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Summary of the doctoral dissertation

"Negotiation and tender procedures for awarding public procurements"

The issue of negotiation and tender procedures for awarding public contracts is theoretically complicated. It concerns the stages preceding the conclusion of the final contract, which, like the final contract itself, are subject to the rules of national law, but adapted to EU directives. According to Art. 8 sec. 1 of the Public Procurement Law in the above scope, the provisions of the Civil Code shall apply, unless this Act states otherwise. The correct application of the provisions of the Code in the field of public procurement caused problems already on the basis of the previously binding regulation contained in the Act of 2004. Constant changes in the still evolving public procurement law do not inspire sufficient confidence as to the certainty of many regulations, they undermine the stability of normative solutions and hinder their use in current administrative and economic practice.

The dominant role in the public procurement law is played by open tendering, however, negotiated and tender procedures are also allowed, sometimes more effective, the practical significance of which is successively increasing. Although they do not yet play a significant role, in the future, with the general development of public procurement, their greater use for more complex contracts is beyond doubt. Currently, contracting authorities, instead of looking for innovative solutions to meet public needs better and better, choose proven, uncomplicated and less time-consuming solutions, since an open tender lasts on average 41 days, while a competitive dialogue lasts 73 days, and negotiations with publication as much as 92 days.

Both advertised negotiations and competitive dialogue were to become essential instruments to support the development of innovation in the EU area, as well as to intensify cross-border trade. Meanwhile, no major progress has been made in their practical application. The Public Procurement Law Act of 2019 introduced many new solutions, increased the role of the contracting authority in negotiations with contractors, and liberalized the conditions for the use of negotiation and tender procedures in order to further develop instruments supporting innovation in the public sector. In addition, the Act also aims to de-formalise public procurement procedures. The basic mode, appropriate for low-value contracts, is, apart from open tender, also tender with the possibility of negotiations (Article 275 point 2 of the PPL) and a tender preceded by negotiations (Article 275 point 3 of the PPL). Under the current legal

status, the application of the negotiation stage in the basic mode does not require a detailed legal or factual justification, however, negotiation procedures in larger contracts still require such justification.

Since the statutory increase in the role of negotiations among public procurement procedures does not translate into an increase in practical interest in negotiation and tender procedures, the main purpose of the dissertation is an attempt to examine and present, together with the doubts arising, the legal nature of individual negotiation procedures, as well as interpretation proposals for unclear provisions and postulates *legit ferenda*. In addition, Polish literature lacks a scientific monograph on negotiation and tender procedures for awarding public contracts. Studies on some of the mentioned modes are too fragmentary and do not respond to all the difficulties, especially in terms of the research issues raised in the dissertation. The same applies to case-law, which is still in development. For these reasons, the choice of the topic of the dissertation seems justified, and the attempts made in it to resolve important theoretical issues may be of great importance for practice.

In theory, as well as in the practice of public procurement, there are too many doubts about the legal nature of the negotiation stage in hybrid procedures. Perhaps that is why they are not sufficiently popular in practice, although thanks to negotiations, contractors can more easily grasp the essence of the contracting authority's economic needs. Negotiations are more likely to lead to a proper description of the subject of the contract and the terms of its implementation.

The provision of art. 72 of the Civil Code regulates negotiations as a way of concluding a civil law contract, but for natural reasons it cannot determine all issues of the effective application of this procedure. In the literature there is a position according to which Art. 72 of the Civil Code takes on the rank of an interpretative rule, applicable especially when the negotiating parties do not agree on other rules applicable in the course of negotiations. Such rules may be established, but the goal of negotiations in terms of the Code is always to conclude a final agreement, although the outcome of the negotiations is usually limited only to establishing a draft final agreement. The situation is different in public procurement law. In each of the negotiation and tender procedures for awarding public contracts, negotiations have slightly different goals than concluding the final contract. They are primarily focused on designing contractual conditions. They are assumed to be multilateral in nature, although they are usually conducted separately with each participant in the proceedings. These circumstances give rise to complex legal problems with regard to the application of the provisions of the Code, including those concerning liability for violation of procedural requirements.

