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Conducting the Proceeding for the Award of a Public Contract for the Purposes of Administrative Procedure in View of the Significance of the (New) Principle of Efficiency in the Public Procurement Law

Prowadzenie postępowania o udzielenie zamówienia publicznego na potrzeby postępowania administracyjnego z uwzględnieniem znaczenia (nowej) zasady efektywności na gruncie Prawa zamówień publicznych

ABSTRACT

The article discusses in a scientific manner the effect of the procurement procedure and the correct application of its efficiency principle on the administrative procedure, for which it may be necessary to pre-select an entity to perform the activities necessary for the administrative procedure. The paper points to the need to explore the relationship between these areas of law. The text analyses the effect of the principle of efficiency introduced by the new Public Procurement Law on the conduct of public procurement procedures and, consequently, on the conduct of the administrative procedure in which the object of a contract awarded in a properly conducted proceeding is used. The article also discusses the appropriateness of legislative amendments to the application of the Public Procurement Law during administrative proceedings, presenting a number of proposals in this area.

Keywords: administrative procedure; public procurement; efficiency principle

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INTRODUCTION

According to the generally approved interpretation, the Public Procurement Law[1] is a tool to prevent public funds from their improper or unreasonable spending,[2] which was also stressed with regard to the previously applicable PPL.[3] As held by most scholars in the field, this act is of a civil-law character,[4] but the positions of those who point to the administrative specificity of this law are also noticeable.[5]

However, apart from the above-mentioned diverging opinions in the perception of the aforementioned law, the mutual correlations between individual legal acts, or even legal areas, should also be analysed. Issues relating to the interdependency of the norms of the PPL and the Administrative Procedure Code[6] are only subject to selective analysis and references, while it seems necessary to consider the relationship between the implementation of the administrative procedure and the need to conduct a public procurement proceeding. Therefore, this article aims to examine and discuss the situation in which, for the purposes of the administrative procedure, it will be necessary to conduct a prior proceeding for the award of a public contract, with particular attention paid to the importance of the principle of efficiency introduced into the legal system under the current PPL, i.e. from 2021.[7] It should be proposed that the principle of efficiency introduces a new quality in the proceedings for the award of a public contract, which, if carried out for the purposes of the administrative procedure, has a positive effect on the outcome of the action taken by the public

[1] Act of 11 September 2019 – Public Procurement Law (consolidated text, Journal of Laws 2024, item 1320, as amended), hereinafter: PPL.

[2] M. Stachowiak, *Art. 1*, [in:] W. Dzierżanowski, Ł. Jaźwiński, J. Jerzykowski, M. Kittel, M. Stachowiak, *Prawo zamówień publicznych. Komentarz*, Warszawa 2021, pp. 41–43.

[3] Act of 29 January 2004 – Public Procurement Law (not applicable; consolidated text, Journal Laws 2019, item 1843). See J. Pokrzywniak, J. Baehr, T. Kwieciński, *Wprowadzenie do systemu zamówień publicznych*, Warszawa 2006, p. 6 ff.

[4] S. Babiarz, Z. Czarnik, P. Janda, P. Pełczyński (eds.), *Prawo zamówień publicznych Komentarz*, Warszawa 2013, p. 21 ff.; R. Szostak, *Zastępstwo inwestycyjne. Część pierwsza*, "Zamówienia Publiczne. Doradca" 2011, no. 3; M. Płużański, *Prawo zamówień publicznych. Komentarz*, Warszawa 2007, p. 150; A. Fermus-Bobowiec, *Umowa w sprawie zamówienia publicznego jako szczególna umowa cywilnoprawna*, "Radca Prawny" 2012, no. 131, p. 8.

[5] For example, see J. Niczyporuk, *Przedmiot zamówień publicznych*, [in:] *System zamówień publicznych w Polsce*, ed. J. Sadowy, Warszawa 2013, pp. 78–80; Z. Gordon, *Charakter prawny postępowania o udzielenie zamówienia publicznego*, "Prawo Zamówień Publicznych" 2012, no. 3, p. 39; K. Horubski, *Publicyzacja prawa prywatnego w obszarze prawa zamówień publicznych*, "Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu" 2018, no. 540, p. 79 ff.

[6] Act of 14 June 1960 – Administrative Procedure Code (consolidated text, Journal of Laws 2024, item 572, as amended), hereinafter: APC.

[7] Article 1 of the Act of 11 September 2019 – Introductory Provisions to Public Procurement Law (Journal of Laws 2019, item 2020, as amended).

authority.[8] This issue is all the more interesting as there are separate rules governing each of the two proceedings in question. In order to comprehensively present the analysis of applicable norms, the legal and dogmatic method was used in the article.

