

Non-substantial change to the public procurement contract

Substantial or non-substantial changes to public procurement contracts should be analysed based on the Act of 29 January 2004 – the Public Procurement Law (hereinafter referred to as the PPL). A key amendment to the PPL regulating this area came into force on 28 July 2016 (it is hereinafter referred to as the Amendment). Many contracts concluded pursuant to the previous regulations are currently being implemented. Interim regulations of the amending law apply to these contracts. These provisions fail to unequivocally determine how the regulations concerning contractual changes should be interpreted or what modification of the contract can be considered by the competent deciding authorities as substantial or non-substantial.

When discussing the possibility of modifying public procurement contracts, the first thing to do should be to compare the previously effective regulations and the interim regulations of the Amendment to the current regulations so as to determine regulations effective in the different legal situations. Pursuant to Article 19.3.1 of the Amendment, changes to public procurement contracts are admissible in the case of contracts concluded before the date of the entry into force of the Amendment or those which were concluded as a result of a public procurement tender process commenced before the entry into force of the Amendment if the contracting authority provided for the possibility of changing the contract in the public procurement notice or in the terms of reference and it also defined the conditions for making the change. The article corresponds to Article 144.1 of the PPL. Prior to the entry into force of the Amendment, this article prohibited substantial changes to contractual provisions and defined exceptions in this regard. An exception was a situation where the contracting authority provided for the possibility of making a substantial change to the public procurement notice or the terms of reference and defined conditions governing such change. Accordingly, making non-substantial changes was by all means possible in the previous legal situation. Furthermore, non-substantial changes are allowed by the new regulations. However, as contrasted with the previous regulations, Article 144 of the PPL currently in force defines the notion of substantial change. Article 19 does not indicate clearly that the contracting authority is authorised to make non-substan-

tial contractual changes unless it previously allowed for such changes. Therefore, doubts arise whether it is possible to make non-substantial changes to contracts concluded in the previous legal situation or the contracts concluded as a result of proceedings commenced in the previous legal situation – so-called “interim contracts”. The provisions of Article 19.3 of the Amendment appear to be exhaustive, but they call into question the rationality of the legislator’s actions. Denying parties from the possibility to make non-substantial changes to the contract they had in the previous legal situation and the one they have in the current legal situation appears to be pointless. An analysis of the Article 144.1 of the PPL previously in force and Article 19.3 of the Amendment suggests that they are not in conflict with each other, which would lead to a conclusion that the parties may make non-substantial contractual changes even if the contract was concluded prior to the entry into force of the Amendment or as a result of a public procurement tender procedure commenced prior to that date.

The issue of non-substantial changes is not the only one to give rise to doubts. Deciding what change can be considered non-substantial is another ambiguous question. The previous legal order, which governs “interim contracts”, does not include the definitions of substantial or non-substantial changes. Accordingly, when assessing the significance of the change, one should rely on judicial decisions and take into account the opinion issued by the head of the Public Procurement Office entitled “Change of a public procurement contract in connection with the stat-

tutory change of the value added tax rate (VAT)”. The opinion contains relevant guidance as to the interpretation of the significance of the change.

The Amendment introduces numerous changes in Article 144 of the PPL, which concerns the prohibition of substantial contractual changes, e.g. it introduces Article 144.1e stating what changes to the contract or framework contract are considered to be substantial. Pursuant to this article, a change is deemed substantial if, among others, it modifies the general character of the contract when compared to the nature of the original contract. The provisions of the PPL do not preclude that, after the conclusion of the bid selection process and before concluding the public procurement contract, the contracting authority changes the provisions of the contract to an extent that is deemed non-substantial or which was previously provided for in the public procurement notice or the terms of reference provided that the future contractor agrees to such a change. Therefore, it is possible to effect a contractual change involving reduction of the fee payable to a contractor whose bid was selected as the most competitive provided that both parties agree to the change. Pursuant to Article 144.1e of the PPL, reduction of the contractor’s fees is not a clearly substantial change of the contract.

Provisions constituting prohibition of changes to public procurement contracts, both in the previous legal situation and in the current legal regime, do not clearly state what contractual changes are allowed. Article 144 of the PPL in force defines what should be considered a substantial change, but it also contains a number of imprecise notions. Therefore, it is still hard to unequivocally determine that a given change is non-substantial and, consequently, that it is allowed.

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