The applicable Polish law does not provide a general normative definition of a commercial activity or a commercial contract, while in business transactions negotiations are widely used to conclude such contracts, primarily in relation to large and complex contracts. They are conducted by persons familiar with the procedure and the subject of negotiations. Public procurement contracts are of economic importance, but due to the status of the contracting authority, they cannot be classified as commercial contracts. Representatives of contracting authorities participating in the negotiation and tender procedures of public procurement are not required to have the skills to properly conduct negotiations, and perhaps the statutory indication to ensure professional service of the official procedure would contribute to greater interest in negotiations. In connection with the above, the dissertation is accompanied by the following theses:

- the changes introduced towards the liberalization of the admissibility of the use of negotiation and tender procedures deserve approval, but the public procurement sector is not yet sufficiently prepared for professional use of negotiations,
- negotiations in public procurement are not fully negotiations within the meaning of Art. 72 §1 of the Civil Code, and therefore its application in this sphere, similarly to Art. 721 Kc, may only be auxiliary,
- in the negotiation and tender procedures for awarding contracts, the negotiation stage leads in fact to determining the preliminary terms of the final contract and the requirements of the offer submitted by the participant of the tender stage,
- Negotiations in public procurement are, by definition, conducted by the contracting authority with many competitors, although with each one separately, and thus they create a multilateral relationship with elements typical of bilateral relations.

As a consequence, the main objective of the dissertation is to analyze both the negotiation and tender stages, while other issues are of secondary importance.

As a part of the general issues, it was necessary to explain the concept of negotiations, indicate their types, explain the essence of initial market consultations, and then present the issues of negotiations with publication, competitive dialogue, negotiations without publication, single-source procurement in a more developed approach; innovation partnership, and negotiations in the so-called basic mode. In the longer term, it was necessary to refer to the legal nature of the negotiation agreements, subject to a broader analysis of the course of the proceedings, verification of the conditions required from competitors, the legal nature of the initial bids, the problem of the multilateral nature of the proceedings with the obligation of loyalty of its participants, and the protection of confidential information.

Then, it became necessary to characterize the tender stage, divided into phases important from the civil law point of view: starting from the submission of offers, through their formal qualification and evaluation, to the selection of the most advantageous offer. The interesting issue of the obligation to conclude the final contract, especially its legal nature and liability for its violation, could not be omitted. As to the importance of the selection of the most advantageous offer, the opinion has been established that as a result it leads to the acceptance of this offer, and consequently to the conclusion of a preliminary contract (under Article 389 of the Civil Code), justifying the conclusion of the final contract only in the longer term. The analysis of the tendering stage proved that it also differs from the tender in terms of the Code. Hence, code solutions can only be used in a subsidiary way. In conclusion, it was necessary to respond to the research theses outlined at the beginning and to present *de lege ferenda* conclusions and postulates. Out of the four negotiation and tender procedures, the most important should be negotiated with publication and competitive dialogue, as the procedures preferred by the European legislator. On the other hand, negotiations without publication, which do not take place under conditions of competition, do not fully guarantee the principle of equal access to contracts and real protection of competition, therefore they should be exceptional.

With regard to infringements committed at the negotiation stage, liability for *culpa in contrahendo* (disloyalty) arises in the first place, although Art. 72 § 2 of the Civil Code cannot be considered as the sole basis for liability for damages, but only as an indication of the obligation to repair damage caused by a breach of a previously concluded pre-contractual agreement. Thus, liability becomes contractual in nature (Article 471 of the Civil Code). On the other hand, however, a violation of the agreed negotiation rules may also constitute a tort (Article 415 of the Civil Code). The overlapping of liability is removed according to which of these forms is more favorable for the aggrieved party, provided that the basis for tort does not disappear at all. The tender stage may also abound in violations of the law or conditions of procedure, but here the prevailing view is in favor of ex-contract liability.

The relatively low popularity of the negotiation and tender procedures for awarding contracts results not only from the well-developed course of the procedure (increase in bureaucratic burdens), but also from the not very transparent statutory regulation, full of indefinite phrases, unfortunate references, linguistic shortcomings, etc. Therefore, it is necessary to introduce improvements procedural as well as legislative and drafting provisions, with explicit permission for premature termination of negotiations, when their goal is achieved earlier.

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