THE ESSENCE OF THE ADMINISTRATIVE PROCEDURE AND THE NEEDS OF THE BODIES

First of all, it should be emphasized that for the sake of the discussion herein, administrative proceedings should be understood as jurisdictional administrative proceedings,[9] which have been primarily regulated in the APC,[10] which can be considered its main feature. The scope of application of the norms of this legal act has been defined by the legislature both positively and by indicating the procedures excluded from this regulation.[11] It should be mentioned that the scope of jurisdictional administrative proceedings covers relations between specific entities and state bodies.[12] The purpose of these proceedings is a binding and final determination of the consequences or rights resulting from the norms of substantive law for an individually specified addressee.[13] At the same time, the authority is required to determine and understand

[8] See Article 5 § 2 (3) APC: "Whenever the provisions of the Administrative Procedure Code refer to public administration bodies, these are understood as ministers, central bodies of government administration, voivodeship governors, other local bodies of the central-government administration (integrated and non-integrated) acting on these bodies or on their own behalf, bodies of local self-government units and bodies and entities listed in Article 1 (2) APC".

[9] For the sake of systematisation, it is worth recalling that the jurisdictional proceedings are intended to establish a specific right or obligation of a substantive nature in relation to a specifically designated addressee by means of an external administrative act (in particular an administrative decision). It should also be emphasized that the following categories of this procedure are distinguished: general jurisdictional proceedings – concerning the issuance of administrative decisions; special jurisdictional proceedings – also aimed at issuing an administrative decision, but in whole or in large part regulated outside the APC; jurisdictional proceedings ending with a tacit settlement of the case – its effect is the so-called implicit administrative act fully taking into account the party's request. For more details, see W. Federczyk, M. Klimaszewski, W. Majchrzak, *Postępowanie administracyjne*, Warszawa 2018, p. 3 ff. As regards non-jurisdictional proceedings, see e.g. A. Matan (ed.), *System Prawa Administracyjnego Procesowego*, vol. 4: *Postępowania autonomiczne i szczególne. Postępowania niejurysdykcyjne*, Warszawa 2021, p. 919 ff.

[10] K. Klonowski, *Art. 1*, [in:] *Kodeks postępowania administracyjnego. Komentarz*, ed. H. Knysiak-Sudyka, Warszawa 2023. It should be noted, citing K. Klonowski, that the provisions of administrative procedure are characterized by a kind of dispersion across many legislative acts, which is determined by the multiplicity of substantive law provisions and, consequently, the multiplicity of special norms.

[11] P.M. Przybysz, *Art. 1*, [in:] *Kodeks postępowania administracyjnego. Komentarz aktualizowany*, LEX/el. 2024.

[12] B. Adamiak, *Refleksje na temat dopuszczalności postępowania administracyjnego*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2015, no. 5, pp. 9–25.

[13] P.M. Przybysz, *op. cit*.

the content of the party's request as precisely as possible.[14] Therefore, the authority should verify the intentions of the applicant (usually a party to the proceedings), without being guided by the title, form of the document or even its literal wording.[15] It should be noted that the two main features of the proceedings in question are: their conduct is entrusted to a competent public administration body and the each administrative procedure is linked to a specific individual case.[16]

Settlement of the case under administrative procedure, as a rule, should take the form of a decision,[17] the party may appeal against (where it does not accept the applicant's claim), and in the event of further dissatisfaction with the decision, the possibility of referring the case to administrative judicial proceedings[18] to review the correctness of administrative proceedings and verify the correctness of the resolutions made therein.[19]

The features of administrative procedure are closely related to the functions attributed to it. Although they relate to individual cases, it is intended to balance the interest of a specific person (a party to the proceedings) and the public (social) interest.[20] That social aspect also determines another function of the procedure, which is to ensure the general organizational order and efficient operation of the state apparatus,[21] the predictability of which is to determine positive social attitudes towards the

[14] Article 9 APC.

[15] Judgment of the Vovivodeship Administrative Court in Szczecin of 12 September 2018, I SA/Sz 480/18, LEX no. 2548078.

[16] K.M. Ziemski, *Indywidualny akt administracyjny jako forma prawna działania administracji*, Poznań 2005, p. 513.

[17] Article 104 § 1 APC. Although it should be pointed out, following the Supreme Administrative Court, that "the issuance of a settlement on the matter, which was mistakenly called a decision, does not mean that we are dealing with a decision. The same will be the case in the case of a decision – giving a wrong name to a settlement does not change its legal nature". See judgment of the Supreme Administrative Court of 5 November 2021, I OSK 902/21, LEX no. 3284307.

