

Defence & Security Procurement

Contributing editor
Matthew L Haws



2018

GETTING THE
DEAL THROUGH 

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Matthew L Haws
Jenner & Block LLP

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Preface

Defence & Security Procurement 2018

Second edition

Getting the Deal Through is delighted to publish the second edition of *Defence & Security Procurement*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Canada.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to Matthew L Haws of Jenner & Block LLP, the contributing editor, for his assistance in devising and editing this volume.

GETTING THE
DEAL THROUGH 

London
February 2018

Poland

Maciej Zalewski and Maciej Szymański

White & Case

Legal framework

1 What statutes or regulations govern procurement of defence and security articles?

The procurement of defence and security articles in Poland is based on the following:

- the Polish Public Procurement Law (PPL);
- the Minister of National Defence (MoD) Decision No. 367/MON of 14 September 2015 on the rules and mode of granting contracts at the MoD regarding essential security interests of the state (Decision 367); and
- other specific rules if enacted by the MoD for a particular procurement.

Other regulations may impose additional rules on the procurement of defence and security articles. This includes offset obligations regulated by the Act on Certain Agreements Concluded in Connection with Contracts Essential for National Security (the Offset Act) (see question 26). In addition, the preparation of the procurement procedure by the MoD and the respective life cycle stages of the product are governed by Decision No. 141/MON of 5 July 2017 on the system of acquisition, operation and decommissioning of military equipment of the Armed Forces of the Republic of Poland, which applies primarily to the internal actions of the MoD.

The PPL regulations governing procurements in general, including procurement of defence and security articles, were brought in line with the principles of EU law in the field of military procurements set out by Directive 2009/81/EC of 13 July 2009.

Procurements are subject to the PPL and in particular its Chapter 4a ('Procurement in the area of defence and security') unless a given procurement is exempt from the PPL on the basis of its provisions. The principal exemption refers to article 346 of the Treaty on the Functioning of the European Union (the Treaty), based on which a procurement may be exempted if necessary to preserve an essential security interest of the state. If a procurement is exempt, lower level regulations issued internally by the MoD will apply, in particular Decision 367.

Government-to-government procurements of defence and security articles are exempt from both the PPL and Decision 367. There is no uniform framework for negotiating such agreements.

2 How are defence and security procurements identified as such and are they treated differently from civil procurements?

Pursuant to the PPL, procurement in the area of defence and security covers the supply of military and sensitive equipment, including any parts, components or sub-assemblies thereof, works, supplies and services directly related thereto. 'Military equipment' is defined as 'special equipment designed and adapted for military purposes and intended to be used as arms, munitions or war material', while 'sensitive equipment' means 'safety equipment that is associated with the use of confidential information, requires its use or contains confidential information'.

Procurement of 'military equipment' and 'sensitive equipment' will, by default, be subject to Chapter 4a of the PPL, unless the procurement is exempt from the PPL. The most common exemption is due to the operation of article 346 of the Treaty, pursuant to which a contract

concerning the production of, or trade in, arms, munitions or war material may be exempt 'if this is required for the protection of an essential security interest of the state and the award of a contract without observance of the PPL will not adversely affect the conditions of competition in the internal market regarding products that are not intended for specifically military purposes'. In such case, the contracting entity can apply Decision 367.

Both Chapter 4a of the PPL and Decision 367 impose different rules than are applicable to civil procurements based on the standard PPL procedures. In particular, Chapter 4a of the PPL offers:

- a narrower selection of modes of procedure available to contracting entities;
- a wider range of circumstances mandating exclusion of contractors from the proceedings;
- formal requirements related to the protection of classified information;
- a wider scope of rights of the contracting entity concerning subcontractors;
- more flexibility for the contracting entity concerning termination of proceedings, rejection of offers and so on; and
- modified rules concerning advance payments.

Decision 367 goes even further than Chapter 4a of the PPL in narrowing the available modes of procurement, offering only procurement through negotiations with one or several suppliers. Moreover, it does not provide for the ability of the contractors to appeal the decisions of the contracting entity to the specialised National Appeals Chamber. Instead, contractors can only file claims to civil courts of general jurisdiction, which are more time-consuming and more expensive. Therefore, there are far fewer cases filed in court in relation to disputes arising out of defence procurements.

3 How are defence and security procurements typically conducted?

The defence and security procurements are typically performed on behalf of the MoD by the Armament Inspectorate.

More standardised and less sensitive procurements are conducted under Chapter 4a of the PPL, while the proceedings aimed at securing the essential security interests of the state are typically conducted on the basis of Decision 367. Alternatively, such procurements can take the form of international inter-ministerial agreements or even be based on an individual decision of the MoD.

The PPL does not apply to procurements of supplies or services below the threshold of €418,000. In regular circumstances, defence procurements above that value can take the following forms (within the discretion of the contracting entity):

- restricted procedure; or
- negotiated procedure with the publication of a contract notice.

