the operational competence and capacity of contracting entities;
  - plans and measures on how to organise systems for coordinated and centralised purchasing, including the use of framework agreements;
  - plans and further measures on the implementation of electronic procurement.

#### *Procurement Practice and Market Functioning*

Contracting entities and economic operations overall have a good understanding and knowledge of applying public procurement legislation. However, the commercial and operational side of public procurement needs to be enhanced in the future and some of the most important and urgent measures proposed therefore are outlined above. The state of competition seems to be satisfactory in Poland.

The following actions are recommended to be taken in order to improve these areas of the public procurement system:

- Initiatives should be taken to support contracting entities in their efforts to enhance the efficiency of their procurement operations by providing models and guidance on how to organise the procurement function and decision-making processes in a rational and cost-effective manner.
- Initiatives should be taken with the purpose of supporting the economic operators to enable them to operate efficiently and with integrity in the public procurement market, domestically as well as in the context of the single market.
- Take measures to strengthen the position of SMEs in public procurement without compromising efficiency, such as the removal of obstacles to participation and facilitation for forming joint ventures and allowing subcontracting.

*The Areas of External Audit, Complaints and Remedies, and Ethics in Procurement*

The Review has noticed a high number of complaints, and the existence of control and audit functions that mainly appear to focus on procedural compliance. On the other hand the complaints system is considered effective and credible, while the presence of corruption in public procurement is regarded as a major problem. Poland is recommended to take the following actions:

- The Supreme Control Chamber (SCC) has well-developed operations and is undertaking external audits today with the following orientation:
  - to analyse the quality of the financial management and control, including the internal audit in the contracting entities;
  - with this as a base gradually shift the approach in the public sector external audit from a transaction towards a system approach focusing on efficiency and effectiveness in the management operations;
  - to analyse the possibilities to carry out thematic audits of the entire public procurement system with the objective to support the capacity building in the system;
  - to assess the programming and project design capacity in the public administration, including capacity of financial planning for big investment projects; and

*The next important step for SCC would be:*

- to progressively develop their capacity to audit procurements and procurement policies from a performance point of view.
- The current level of complaints is very costly for all parties involved and various measures should be taken to improve the situation. Some measures are associated with the simplification of the PPLs and capacity building, as discussed earlier, but other measures should also be considered.
- As the further restrictiveness of procurement legislation is seen to be inappropriate, Poland is recommended to take other more constructive measures to prevent corruption and to ensure integrity in the procurement processes. Such measures may focus on changing attitudes, perceptions and behaviour, including the removal of the underlying reasons for corrupt behaviour — with both short and long-term perspectives — in order to establish a commercial culture significantly free from such practices and capable of contributing to economic growth (please see the *consolidated version* for a list of proposed measures).

**14. Final Remark**

SIGMA wishes to express its warm thanks to the Government of Poland for all the support given during the entire Review process and to the Commission for all its contributions towards facilitating the work of the SIGMA Project Team.

**Appendices**

- Annex 1: Procurement Statistics.
- Annex 2: Complaints Data.

## PROCUREMENT STATISTICS

Country: Poland

Item	2000 (Estimates)		2001 (Estimates)		2002	
Total number of contracting entities	ca 62 700		ca 62 700		ca 62 700	
Central Government	ca 5 240		ca 5 240		ca 5 240	
Regional and local authorities	ca 57 530		ca 57 530		ca 57 530	
Utilities	no data available		no data available		no data available	
Other Bodies	no data available		no data available		no data available	
<b>A. Awarded Contracts/Contracting Entities</b>	<b>Value</b> (mil. PLN)	<b>Number</b>	<b>Value</b> (mil. PLN)	<b>Number</b>	<b>Value<sup>1</sup></b> (mil. PLN)	<b>Number<sup>2</sup></b>
Central Government	8 459	12 600	9 560	15 000	6 950	10 925
Regional and Local Authorities	10 914	13 400	10 516	13 600	12 659	16 773
Utilities	-	-	-	-	-	-
Other Bodies	3 627	3 600	3 824	3 800	3 456	4 087
<b>TOTAL</b>	<b>23 000</b>	<b>29 600</b>	<b>23 900</b>	<b>32 400</b>	<b>23 065<sup>3</sup></b>	<b>31 785</b>
<b>B. Procedure Methods</b>						
State applicable procedures						
Unlimited Tendering	20 000	27 650	21 880	30 450	19 118	25 742
Limited Tendering	58	200	39	140	13	45
Two — Stage Tendering	2 150	720	1 787	630	1 220	416
Negotiations with Retaining Competition	53	80	94	150	763	1 167
Request for Quotations	21	120	28	170	365	2 148
Single Source Procedure	0	0	43	60	1 554	2 258
Prequalification	24	6	4	1	33	8
<b>C. Nationality</b>						
Contracts awarded to national contracts	22 989 981	29 596	23 894 864	32 395	22 985 001	31 741
Contracts awarded to EU firms	1 416	3	4 956	4	36 751	30
Contracts awarded to candidate country firms	0	0	0	0	6 532	3
Other countries	8 603	1	0 180	1	36 715	11
<b>D. Participation Rate</b>						
Works	5.50		5.71		5.08	
Goods	4.85		4.45		3.66	
Services	4.52		4.84		4.36	

Statistics reflects public procurements announced in Bulletin of Public Procurement (procurements of value exceeding €30 000).