[18] Act of 30 August 2002 – Law on proceedings before administrative courts (consolidated text, Journal of Laws 2024, item 935, as amended), hereinafter: LPAC.

[19] Of course, the provisions of the APC and the LPAC clearly delimit the formal framework within which a party dissatisfied with the decision of the authority should act. Nevertheless, it should be emphasized that it is possible to request several verifications of the correctness of the conduct of the proceedings and the decision taken in the first instance. For example, see judgment of the Supreme Administrative Court of 6 May 2022, I OSK 2131/21, LEX no. 3341278.

[20] For example, see judgment of the Supreme Administrative Court of 18 November 1993, III ARN 49/93, OSNCP 1994, no. 9, item 181: "(…) in any case, the authority is required to indicate the general (public) interest involved and to prove that it is so important and significant that it necessarily requires a restriction on the rights of individual citizens. Both the existence of such an interest and its significance, as well as the conditions for the need to put the public interest before the individual interest in a particular case, must always be subject to thorough instance and judicial review".

[21] As D. Gregorczyk (*O rozstrzyganiu wątpliwości prawnych na korzyść strony w postępowaniu administracyjnym*, "Państwo i Prawo" 2019, no. 8) rightly states, the protection of the interests of other parties, and even more so of third parties, should be limited to legitimate interests, which is

public administration.[22] The procedure is also to ensure the implementation of the provisions of substantive law. Therefore, it can be concluded that the main purpose of administrative proceedings is to execute and implement the norms of substantive law and to protect individual rights and freedoms in case of their violation by the state.[23]

Scholars in the field point to the definition of public administration body as the key to interpreting the provisions of the APC. According to it, "any entity that performs in a sovereign manner the tasks in the field of public administration consisting in resolving individual cases by way of administrative decisions or tacitly" should be considered such a body.[24] A body thus understood is competent to conduct administrative proceedings. It is worth noting in this context that not every State body is a public administration body according to the APC. For example, the President of the Republic of Poland is not such a body,[25] and neither is the National Bank of Poland.[26]

The issuance of an administrative decision is each time preceded by a series of legal and factual acts that the authority is obliged to perform in order to properly conduct the administrative procedure.[27] Material-technical activities should be particularly stressed here, as they are not undertaken in the internal sphere only – in the context of organizing the operation of the public administration, but also in terms of effects caused in the sphere of rights and obligations of entities not subordinated to the public administration.[28] It should be noted that the bodies may use, and in certain situations are even required to, the tools of verification of expertise or carry out professional activities necessary to complete the proceedings.[29] At this point, it may be necessary to use an expert opinion.[30]

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lacking in Article 7a APC and which is in axiological contradiction with Article 7 APC. It cannot be the case that any actual interest, including an unjust or unlawful interest, will be able to deprive a party of the benefits under Article 7a APC.

[22] See Z.R. Kmiecik, M. Grzeszczuk, E. Streit-Browarna, *Klauzula generalna interesu społecznego w postępowaniu administracyjnym, sądowoadministracyjnym oraz egzekucyjnym w administracji*, "Annales UMCS sectio G (Ius)" 2016, vol. 63(2), pp. 210–221.

[23] A. Wróbel, *Art. 1*, [in:] M. Jaśkowska, M. Wilbrandt-Gotowicz, A. Wróbel, *Komentarz aktualizowany do Kodeksu postępowania administracyjnego*, LEX/el. 2025.

[24] P.M. Przybysz, *op. cit*.

[25] Decision of the Supreme Administrative Court of 7 December 2017, I OSK 857/17.

[26] Decision of the Supreme Administrative Court of 19 June 2018, I OSK 1825/18.

[27] G. Łaszczyca, A. Matan (eds.), *System Prawa Administracyjnego Procesowego*, vol. 2, part 3: *Czynności procesowe w postępowaniu administracyjnym ogólnym*, Warszawa 2021, p. 185 ff.

[28] N. Szczęch, *Art. 49(a)*, [in:] *Kodeks postępowania administracyjnego. Komentarz do art. 1–60*, eds. M. Karpiuk, P. Krzykowski, A. Skóra, vol. 1, LEX/el. 2022; judgment of the Voivodeship Administrative Court in Szczecin of 28 March 2019, II SA/Kr 197/19, CBOSA.

[29] N.A. Urbańska, *Instytucja biegłego w administracyjnym postępowaniu dowodowym*, "Studia z Zakresu Prawa, Administracji i Zarządzania UKW w Bydgoszczy" 2016, no. 9, pp. 181–193.

[30] Article 84 APC.