In both of these generally available modes, the proceedings start with a contract notice. In the restricted procedure, contractors submit an application for access to the proceedings and the contracting entity invites a specific number of entities to submit offers, while the number and the selection criteria are specified in the contract notice (preselection). In the negotiated procedure, following the preselection and admission to participate in the proceedings, contractors are invited to

submit their initial offers followed by negotiations. Following the negotiations, the requirements can be made more specific or supplemented. Subsequently, contractors are invited to submit their final offers.

In certain cases, enumerated in the PPL, the contracting entity may also award a contract through a competitive dialogue (not to be confused with the technical dialogue that is a preparatory stage preceding the procurement procedure), negotiated procedure without the publication of a contract notice, a single-source procurement procedure or through an electronic auction.

For procurements exempt from the PPL and conducted on the basis of Decision 367, the procedure can take the shape of negotiations with one or several suppliers. If a closed catalogue of suppliers cannot be ascertained, the MoD publishes a contract notice based on which it creates a list of entities and conducts negotiations.

4 Are there significant proposals pending to change the defence and security procurement process?

As reported by the Ministry of Development and the Public Procurement Office, in the first half of 2018 a new public procurement law is planned to be adopted. Although the draft of the act has not been published yet, the assumptions that guide the works focus on the introduction of mechanisms to better prepare and monitor the proceedings, including electronic solutions, to verify the potential of contractors, encourage the use of innovative solutions and increase the share of small and medium-sized companies in the awarded contracts. The impact of the new public procurement law on defence and security procurement process should be monitored.

The criterion of the most economically advantageous offer, which is to be implemented in accordance with EU directives, is aimed at enabling the contracting entity to place greater emphasis on quality, environmental conditions and innovations, taking into account not only the price, but also the life cycle costs of the product.

5 Are there different or additional procurement rules for information technology versus non-IT goods and services?

There are no different or specific procurement rules regarding information technology. However, the MoD did adopt Decision 349 of 20 September 2011 setting forth certain requirements for technical documentation, including software, supplied by contractors to the MoD. In addition, there are provisions of the Act on Copyright and Related Rights of 4 February 1994 that apply to licence agreements, which are a typical way that the MoD obtains rights to information technology, rather than by transfer of ownership, unless the newly developed IP is financed by the MoD.

The MoD uses both competitive and non-competitive procurement procedures to purchase IT. However, for complex IT systems negotiations are the most appropriate, as they enable broader cooperation between the parties.

6 Are most defence and security procurements conducted in accordance with the GPA or other treaty-based procurement rules, or does this jurisdiction commonly use the national security exemption to procure them?

Polish procurement law is a result of the harmonisation process within the European Union. The GPA and the EU directives, on which the national legislation in this area is to a large extent based, are coordinated, since the EU and the member states of the EU are all members of the World Trade Organization.

The 2014 version of the GPA is in line with the relevant EU directives and is consequently already reflected in the Polish PPL. The national security exemption was introduced in the PPL and is mainly expressed in Decision 367.

Disputes and risk allocation

7 How are disputes between the government and defence contractor resolved?

Disputes stemming from proceedings based on the PPL are resolved by the National Appeals Chamber, a state entity (quasi-court) that specialises in such disputes. The PPL contains specific remedies that provide legal protection to contractors if they have or had an interest in being awarded a contract and suffered or may suffer damage as a result of violation of the PPL. Contractors can appeal actions that are not compliant

with the PPL performed by the contracting entity in the course of the contract award procedure or the contracting entity's failure to act while being bound to perform under the PPL. The ruling issued by the National Appeals Chamber may be appealed to the regional court competent for the seat of the contracting entity. The validity of a contract can be questioned based on the relevant provisions of the PPL, as well as on the basis of the general provisions of the Polish Civil Code.

In the procurement proceedings conducted on the basis of exemption from the PPL, mostly governed by Decision 367, disputes related to the procurement process are resolved by courts of general jurisdiction. At the stage of contract performance, disputes are typically subject to resolution by the court of general jurisdiction competent for the seat of a contracting entity. In practice, only offset contracts (separately described below) can contain an arbitration clause.

8 To what extent is alternative dispute resolution used to resolve conflicts? What is typical for this jurisdiction?

Mandatory resolution of disputes related to the procurement process under the PPL by the National Appeals Chamber is often considered to be a form of alternative dispute resolution, although the Chamber is a state body formed under the statutory provisions of the PPL. At the stage of contract performance, the parties may confer disputes to arbitration. However, the MoD usually does not agree to include arbitration clauses in contracts.

The manner of resolving disputes between the prime contractor and a subcontractor is entirely within the discretion of the parties and can involve ADR within the boundaries of applicable law.

9 What limits exist on the government's ability to indemnify the contractor in this jurisdiction and must the contractor indemnify the government in a defence procurement?