1. The figure does not include unit prices.
2. The number of procurements (in one procurement few contracts may be awarded).
3. This amount does not reflect the total amount of funds spent on public procurement; the estimates show that expenditures on public procurement contracts (in procurements of value exceeding €30 000) amounted to ca €35 billions in 2002.

**Procuring entities, whose expenditures on public procurement contracts in 2002 were the biggest** (data based on notices of the results of procurement proceedings announced in the Bulletin of Public Procurement in 2002):

	<b>Procuring Entity</b>	<b>Town</b>
1	Podkarpacki Zarząd Dróg Wojewódzkich w Rzeszowie	Rzeszów
2	Zarząd Dróg i Komunikacji	Wrocław
3	Zakład Zamówień Publicznych przy Ministrze Zdrowia	Warszawa
4	Departament Zaopatrywania Sił Zbrojnych MON	Warszawa
5	Zarząd Dróg Miejskich	Poznań
6	Zakład Ubezpieczeń Społecznych	Warszawa
7	Urząd M.ST Warszawy	Warszawa
8	Zarząd Dróg Miejskich	Warszawa
9	PKP Polskie Linie Kolejowe S.A. — Centrala — Biuro Logistyki	Warszawa
10	PPUP Poczta Polska -Centralny Zarząd Poczty Polskiej	Warszawa

## COMPLAINTS DATA

### Administrative Review

The data should only apply to complaints subject to administrative review received and dealt with by the Central Review Body (CRB) of the country.

#### A. Background Data

- Name of Central Review Body: Panel of Arbiters<sup>4</sup>.
- Year of establishment: 1995.
- Number of members: 630.

#### B. Number of Complaints

- Number of complaints received by CRB during 2000, 2001 and 2002:

	2000	2001	2002
Complaints	1 565	1 687	1 936

- Distribution (percentage) of complaints by category of contracting entity:

	2000	2001	2002
Central government	36.23	35.45	35.60
Regional & Local authorities	35.27	41.19	43.39
Utilities	-	-	-
Other	28.50	23.36	21.01

- Distribution (percentage) of complaints by category of contract (2000 — 2002):

Works	46.79
Services	26.08
Goods	27.13

#### C. Nature of Complaints

- The most common types of complaints in descending order of importance during 2000, 2001, and 2002 ( e.g. incorrect use of award criteria, and biased specifications):

Provisions of the specification of essential conditions of public procurement (tender documentation):

- description of the subject matter of public procurement violating the fair competition principle;
- too short time limits for submitting of tenders;
- insufficient information concerning the way of tender evaluation.

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4. Panel of arbiters for one case consists of 3 persons – selected by the Chairman of the Office, the procuring entity and the complaining party from the list of arbiters maintained by the Chairman of the Office.

Selection of the best tender:

- unjustified rejection of the tender;
- unjustified exclusion from the procedure;
- evaluation of tenders based on other criteria (not mentioned in the tender documentation).

#### D. Outcome of Review Process

- The outcome of the review process by type of decision (in percentage) in favour of the complainant and contracting entity, respectively:

	2000	2001	2002
Appeals Rejected	54	57	49
Appeals Accepted (in favor of the complainant)	46	43	51

- Corrective measures decided by the CRB:

The Panel of Arbiters can either accept or reject the appeal. While accepting the appeal The Panel of Arbiters may order the execution or repeating of an action by the procuring entity, or may invalidate an action, with the exception of the signing of a public procurement contract.

#### Judicial Review

Information should refer to complaint cases subject to judicial review after the contract has been concluded with a request for damages.

*No data available.*

#### E. Number of Cases and Outcome of Judicial Review

- Number of cases subject to judicial review during 2000, 2001, and 2002:

	2000	2001	2002
Number of cases	-	9	187

- Outcome of these cases during the same period:

Cases in 2002	Number
Cases dismissed	71
Verdicts	59
Rejected	49
Accepted	10

Since 26 October 2001 there is a possibility to complain against the verdict of Arbiters to the District Court in Warsaw.