IMPORTANCE OF THE PUBLIC PROCUREMENT LAW AND ITS APPLICATION

Entities perceived as bodies under the PPL from the point of view of the administrative procedure are generally considered to be contracting entities.[31] Of course, this will not be strictly related to the first role (and the resulting tasks), but in the context of the body's needs arising out during individual administrative procedures, it may be necessary to conduct a proceeding for the award of a public contract.

For the sake of completeness, it should be noted that the PPL was introduced to systematise the relationship between the entity that orders the service, supply or works concerned and the economic operator,[32] with an optimal use of public funds.[33] It should also be pointed out that, although the law currently in force has been in place since 2021, the previously effective legislation had the same purpose and objectives. Public procurement in general is one of the elements which shapes the economy of the State, as the State is a kind of a party in each of the proceedings.[34] Therefore, it is justified and even indispensable to have a legal act formalising the application of appropriate procedures for the disbursement of public funds.

The application of the provisions of the PPL is intended to guarantee economic operators that the offers are chosen in a clear and legible manner, while the contracting entity being protected by providing mechanisms for the purchase of goods and services at the lowest prices possible. In the context of the new PPL, the discussion on how to ensure a balance between the quality of the object of contract and its price – the choice of the most advantageous offer – remains particularly relevant.[35]

Public procurement is a kind of system, owing to which it is possible to verify and supervise contracts carried out for the State.[36] Moreover, the assumptions of this system allow for influencing and regulation of the State finances, which is undoubtedly an important element of the economy. The system also prevents the competent authorities from spending state funds in an arbitrary, hasty or unfair

[31] According to Article 7 (31) PPL, it should be understood as a natural person, legal person or an organisational entity without legal personality, obligated under the PPL to apply it.

[32] According to Article 7 (30) PPL, it should be understood as a natural person, a legal person or an organisational unit without legal personality who offers on the market the performance of works or construction of a structure, the supply of products or the provision of services, or has submitted an offer or concluded a public contract.

[33] M. Zaborowski, *Cel i funkcje zamówień publicznych*, "Optimum. Economic Studies" 2019, no. 3, p. 151 ff.

[34] A. Gawrońska-Baran, *Art. 4*, [in:] A. Gawrońska-Baran, E. Wiktorowska, P. Wójcik, A. Wiktorowski, *Prawo zamówień publicznych. Komentarz aktualizowany*, LEX/el. 2024.

[35] For example, see M. Kania, *Zasada efektywności w nowym Prawie zamówień publicznych*, "Kwartalnik PZP" 2020, no. 1, p. 3 ff.

[36] M. Stachowiak, *Art. 4*, [in:] W. Dzierżanowski, Ł. Jaźwiński, J. Jerzykowski, M. Kittel, M. Stachowiak, *op. cit*.

manner. A number of rules and procedures under which funds can be spent are designed to prevent abuse by authorised bodies.[37]

In view of the foregoing, the application of public procurement provisions and, above all, the regulation under the PPL are intended to prevent the misuse of public funds. The law is also intended to guarantee the competitiveness and equality for entities operating in the procurement market, that is to regulate the rules under which entities taking part in tendering will be aware of the criteria with which they will be assessed and the basis on which they will take part in the tender procedure.[38] This in turn is supposed to provide the opportunity to apply for the contract by the widest possible group, which in practice means all entities who meet the relevant conditions and guarantee the performance of the contract.[39] As a result, this principle focuses on non-discrimination, while still favouring economic operators who meet the criteria defined by the contracting entity in order to meet contracting entity's needs in the best possible way.[40]

One of crucial elements of the procurement procedure is also the principle of written documentation, because the guarantee of the correct award and performance of the contract is compliance with the written form, and this in turn gives the opportunity to verify the procedure in question from the point of view of compliance with the regulations, and provides the parties to the resulting contract with a solid basis for pursuing claims, e.g. related to the improper performance of the contract.[41]

The application of those rules is to ensure universal and equal access to public procurement. Public procurement is also important in terms of distributing certain financial resources to specific markets and thus shaping and influencing them. In this regard, the State also performs the function of a guarantor of the implementation of certain norms, which may either hinder the development or develop the market, which can be affected by, e.g., the State's purchasing policy.[42]

The PPL is also intended to ensure that funds are spent efficiently and reasonably. Although, from the perspective of the management of the entirety of funds of the State and its units, it should be pointed out that obligations in this respect are

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[37] K. Subocz, *Art. 5*, [in:] *Odpowiedzialność za naruszenie dyscypliny finansów publicznych. Komentarz*, ed. A. Kościńska-Paszkowska, Warszawa 2021, pp. 75–95.

[38] P. Granecki, I. Granecka (eds.), *Prawo zamówień publicznych. Komentarz*, Warszawa 2021, p. 104 ff.