The procurement regulations do not modify the general rules of Polish civil law governing contractual liability, pursuant to which (under article 471 of the Polish Civil Code) the contractor bears contractual liability if all of the following elements are in place:

- it fails to perform or improperly performs the contract;
- the contracting entity suffers damage;
- the damage suffered constitutes a normal (typical) consequence of the contractor's conduct; and
- the failure to perform or improper performance of the obligation results from circumstances within the contractor's control (is attributable to its fault).

The procurement regulations also do not modify general tort liability. Pursuant to article 415 of the Polish Civil Code, whoever through his or her own fault causes damage to another person is obliged to redress it.

In practice, it is very common for the contracting entity to require contractors to show proof of civil liability insurance.

10 Can the government agree to limit the contractor's liability under the contract? Are there limits to the contractor's potential recovery against the government for breach?

In the absence of a different provision of statutory law or provision in the contract, the redress of damage covers the losses as well as the benefits that could have been obtained but for the action or inaction causing the damage. The amount of compensation may not be in excess of the damage suffered (no punitive damages).

The general rules governing liability (both contractual and in tort) may be modified by a statute or contract. However, contractual modifications are often subject to certain limitations (eg, the tortious liability of the possessor of a mechanical vehicle, liability for the operation of an enterprise by the person running such enterprise or liability for damage caused by intentional fault).

Therefore, as a matter of law, contractor liability can be limited. Contracts typically include provisions on the payment of liquidated damages, which may either result in the elimination of further liability by the payment of an amount stipulated in advance in a contract or take the form of a non-liquidating contractual penalty. The latter form of liquidated damages does not eliminate liability in excess of the amount stipulated in the contract and is only possible when a contract explicitly allows damages to be claimed exceeding the amount of the contractually stipulated liquidated damages.

In practice, contractors are obliged to present a performance bond, which eases potential enforcement by the MoD.

There are no specific limits on the contracting entity's liability towards contractors. In general, contractors can claim recovery in the amount of damage suffered. However, considering that the principal obligation of the contracting entity is limited to payment of the agreed consideration, the damages would usually encompass such consideration (for performed deliveries or advances due) and applicable interest (if not contractually indicated, then statutory interest rates apply).

At the stage of procurement proceedings, it is common practice to require contractors to submit a bid bond, which is returned upon the selection of an offer or kept by the contracting entity if the contractor avoids the execution of the contract. If the contracting entity avoids the execution of the contract, the contractor may either ask for the return of double the amount of the security (ie, return of the bid bond and a lump sum of the amount of the bid bond) or damages.

11 Is there risk of non-payment when the government enters into a contract but does not ensure there are adequate funds to meet the contractual obligations?

The contracting entity needs to observe not only the procurement regulations, but also the Act on Public Finances, pursuant to which it can only undertake obligations that are within its budget. Moreover, the MoD conducts most of its major procurements in line with the Polish Armed Forces development programmes. These are financed from the state budget, as well as from a special Armed Forces modernisation fund.

A multi-year programme 'Priority Tasks of Technical Modernisation of the Polish Armed Forces within the Operational Programs', which was in force between 17 September 2013 and 1 November 2017 (the Programme), laid down the amounts set aside for the purchase of equipment within the 14 main operational programmes for the years 2014-2022 and limited the MoD's ability to shift funds between such operational programmes. After the cancellation of the Programme, the MoD gained greater flexibility in spending funds allocated for defence needs. Currently, the MoD operates under an updated Plan for Technical Modernisation of the Polish Armed Forces for the years 2017-2022 (the Plan), adopted in 2016 on the basis of the Act on Reconstruction, Technical Modernisation and Financing of the Polish Armed Forces of 2001 (Act on Modernisation). Under the Plan, the MoD is entitled to conclude multi-year contracts with flexible budgets, not strictly constrained by annual breakdowns.

Pursuant to the latest amendment of the Act on Modernisation, the GDP rate intended to cover expenditures related to the defence needs of the Republic of Poland is envisaged to systematically grow from the current 2 per cent to 2.5 per cent in 2030 and subsequent years (see 'Update and trends').

12 Under what circumstances must a contractor provide a parent guarantee?

There is no obligation to provide a parent guarantee. The contracting entity may require a security of performance of the contract and, for large contracts, it is customary. The procurement regulations contain a list of forms in which security of performance of the contract should be provided. These include primarily bank guarantees and insurance guarantees (performance bond).

For offset contracts, the submission of a performance bond is mandatory.

A parent guarantee may sometimes be accepted; usually together with another security instrument, however.

Defence procurement law fundamentals

13 Are there mandatory procurement clauses that must be included in a defence procurement contract or that will be read into the contract regardless of their actual inclusion?

There are numerous provisions of the PPL (for contracts subject to the PPL), as well as provisions of the Polish Civil Code (for all contracts) and other legal acts, that may be applicable and that will apply regardless of their inclusion in a defence procurement contract. Such provisions concern liability, warranty, rescission, subcontracting, payment, technical supervision and so on.

14 How are costs allocated between the contractor and government within a contract?

There is no allocation of costs. The consideration due to the contractor is indicated as a fixed price, so any costs that the contractor would like to have reimbursed would need to be included in the price.