[39] H. Nowak, M. Winiarz (eds.), *Prawo zamówień publicznych. Komentarz*, Warszawa 2021, pp. 151–154.

[40] J. Kola, *Kontekst modernizacji polskiego prawa zamówień publicznych*, [in:] *Nowe Prawo zamówień publicznych. Podręcznik dla małych i średnich przedsiębiorców*, ed. J. Kola, Warszawa 2020, pp. 11–15.

[41] M. Zaborowski, *op. cit.*, p. 156.

[42] H. Nowak, M. Winiarz (eds.), *op. cit.*, pp. 172–173.

regulated by the Public Finance Act,[43] and in this respect detailed guidelines and rules are also in force, thanks to which the spending of funds should be reasonable, purposeful and efficient.[44] This will be of particular importance in the case of contracts below the amount of PLN 130,000, in respect of which, as a rule, the contracting entities develop their own spending regulations.[45]

The PPL is not only about the proper spending, selection of an offer and tender procedures, but also a guarantee of timely performance of the contract.[46] The procedures defined under the PPL guarantee that not only the proceeding for the award of the contract, but also its implementation, will take place within the time frame specified by the contracting entity, and on the other hand, the economic operator has a guarantee of cooperation with an entity (contracting entity) that will also meet the specified deadlines, also with regard to payment of the consideration, for which it must secure funds yet before the announcement of the intention to award a public contract.[47]

In order to show the place of PPL in the legal system, reference should be made to the definition of contract adopted in that legal act. It is usually pointed out that the term in question should be understood as any paid agreement concluded between a contracting entity and an economic operator, covering the purchase by the contracting entity of works, supplies or services from the selected operator.[48] As already mentioned, the key legal act from the perspective of spending public funds is the Public Finance Act. In practice, however, the rules or procedures provided for under the PPL are used or adapted for the purposes of proceedings in which the application of the PPL is not obligatory due to the lower value of the contract.[49]

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[43] Act of 27 August 2009 on public finance (consolidated text, Journal of Laws 2024, item 1530, as amended).

[44] M. Cilak, *Art. 44*, [in:] *Ustawa o finansach publicznych. Komentarz*, ed. Z. Ofiarski, LEX/el. 2021.

[45] M. Gabryel, *Zakres spraw regulowanych pzp*, [in:] *Prawo zamówień publicznych po 1 stycznia 2021 – poradnik praktyczny*, ed. M. Filipek, Warszawa 2021, p. 18.

[46] For more details on the time limits in the PPL, see M. Jaworska, *Art. 8*, [in:] *Prawo zamówień publicznych. Komentarz*, ed. M. Jaworska, Legalis 2020.

[47] For example, see judgment of the Supreme Administrative Court of 19 December 2013, II GSK 25/13, LEX no. 1530500. It follows from the wording of Article 46 (1) in conjunction with Article 44 (1) (2) to (3) of the Public Finance Act that a public finance sector entity is prohibited from assuming commitments in excess of the financial capabilities resulting in a given year from the budget adopted for the voivodeship (province), the implementation of which is entrusted to its budgetary units. At the same time, it must be pointed out that the budget may be subject to changes, because the possibility of making changes to the budget is an expression of the financial autonomy of the voivodeship.

[48] Article 7 (32) PPL.

[49] Resolution of the National Appeals Chamber of 12 July 2018, KIO/KD 28/18.

SIGNIFICANCE OF EFFICIENCY UNDER THE PUBLIC PROCUREMENT LAW

The amendment to the PPL introduced many changes, and one of them was supplementing the procedural rules with the principle of economic efficiency. The legislature indicates that, in accordance with this principle, the contract should have the highest possible quality in relation to the price that the contracting entity may pay, and the best cost-benefit ratio. It is important for the contracting authority to take into account the newly introduced rule, in particular when determining the terms of the contract.[50]

This rule is of a general character and should accompany contracting entities in planning all proceedings. It was introduced with the aim of a systematic change in the philosophy of proceedings conducted in Poland. Previously, these proceedings were characterised by the selection of the cheapest products or services offered in tenders, which repeatedly led to incorrect performance as a result of the contract, due to the lack of actual evaluation of the offered items by the tenderer, or ignorance about the products or the specificity of the contract. The change introducing the principle of efficiency is to result in the selection of products that will balance the ratio of the quality and effects of the product to the proposed price. Economic efficiency is to ensure the quality of the product in relation to the contract, as well as the ratio of expenditure to effects, while distinguishing social, environmental and economic effects.[51]

The change in the Polish legislation in this area resulted from the necessity to implement EU regulations into the national legal system. It can be pointed out, based on Directive 2014/24/EU, that the selection of the tender is based on a cost-effectiveness approach, such as "life cycle costing" including the cost-price ratio and other relevant aspects.[52] Moreover, the provisions of the Directive entail the necessity to select an economic operator taking into account qualitative criteria based on three elements.[53] The first is to determine quality, in terms of technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions.[54] The second criterion to define the quality may be determined through organisation, qualification and experience of staff assigned to performing the con-

[50] Urząd Zamówień Publicznych, *Co oznacza nowa zasada efektywności w Pzp? (2020-11-19)*, https://www.gov.pl/web/uzp/co-oznacza-nowa-zasada-efektywnosci-w-pzp-2020-11-19 (access: 3.2.2025).

[51] A. Wiktorowski, *Art. 17*, [in:] A. Gawrońska-Baran, E. Wiktorowska, P. Wójcik, A. Wiktorowski, *op. cit*.

[52] Article 67 (2) Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94/65, 28.3.2014).

[53] Article 67 (2) of Directive 2014/24/EU.

[54] A. Wiktorowski, *op. cit*.

tract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract. The third quality criterion is assessed based on after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.[55] It is important for the contracting entity to specify in the terms of the contract how the contract will be assessed and what will be the priority in the evaluation. It is obvious that each contract and its evaluation differs as the contracting entities' needs and the methods of their evaluation also differ. However, the legislature assumed that the introduction of Article 17 § 1 PPL will strengthen and stabilise public spending.

The newly introduced principle can also be found in other provisions of the PPL, including the necessity to negotiate with economic operators by assessing the needs analysis in relation to the proposed price. According to the explanatory memorandum to the PPL, the principle in question was added as a response to new needs, especially to insufficient links between public spending and the implementation of the State's policies and strategic goals. The current problem, according to the previous legislation, is the choice of the cheapest option without taking into account its long-term efficiency.[56]

RELATIONSHIP BETWEEN THE ADMINISTRATIVE PROCEDURE CODE AND THE PUBLIC PROCUREMENT LAW

To discuss the relationship between the norms of the APC and the norms of the PPL, it is necessary to begin by addressing the discrepancies in the perception of the nature of the norms of the PPL as mentioned in the introduction. First of all, it should be noted that the provisions of the APC do not apply to civil and criminal matters. However, there is still a dispute among scholars in the field as to the nature of the norms and, consequently, the possibility of application of the provisions of the APC as auxiliary to the provisions of the PPL. Although advocates of administrative-law approach to PPL norms put forward a number of rational arguments,[57] the prevailing view is that PPL norms are of civil-law character.[58] The argument in this regard is based on the fact that the PPL itself makes reference to the rules of civil procedure[59]

[55] See Directive 2014/24/EU.

[56] The principle of efficiency in the proceedings for the award of a public contract and the analysis of needs and requirements.

[57] It is noted, e.g., that the PPL directly affects the functioning of the public sphere, which in consequence regulates administrative-law relations. For more details, see J. Niczyporuk, *op. cit.*, pp. 78–80.

[58] P.M. Przybysz, *op. cit*.

[59] For example, see Article 8 PPL or Article 465 (8) PPL.

and the definition of civil-law case in the broad sense.[60] However, that issue is not the basis for the discussion herein. It is crucial to verify the relationship that may exist between the administrative procedure and the public procurement procedure.

It should therefore be noted that, in view of the specific nature of public spending, the administrative proceeding may have to be preceded by a proceeding for the award of a public contract. The possibility of such a situation has been pointed out, as a side note, in the opinion of the Public Procurement Office[61] with regard to the application of the provisions of the PPL, still under the previous legal act governing this area.[62] However, this issue remains relevant, and in the context of the new approach to public procurement, especially due to the introduction of the principle of efficiency in the PPL, the relationship between these proceedings may be more significant.

Administrative proceedings, as already mentioned above, are conducted by competent bodies, but it may be necessary before or during conducting them to obtain special information that is not held by the body and without which it would be impossible to settle the case in a manner consistent with the APC, including in particular with the principles provided for in that act.

It should be noted that the rules of the APC provide that the body has the possibility to consult an expert witness or expert witnesses in order to obtain information within their expertise (particularly complex) for the purposes of administrative proceedings.[63] Scholars in the field point to the relatively laconic wording of the APC provisions on the rules for appointing an expert witness for the purposes of administrative procedure, which is surprising, especially since the principle is to pay related costs from the public budget.[64] In principle, there are two potential moments in which an expert witness may be appointed, which may affect the way in which an expert should be selected.