15 What disclosures must the contractor make regarding its cost and pricing?

In large complex defence procurement contracts that comprise an entire system, the contractor may be required to fill out a spreadsheet indicating the elements of the price (often also the life cycle costs) broken down into elements of the system.

While typically the price is provided merely as a fixed amount, the Armament Inspectorate often reserves for itself the right to require more detailed information regarding cost and pricing where only one valid offer is submitted and the MoD wishes to obtain insight into the price calculation methodology to verify that the values are, in fact, market-based. Thus, the MoD often requests a cost calculation indicating, inter alia, the costs of materials, cooperation, purchase, warranty and so on. Additionally, the contractor may be requested to submit a representation on the mathematical method of calculating the values of individual cost components, resulting from the company's accounting policy.

16 How are audits of defence and security procurements conducted in this jurisdiction?

Audits of the Armament Inspectorate are conducted on a regular basis by internal audit and control units. Periodically, an audit is also performed by the Supreme Audit Office, from the perspective of general compliance with law and in particular with the Act on Public Finances.

At the stage of procurement proceedings, the process is monitored by the MoD's Office of Anti-corruption Procedures. Also, representatives of the counter-intelligence service serve on the tender commission.

As far as quality audits of the contractors are concerned, for foreign contractors from NATO countries the contract typically states that quality supervision should be performed by a government quality assurance representative from the contractor's country in accordance with the relevant AQAP requirements.

17 Who gets the ownership rights to intellectual property created during performance of the contract? What licences are typically given and how?

Defence procurement contracts mostly oblige the contractors to grant the contracting entity a licence. The items licensed are predominantly documents, including technical documents, or complete IT solutions. Typically, licences under defence procurement contracts are granted to the contracting entity on a non-exclusive basis. According to the MoD's understanding, a non-exclusive licence is one that is not limited to the contractually stipulated purpose of the licence. Such stipulation of the exclusive purpose of the licence would restrict its usage in the manner described in the contract.

Licences typically cover Polish territory and allow the use of the equipment outside Poland where the Armed Forces of the Republic of Poland may be deployed.

Moreover, licences usually authorise the contracting entity to grant further licences (sub-licences), but only to such entities in which the Polish State Treasury directly or indirectly holds all or a majority of shares in the share capital, or that are under the supervision of public authorities, such as the MoD. In order to be allowed under Polish law, a sub-licensing right has to be expressly stated in the contract.

Typically, the licences required in Polish defence procurements are irrevocable, granted for an indefinite period of time, and may not be terminated before the lapse of a specific period of time (not shorter than expected time of operation of the procured military equipment). In the absence of specific contractual provisions and if a licence is open-ended, the granter may terminate the agreement in accordance with the notice periods established therein, or if no notice periods have been established, with one year's notice as of the end of a calendar year.

The MoD seeks to ensure that it can use the rights in a manner enabling the full benefit of the foreground intellectual property (IP). Therefore, it is keen to obtain access to all applicable IPs (through

ownership or a licence), within the widest possible scope, with regard to the background IP.

For contracts encompassing development work financed by the MoD, the MoD will typically reserve for itself the ownership of the foreground IP and may agree to grant a reverse licence to the contractor.

18 Are there economic zones or other special programmes in this jurisdiction commonly utilised by foreign defence and security contractors for financial or other procurement related benefits?

There are no specific economic zones or programmes dedicated to defence contractors. However, some defence contractors take advantage of the benefits offered in general by state aid, special economic zones and other similar programmes and there are regions characterised by a large concentration of defence companies, research centres and educational and training facilities, cooperating in the form of industrial clusters (eg, the Aviation Valley Association in south-eastern Poland and the Military Aviation Upland in central Poland).

19 Describe the process for forming legal entities, including joint ventures, in this jurisdiction.

Taking up economic activity in Poland is more straightforward for persons from EU member states and European Free Trade Association countries (Iceland, Lichtenstein, Norway, and Switzerland). Residents of other countries have limited forms of legal entities that they can adopt in Poland, unless otherwise agreed in a relevant international agreement (eg, an agreement with the US, which eliminates such limitations for US persons).

It is typically not necessary to set up a Polish legal entity to perform deliveries to the MoD.

For persons from the EU and EFTA, the available legal forms include a limited liability company (minimum share capital is 5,000 zloty), a private corporation (minimum share capital is 100,000 zloty) and several forms of partnerships:

- general partnership;
- limited liability partnership;
- limited partnership; and
- limited joint-stock partnership.

The typical formation process includes execution of an agreement (usually in the presence of a notary), registration in court and for tax purposes.

Subject to the limitations related to the origin of a foreign entity mentioned above, business activity may also be conducted in the form of individual business activity, a civil partnership (under a contract) or a branch office of a foreign company.