The first and most obvious situation, that is not subject to dispute among scholars in the field in the context of the applicable rules, is where the need to appoint an expert arises in the course of proceedings. It is then pointed out that the appointment of an expert does not imply the establishment of a civil-law relationship

[60] It is also perceived as a civil-law case an occurrence where an administrative act or ruling will cause civil-law effects. See decision of the Supreme Court of 22 August 2007, III CZP 76/07, LEX no. 345575; decision of the Supreme Court of 5 November 2009, I CSK 16/09, LEX no. 583720.

[61] Urząd Zamówień Publicznych, *Stosowanie ustawy Prawo zamówień publicznych a powołanie biegłego rzeczoznawcy majątkowego na potrzeby postępowania administracyjnego*, [in:] *Opinie prawne Urzędu Zamówień Publicznych dotyczące ustawy Prawo zamówień publicznych*, Warszawa 2015, p. 239 ff.

[62] Act of 29 January 2004 – Public Procurement Law (not applicable; consolidated text, Journal Laws 2019, item 1843).

[63] M. Bartnik, *Art. 84*, [in:] *Kodeks postępowania administracyjnego. Komentarz do art. 61–126*, eds. M. Karpiuk, P. Krzykowski, A. Skóra, vol. 2, LEX/el. 2020.

[64] M. Gdesz, P. Szustakiewicz, *Rzeczoznawca w przetargach: jest problem*, 5.11.2012, https://www.rp.pl/opinie-prawne/art13392921-rzeczoznawca-w-przetargach-jest-problem (access: 3.2.2025).

between the expert and the body, but rather an official act of a sovereign nature.[65] It consists essentially only of issuing a decision for the appointment of an expert, performance of the commissioned work by the expert and, consequently, the payment of the remuneration as requested by the expert. Although this is essentially not in line with the rules on the expenditure of public funds, it is accepted in the case law and scholarly opinion that this is a correct practice related to the nature of administrative proceedings. This approach is also approved when the cost of the expert opinion exceeds PLN 130,000. It is emphasized that the PPL regulates legal relations arising from civil-law contracts.[66] Furthermore, some scholars in the field indicate that the expert opinion does not fall within the objective scope of the PPL.[67] This primarily concerns the definition of services,[68] which, although open, must be juxtaposed with the content of the PPL related to contracts covered by the regulation. It should be noted, however, that from the perspective of legislative practice, the need to supplement this regulation[69] or its extending interpretation should not be perceived as an obstacle that prevents the application of the PPL.

Secondly, the need to invoke an expert opinion or to use several opinions for the purposes of identical proceedings may arise at the stage prior to the proceedings. In such a case, it is difficult to agree with the advocates of the view that the provisions of the APC should still apply here.[70] This is so because the lawmakers used in Article 84 § 1 APC in the wording as follows: "When special expertise is required in a case, the public administration body may ask an expert or experts for an opinion". It should be noted at this point that in the case of the selection of an expert at the pre-proceedings stage, it is not possible to speak of an administrative case, since according to scholarly opinion and case law and in the context of jurisdictional administrative proceedings the case starts from the moment the first procedural actions are taken in relation to a specific addressee (i.e. the initiation of such proceedings).[71] In such a situation, an expert is indeed selected for the purposes of administrative proceedings, but not within the framework of such proceedings (without reference to a specific administrative case) and, consequently, without the possibility of applying the procedure provided for in the APC in relation to the

[65] Urząd Zamówień Publicznych, *op. cit.*, p. 239.

[66] Judgment of the Voivodeship Administrative Court in Warsaw of 14 December 2005, III SA/Wa 2812/05, LEX no. 237111.

[67] M. Gdesz, P. Szustakiewicz, *op. cit.*, p. 6.

[68] A legal opinion cannot certainly be considered as a supply or work.

[69] It does not list the expert opinion.

[70] Urząd Zamówień Publicznych, *op. cit.*, p. 239.

[71] See T. Kiełkowski, *Przedmiot postępowania administracyjnego – sprawa administracyjna*, [in:] *System Prawa Administracyjnego Procesowego*, vol. 2, part 1: *Zakres przedmiotowy i podmiotowy postepowania administracyjnego ogólnego*, ed. W. Chróścielewski, Warszawa 2018, pp. 23–101; judgment of the Supreme Administrative Court of 19 January 2017, I FSK 925/15, LEX no. 2258580.

appointment of expert witnesses. This should mean that if the contracting entity has the possibility to predict and estimate the scope of expert services it will need in a specific year, it should carry out the procedure on the basis of the provisions of the PPL if their cost exceeds PLN 130,000, and if the value of such a contract does not exceed the aforementioned amount, the procurement proceedings should be carried out based on the internal procurement procedures.[72]