There are no specific rules on forming joint ventures, which are subject to laws applicable to the chosen legal form (primarily a limited liability company and sometimes a private corporation). Sometimes the parties decide to form a partnership or resign from establishing a separate entity and conduct business based on various types of agreements, for example, cooperation agreements, consortium agreements and agreements on a common understanding.

20 Are there statutes or regulations enabling access to copies of government records? How does it work? Can one obtain versions of previous contracts?

Everyone (including foreign persons) has a right to access public information, namely, any information about public affairs that has not been classified. Polish authorities publish information in bulletins on their websites. Moreover, anyone can make an application to the relevant authorities to demand the disclosure of particular information. The contracting entity may only limit access to information related to the contract award procedure in specific cases, which encompass primarily classified information (at the levels of restricted, confidential, secret and top secret information) and information that is regarded as a business secret of the contractor, who is entitled to request that information of a technical, technological, organisational or other nature, which is of economic value, not be disclosed by the contracting entity.

Contract award procedures are public. In particular, protocols prepared by contracting entities (including appendices, such as offers and the executed contract) are, in principle, public. This means that they

will be disclosed (by electronic means or presented for personal inspection) upon application.

In proceedings conducted under Decision 367, considering their aim to secure essential security interests of the state, it is more common to classify the proceedings (usually at the lowest, 'restricted' level).

The Government Legislation Centre is working on a draft of the Act on Transparency in Public Life (Transparency Act), which is aimed at enhancing the transparency of the management of the Polish state and its assets. It is still unclear, however, whether the new transparency concept will also apply to matters within the field of defence and security.

21 What are the rules regarding eligible suppliers and supply chain management and anti-counterfeit parts for defence and security procurements?

Pursuant to the PPL, contracts in the fields of defence and security may be bid for by contractors established in one of the EU member states or the European Economic Area, or a state with which the EU or Poland entered into an international agreement concerning such contracts (eg, the US and the Republic of Korea). Moreover, the contracting entity may specify additional states. If the Armament Inspectorate has knowledge of contractors from such other states, it will include them in the contract notice (this concerns, among others, Israeli and Canadian contractors).

Decision 367 does not have limitations similar to those contained in the PPL. There are, however, examples of procurements where the Armament Inspectorate narrowed the scope of eligible entities to Polish contractors, who acted as prime contractors (integrators). In such cases, foreign entities are limited to act as subcontractors of a Polish entity. It seems that this may become a prevailing tendency in the MoD's procurement practice.

In defence and security procurements, the contracting entities may influence the organisation and management of the supply chain of the contractor. Under the PPL, despite general permission for contractors to use subcontractors, the rights of the contracting entity include the following:

- the right to request the contractor to subcontract a share of the contract in a non-discriminatory manner (if such subcontractors were not previously selected);
- the right to request the contractor to specify in his or her offer which part or parts of the contract he or she intends to subcontract to fulfil the subcontracting requirement;
- the right to request the contractor to indicate in the offer the share of the contract that will be subcontracted as well as the names of subcontractors (if already selected);
- the right to request the contractor to indicate without delay any change occurring at the level of subcontractors during the execution of the contract; and
- the right to refuse to consent to a subcontract with a third party if that party does not comply with the conditions for participation, both during the procurement procedure and the performance of a contract.

Decision 367 does not provide for a general right to use subcontractors. The contracting entity may allow it, but must require the contractor to indicate the part of the contract that it intends to subcontract. Just like under the PPL, the contracting entity may refuse to consent to a subcontract with a third party.

International trade rules

22 What export controls limit international trade in defence and security articles? Who administers them?

The export control system applicable in Poland is harmonised with the EU regulations (Council Regulation No. 428/2009 of 5 May 2009). Authorisations are necessary (individual, global or national general export authorisations) for the trade in strategic goods (including dual-use).

In Poland, authorisations are issued by the minister relevant for the economy (currently the Minister of Economic Development), who issues a list of armaments that require authorisation.

23 What domestic preferences are applied to defence and security procurements? Can a foreign contractor bid on a procurement directly?

In principle, foreign contractors may bid on procurements directly. Neither the PPL nor Decision 367 explicitly indicate that the contracting entity can prefer domestic contractors. Nevertheless, if justified by the essential security interests of the state (ie, in proceedings conducted under Decision 367), the contracting entity may demand from the foreign contractor some forms of industrial cooperation such as offset or the establishment of production or maintenance capacity in Poland, which may offer an advantage to domestic contractors that are not burdened with such obligations (although the obligations may have to be shifted to the foreign sub-suppliers of a domestic contractor). Moreover, the contracting entity may go so far as to request that the prime contractor be a domestic company (at least indirectly controlled by the Polish State Treasury), again, if it can be demonstrated that it is justified by the essential security interests of the state.

24 Are certain treaty partners treated more favourably?

The PPL, in line with the EU procurement regulations, does not allow discrimination on the basis of nationality with respect to other member states of the EU or the European Economic Area, or a state with which the EU or Poland entered into an international agreement concerning such contracts. The less favourable treatment, for example, a prohibition on participating in procurement proceedings, can thus be limited only to other states that do not belong to these groups.