Essentially, it could be concluded that in most administrative proceedings, during which the use of special expertise will be necessary, the selection of an expert witness will not be made using the provisions of the PPL, but in accordance with Article 84 § 1 APC (although in this case the authority will be obliged to comply with the discipline of public finance and, in the alternative, may apply the provisions of the PPL). However, if before the commencement of such proceedings it is known that it will be necessary to obtain an expert's opinion – one or a series of identical ones with the value exceeding PLN 130,000, the authority is obliged to conduct a relevant public procurement procedure in accordance with the provisions of the PPL. However, the question remains open whether the provisions of the PPL must be applied when, during the administrative procedure, it turns out that it is necessary to obtain an expert's opinion whose value exceeds PLN 130,000. It seems that from the perspective of the literal wording of the APC, the authority, despite exceeding this amount, generally does not have to apply the APC regulations to commission such an opinion.

Referring to the first of the discussed situations, it should be noted that the argument that the relationship created in the course of the administrative procedure is not of a civil-law nature seems to be insufficient.[73] Although, in fact, from the perspective of the objective scope of the PPL, it is currently difficult to classify an expert opinion as works or services[74] (taking into account the definitions contained in the PPL and secondary legislation), nevertheless, from a functional perspective, it is necessary to postulate that a regulation should be introduced that allows classifying the commissioning of an expert opinion under the APC as services from the perspective of the PPL.

Moreover, it should be emphasized that the PPL is a guarantee of reasonable spending of funds on contracts of considerable value, and it would therefore be unreasonable to abandon the mechanism to safeguard the interests of the contracting entity and public finance. The current public procurement procedure appears to be a relatively streamlined solution, and its effectiveness is positively influenced by the principle of efficiency introduced. Therefore, it seems reasonable to postulate adopting a regulation to resolve doubts in the area of the obligation to apply the PPL

[72] Urząd Zamówień Publicznych, *op. cit.*, p. 239 ff.
[73] *Ibidem*, p. 240.
[74] M. Gdesz, P. Szustakiewicz, *op. cit.*, p. 6.

in relation to the use of expert assistance (in particular during such proceedings) where the value of such an opinion exceeds PLN 130,000. This should be stated all the more that the legislature's intention was undoubtedly to streamline the administrative procedure and to limit its duration to the minimum as necessary, but it can be presumed that the use of expert services of a value exceeding the threshold set out in the PPL was not envisaged at the stage of adopting the regulation and that the risk of irregularities in the spending of public funds in this respect supports the need to impose an obligation to award such contracts under the PPL provisions.

CONCLUSIONS

The above discussion confirms that, apart from the similarities in the regulation of individual issues[75] and the legal situation of the entity spending public funds – a body or contracting entity, there may undoubtedly be functional relationships between the administrative procedure and the public procurement procedure. Under the currently applicable PPL, in the context of the efficiency of administrative proceedings for the purposes of which a contract may be awarded, it will be particularly influenced by the new principle of efficiency. This is so because for contracting entities it constitutes in many respects a framework to streamline the proceedings, undoubtedly having a positive effect on the achievement of the goal that needs to be satisfied by the procedure in question. In the discussed situation, this in turn means a significant and positive impact of the new principle of efficiency (if adhered to) on the possibility of efficient and effective conduct of administrative proceedings, which, together with the need to secure public finance against improper spending, convinces to introduce an unambiguous regulation requiring the selection of an expert in the course of administrative proceedings (and, if foreseeable, before initiating them) under the procedures provided for in the PPL when the value of such a service exceeds PLN 130,000.

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ABSTRAKT

W artykule omówiono wpływ postępowania o udzielenie zamówienia publicznego i prawidłowego stosowania funkcjonującej na jego gruncie zasady efektywności na postępowanie administracyjne, na potrzeby którego konieczne może okazać się uprzednie dokonanie wyboru wykonawcy czynności niezbędnych w ramach postępowania administracyjnego. Zwrócono uwagę na potrzebę zgłębienia zależności pomiędzy tymi dziedzinami prawa. Podjęto też analizę oddziaływania wprowadzonej na gruncie nowej ustawy Prawo zamówień publicznych zasady efektywności na sposób prowadzenia postępowań o udzielenie zamówienia publicznego, a w konsekwencji także na sposób prowadzenia postępowania administracyjnego, w ramach którego wykorzystywany jest przedmiot zamówienia udzielonego w poprawnie prowadzonym postępowaniu. W artykule przeanalizowano również zasadność wprowadzania zmian legislacyjnych w zakresie stosowania ustawy Prawo zamówień publicznych w toku postępowania administracyjnego oraz przedstawiono szereg propozycji w tym zakresie.

Słowa kluczowe: postępowanie administracyjne; zamówienia publiczne; zasada efektywności

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