In practice, there may also be mechanisms within the EU that make it easier, whether at the stage of procurement or performance of the contract, to fulfil or demonstrate fulfilment of certain requirements by EU-domiciled contractors.

25 Are there any boycotts, embargoes or other trade sanctions between this jurisdiction and others?

Poland adheres to the trade sanctions imposed by the Security Council of the United Nations, the European Union, the Organization for Security and Co-operation in Europe and the North Atlantic Treaty Organization.

26 Are defence trade offsets part of this country's defence and security procurement regime? How are they administered?

The Offset Act, which entered into force on 30 July 2014, is a result of harmonisation with the EU approach to offsets. The general rule recognised by the European Commission is that any type of offset is a restrictive measure that goes against the basic principles of EU law by impeding the free movement of goods and services. Nevertheless, the EU Commission admits that offset requirements can be justified on the basis of article 346 of the Treaty on the Functioning of the European Union, if necessary, for the protection of the essential security interests of the state.

Therefore, offsets in Poland are part of the defence and security procurement regime, but may be required only if both the procurement itself and the related offset are justified by the existence of an essential security interest of the state.

The possible justification for allowing offsets narrows down the scope of admissible offset to direct obligations, namely:

- offset commitments directed towards offset recipients operating in armament production or trade business; and
- ensuring independence from the foreign supplier in order to maintain or establish in Poland production, servicing, maintenance or other capabilities necessary from the point of view of protection of essential security interests of the state.

It is arguable whether offsets can be justified by essential security interests unrelated to the subject of the procurement, although the MoD has adopted such position on certain occasions.

Offsets are not admissible in proceedings subject to the PPL, but only those governed by Decision 367 or otherwise exempt from the PPL (eg, government-to-government). Offsets are negotiated by the MoD and the offset contract is executed by the State Treasury represented by the MoD following an offset offer submitted by a foreign supplier in response to the assumptions for an offset offer drafted by the MoD and constituting part of the terms of reference of the procurement

procedure. A supply contract cannot be executed before an offset contract becomes effective, that is, upon its approval by the Council of Ministers (the Cabinet).

Ethics and anti-corruption

27 When and how may former government employees take up appointments in the private sector and vice versa?

According to the Act of 21 August 1997 regarding Limitation of Conducting Business by Persons Exercising Public Functions, governmental employees may not hold positions in companies if they took part in the issuance of a decision regarding a company's rights within one year from the issuance of the decision. Pursuant to the draft Transparency Act referred to in question 20 above, this limit may be increased up to three years.

Also, based on the Act of 11 September 2003 on Professional Military Service, soldiers who within three years before leaving the service participated in the preparation of procurement proceedings for defence articles are prohibited from working for contractors manufacturing or trading in such defence articles for a period of three years following the end of service.

Both of the above limitations are replicated in defence procurement contracts.

Moreover, in proceedings conducted under the PPL and Decision 367, a contractor that took part directly in the preparation of procurement proceedings or, in the preparation of an offer, used a person who participated in preparing the proceedings, must be excluded from further proceedings. In proceedings subject to the PPL, the exclusion is not mandatory if the distortion of competition caused by this situation may be eliminated in a different way.

28 How is domestic and foreign corruption addressed and what requirements are placed on contractors?

Both domestic and foreign corruption practices (based on the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions) are penalised in Poland. Moreover, contractors sentenced (including persons holding management or supervisory positions) by a final judgment for corruption must be excluded from procurement proceedings.

Also, in proceedings conducted within the framework of Decision 367, the MoD's Office of Anti-Corruption Procedures investigates potential corruption threats.

As far as the contract implementation phase is concerned, Decision 367 mandates the inclusion of a provision in defence contracts stating that, in the event of corruption concerning the subject procurement involving the contractor or its representatives, such contractor is obliged to pay liquidated damages in the amount of 5 per cent of the gross value of the contract.

New anti-corruption measures (eg, a requirement for all medium-sized and large enterprises to implement internal anti-corruption procedures) are also planned to be introduced under the currently discussed new Transparency Act.

29 What are the registration requirements for lobbyists or commercial agents?

Under Polish law, all lobbyists must be entered in the register of entities conducting lobbying activities held by the minister relevant for administrative affairs. Applications for the registration need to be filed on a rather simple official form.

Persons performing intermediation services in executing contracts concerning military equipment need to possess the relevant licence in accordance with the Act of 22 June 2001 on Conducting the Business of Manufacture and Sale of Explosives, Weapons, Ammunition and Technology for the Military or Police (the CBMSE).

30 Are there limitations on the use of agents or representatives that earn a commission on the transaction?

No, there are no such limitations in Poland.

Update and trends

Modernisation strategy

Even before repealing the Programme referred to in question 11 (on 1 November 2017), in 2016, the MoD approved an updated Plan for Technical Modernisation of the Polish Armed Forces for the years 2017–2022 (the Plan). The Plan has not been formally published, but the scope reportedly still contains the key tasks envisaged in the repealed Programme.

On 19 September 2017, the MoD issued a decision on the implementation of the results of the 2016 Strategic Defence Review, which assumes significant strengthening and structural changes in the armed forces in Poland. Following the Review, the MoD prepared a document entitled the 'Detailed directions of reconstruction and technical modernisation of the Polish Armed Forces 2017–2026', which implements the conclusions of the Review. The document is still awaiting adoption by the Council of Ministers.

System of procurement

The discussions continue about the possible reform of the administration of the procurement system by replacing the Armament Inspectorate with a new agency, but no specific information is available on the plans concerning this subject. As far as Decision 367 is concerned, due to the nature of that act (ie, not generally applicable provisions but the MoD's internal rules), it can be amended or replaced relatively easily by a decision of the MoD radically changing the procedures of defence and security procurements essential to the security interest of the state.

The trend continues towards using Polish entities (consolidated under the holding entity Polska Grupa Zbrojeniowa) as prime contractors and integrators, in which case foreign entities are limited to acting as strategic subcontractors. It seems that this may remain the prevailing tendency in the MoD's procurement practice for the foreseeable future.

Spending of the funds

Pursuant to the latest amendment of the Act on Modernisation, the GDP rate intended to cover expenditures related to the defence needs of the Republic of Poland is envisaged to systematically grow from the current 2 per cent to 2.5 per cent in 2030 and subsequent years.

At the same time, the Act on Modernisation introduced a change by which the MoD is able to grant higher advance payments to the contractors both under the PPL and Decision 367. The maximum single advance payment has been increased from 25 per cent to 33 per cent of the contractor's remuneration for a given procurement. In addition, the manner of settling the advance payments in order to obtain new ones was changed giving more flexibility to the contractors.

On a more general level, on 11 December 2017, the European Council adopted a decision establishing the Permanent Structured Cooperation (PESCO) with 25 participating EU member states. It foresees a number of options of the EU member states working closely together in the area of security and defence. PESCO is related to other initiatives, including the new Coordinated Annual Review on Defence (CARD) and the European Defence Fund (EDF). CARD, to be run by the European Defence Agency, is aimed at systematic monitoring of national defence spending plans and help identify opportunities for new collaborative initiatives. The EDF will provide financial incentives to foster defence cooperation from research to the development phase. PESCO will develop capability projects, identified notably through the CARD process in priority areas. Eligible projects could also benefit from financing under the EDF.

Transparency Act

The Government Legislation Centre is working on the draft Transparency Act. The new Transparency Act is expected to supersede the current provisions of the Act of 21 August 1997 regarding Limitation of Conducting Business by Persons Exercising Public Functions, as well as the Lobbying Act of 7 July 2005 and the Act of 6 September 2001, on Access to Public Information.

Aviation

31 How are aircraft converted from military to civil use, and vice versa?

There are separate registers for military and civil aircraft. The registers are maintained by the MoD and are based on the regulations adopted by the Minister of Transportation and by the President of the Civil Aviation Authority respectively. The formalities concerning entering aircraft into a register are set forth in the Ordinance of the Minister of Transportation dated 6 June 2013 on the registration of civil aircraft, and Order No. 3/MON of the MoD dated 11 February 2004 on the keeping of the register of military aircraft. The latter contains provisions that suggest that an aircraft cannot be included in both registers at the same time. Specifically, in order to include an aircraft in the military register, the application should be accompanied by confirmation of the aircraft's deletion from the civil register if the previous owner was not the Polish Armed Forces (§8 of the Order). Moreover, until a military aircraft is deleted from the military register, the aircraft's entry in another register will not be recognised (§16 of the Order).

32 What restrictions are there on manufacture and trade of unmanned aircraft systems or drones?

The manufacturing and trade of UAS or drones for military use requires a licence as per the CBMSE. Unmanned aircraft designated for military use are included in the list attached to the Ordinance of the Council of Ministers dated 3 December 2001 on the types of arms and ammunition and the list of products and technologies designated for military or police use whose manufacturing requires a licence.

Miscellaneous

33 Which domestic labour and employment rules apply to foreign defence contractors?

Under Polish labour law, foreign defence contractors may use foreign law to govern their employment relations. However, if the work is to be performed in Poland or by a Polish worker, the employment contract with the foreign contractor cannot be less favourable to the employee than the rules set out in Polish labour law. The rule of favouring the

employee is a fundamental principle of Polish labour law, also applicable in employment contracts governed by foreign law if most of the elements of a certain employment relationship are located in Poland. An employer and an employee may only deviate from the standard provided under Polish labour law as long as their contractual relationship is not less beneficial to the employee than it would be if governed solely by the Polish statutory provisions. Otherwise, any deviation will be invalid.

The performance of work in Poland by employees of a foreign contractor may result in tax and insurance-related consequences for the employees and the contractors.

34 Are there any specific rules that contractors, foreign or domestic, are bound by in defence contracts?

Typically, the form of a defence contract or at least its material terms are provided to the contractor by the contracting entity. The draft contract is usually negotiable only to a limited extent. Most defence contracts refer to several legal acts that constitute mandatory provisions of law in Poland including with respect to foreign suppliers. These may include:

- legislation governing the assessment of conformity of goods;
- legislation governing technical supervision of military equipment;
- the Industrial Property Law dated 30 June 2000; and
- the Act on Copyright and Related Rights of 4 February 1994.

There are also numerous contractual provisions regularly included by the Armament Inspectorate in contracts concerning defence procurements, including clauses pertaining to:

- Polish governing law;
- the right to unilaterally rescind the contract granted to the contracting entity in certain cases;
- subcontracting;
- contractual warranty; and
- licensing.

35 Do contractors avail themselves of these rules when they perform work exclusively outside of the jurisdiction?

An individual approach is necessary. Some rules may no longer apply and others may come into play (eg, quality control), while certain rules are mandatory provisions of Polish law applicable regardless of where the work is performed and whether the contract refers to those rules. Others will apply due to the fact that they are invoked in the contract, which is the primary source of obligations for the parties. Thus, contractors cannot necessarily avoid their obligations under a contract simply by selecting a particular place of performance of work connected with the subject of the contract.

36 Must directors, officers or employees of the contractor provide personal information or certify that they fulfil any particular requirements to contract with a government entity?

Considering the fact that the sentencing of members of a contractor's management or supervisory bodies for certain crimes may lead to the contractor's exclusion from procurement proceedings, the relevant information from the criminal records must be disclosed to the contracting entity. However, only the person's name, place of residence and criminal record are required.

Pursuant to the PPL, in some cases, the request for submission of such data may be deferred by the contracting entity until after the selection of the contractor's offer as the most advantageous. Under Decision 367, the contracting entity is entitled to, but not obliged to, request the relevant documents from the contractor.

Basic details of the contractor's representatives are necessary for the purpose of the proceedings (eg, admittance to the MoD's premises for negotiation meetings, etc).

37 What registration or licensing requirements exist to operate in the defence and security sector in the jurisdiction?

In accordance with the CBMSE, in order to conduct such business, an entity must obtain a licence from the Minister of Internal Affairs. One of the requirements for obtaining a licence is that two members of the management of the entity have to be citizens of Poland, another EU member state, Switzerland or an EEA member country, or another country under specific conditions (permanent stay in Poland, reciprocity, etc).

However, for the purpose of participating in procurement proceedings, it is sufficient if the foreign contractor possesses the necessary licence to perform the activities covering the scope of the contract issued in compliance with the provisions prevailing in its country of residence, as well as potentially a permit to trade in Poland, if applicable (this is typically specified by the contracting entity in the terms of reference of the proceedings).

In addition, an entity wishing to operate in the defence and security sector must possess the necessary military quality control systems (WSK, AQUAP) as well as typical security clearances up to the required level of classified information.

38 What environmental statutes or regulations must contractors comply with?

Contractors and contracting entities are obliged to comply primarily with EU and Polish legislation, including the Environmental Law of 27 April 2001, and with secondary legislation issued based on that law. The Polish Environmental Law imposes obligations on entities using the environment, including foreign entrepreneurs, as well as the authorities, including the MoD, which, in order to ensure the compliance of its units with the law, adopted the Regulation of 24 March 2016 on compliance with laws on environmental protection in organisational units subordinated to or supervised by the MoD. Consequently, both the PPL and Decision 367 enable the Armament Inspectorate to take environment protection aspects into account when drafting the requirements of procurement proceedings. This can take the form of specific mandatory or premium requirements, which are subsequently assessed based on the legislation related to assessment of compliance.

Specific requirements imposed on contractors in procurement proceedings may refer, for example, to the acceptable level of noise or limits on the emission of substances detrimental to the air or ground, depending on the subject of the procurement.

Military equipment and operations may, however, be subject to specific exemptions or less restrictive treatment. Pursuant to Regulation (EC) No. 216/2008 of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, environmental protection requirements imposed by the Regulation do not apply to military aircraft. Also, pursuant to the Polish legislation implementing Regulation (EC) No. 1907/2006 of the European Parliament and of the Council of 18 December 2006 on Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), the MoD may exempt certain substances necessary for needs of defence of the state from the application of REACH.

39 Must companies meet environmental targets? What are these initiatives and what agency determines compliance?

Entities operating in Poland may be required to meet environmental targets by way of restricting activities that have a negative impact on the environment (which predominantly impacts production activities). The authorities may require an entity to obtain permits related to use of the environment, impose monitoring obligations and so on. The authorities conducting inspections and issuing permits include, in particular, the Ministry of Environment and local government administration bodies.

40 Do 'green' solutions have an advantage in procurements?

No, 'green' solutions do not have an advantage in procurements. Theoretically, however, the contracting entity may include certain 'green' parameters in the procurements, whether as mandatory or premium requirements.

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