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### **SOCIALLY RESPONSIBLE PUBLIC PROCUREMENTS AS A STATE POLICY TOWARDS THE PUBLIC PROCUREMENT MARKET (CONTEXT OF THE PUBLIC SUPERVISION OVER THE PUBLIC PROCUREMENT MARKET)**

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#### **Abstract**

The very essence of public procurements is usually perceived as a platform for the flow of services, supplies and public works between contracting entities and contractors. The former ones, due to the availability of public funds, are obliged to select contractors and conclude contracts with them through appropriate procedures, rather than in a manner resulting solely from the principle being the civil law freedom of contracts. The contractors, on the other hand, usually participate in the mentioned procedures, pursuing their particular interests focused on the desire to reach profits. Introduction to the Polish legislation of the EU directives of the provisions concerning the so-called socially responsible public procurements signifies a change in the said arrangement. On the one hand, the ordering entity has a possibility of applying different requirements (the so-called social criteria), the purpose of which is to trigger positive social impacts (e.g. promoting 'decent work', supporting 'social inclusion' or even taking into consideration the issues of 'ethical trade'). On the other hand, contractors, who generally pursue their interest, can participate in the process of developing the mentioned effects. Therefore, the functioning of the discussed category of public procurement should be included in the context of a specific state policy in relation to the public procurement market. This policy defines the role of the ordering parties and the contractors - in the described way. The existence of socially responsible public procurements, considered at the level of state policy (including the necessity to comply with the law), implies at the same time the legal shape of public supervision of the state over the public procurement market.

**Keywords:** Public Procurement, Public Supervision over the Public Procurement Market, Social Policy, Socially Responsible Public Procurements, Ordering Entities, Contractors

**JEL Classifications:** K23, H10

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#### **1. Introduction**

The essence of public procurements (more on public procurements: Babiarz, *et al.* 2013; Pawlak, 2013; Pierog, 2017; Piwowarczyk, 2012; Skubiszak-Kalinowska and Wiktorowska, 2017; Soltysinska, 2016; Szydło, 2014) is usually perceived as a platform for the flow of services and supplies (referred to as a triad of services, supplies and public works) between contracting entities and contractors. The former ones, due to the availability of public funds, are obliged to select contractors and conclude contracts with them through appropriate procedures

rather than in a manner resulting solely from the principle of civil law freedom of contracts. The contractors, on the other hand, usually participate in the mentioned procedures, pursuing their particular interests focused on the desire to obtain profits.

Introduction to the Polish legislation of the EU directives of the provisions (European Parliament and the Council, 2014a, b) - concerning the so-called socially responsible public procurements signifies a change in the said arrangement. On the one hand, the ordering entity has the possibility to apply different requirements (the so-called social criteria), whose aim is to trigger positive social impacts (e.g. promoting 'decent work', supporting 'social inclusion' or even taking into consideration the issues of 'ethical trade'). On the other hand, contractors, who generally pursue their interest, can participate in the process of developing the mentioned effects. European Commission (2010) underlines that "around 17% of gross domestic product in the EU comes from public procurement. It can therefore have a significant impact on such areas as social policy."

European Commission (2010) further notes that socially responsible public procurements (SRPP) are to set an example and influence the market. By propagating the SRPP, public administration bodies can effectively encourage companies to develop socially responsible management. Due to prudent purchases, public administration bodies can promote employment opportunities, decent work, social integration, accessibility, design for all and ethical trade, as well as strive to achieve a broader scope of compliance with social standards.

European Commission (2010) defines the term "socially responsible public procurements" understanding as a public procurement, which takes into account at least one of the following social issues: employment opportunities, decent work, compliance with social rights and the right to work, social integration (including people with disabilities), equal opportunities, accessibility, design for all, including sustainability criteria with ethical trade issues and a broader voluntary compliance with corporate social responsibility (CSR), while taking into account the principles captivated in the European Union Treaty and in the public procurement directives.

The existence of the discussed category of public procurement should be included in the context of a specific state policy (in the context of this article, the term 'state' should also be understood as the organs of the European Union and the territorial self-government units) in relation to the public procurement market. The policy defines the role of ordering parties and the contractors - in the way described. Particular attention should be paid to the state's influence on the contractors. Such an outline should be considered on the basis of the goal of solving social problems by awarding public contracts. This is so-called new approach to the public procurements (Council of Ministers, 2017). There is no doubt that it is necessary to consider the analyzed category of public procurements only within the framework of existing legal regulations (both EU and national).

The existence of socially responsible public procurements, considered at the level of state policy (including the necessity to comply with the law), implies at the same time the legal shape of public supervision of the state over the public procurement market. Council of Ministers (2017) - referred to above - points out that the regulations of Sejm of the Republic of Poland (2014) (hereinafter: PPL) "provide for a number of solutions allowing for taking into consideration the social aspects within the framework of public procurements proceedings. Some of these regulations are voluntary, allowing for assessment by a specific contractor of the possibility of taking into account the social aspects within the framework of public procurements procedures depending on the necessity of the contracting authority and the nature of the subject of the contract, whilst some remaining absolute, indicating the necessity of using explicitly defined prosocial instruments in the public procurement procedure."

In this regard, attention should be paid to the entry into force on 28.07.2016 of amendments to the PPL (Sejm of the Republic of Poland, 2016) related to the issue of socially responsible procurements. They concern, in particular, the content of art. 22, par. 2 and par 2a, art. 29, par. 3a, par. 4 and par. 5, as well as art. 91, par. 2 point 2 of the PPL.

## **2. State policy on the public procurement market - the essence and types**

The existence of the public procurement market, as a 'meeting point' for ordering parties and contractors, is a platform for the flow of specific goods and services (services - supplies - public works). Various interests of these entities are revealed. The analyzed market is considered as a place of creation and, at the same time, of implementation by the state of different policies.

For the purpose of further deliberations, it is worth to distinguish a state, that can perform the role of the contracting party in individual proceedings (e.g. territorial self-government units), and a state acting as a creator of various policies. In the case of the contracting state, these are national entities performing the functions of the contracting party; on the other hand, creating the policy belongs also to the EU legislator and not solely to the national legislator (broad understanding of the term 'state'). Secondly, fulfilling the role of the contracting party belongs to the sphere of the application of law, and not its creation, which constitutes an essence of the process of setting specific policies.

Subsequently, it should be noted that the body, acting as the ordering entity in a given procedure, acts in a 'limited' way - only within the scope of its own tasks and competences. On the contrary to this, the state while creating a policy is substantially not limited to the activity of a single body or institution (which does not change the fact that a given policy may concern only a specific field, not the entire state – i.e. social policy).

Distinguishing both of these roles, in which the state can act (ordering party - creator of the policy), shows that private entities that belong to the category of "public law entities" – obliged to apply the public procurement regulations - do not have formal and structural links with the state (they do not belong to the state organization) (Odachowski, 2018). In addition, in the case of facultative social orders, the ordering party itself (in principle – Council of Ministers (2017) obliges the indicated heads of government administration units to "ensure that in units, which are led by social aspects, in particular social clauses, they are included in the widest possible scope and in as many public procurement procedures as possible") decides whether he will use the solution provided by the state (an aspect of his policy). This means that in the case of a negative decision of the contracting body, it is possible to speak of a lack of compliance between his interests (resulting in such decision) and the interest of the state (interested in applying the discussed legal solutions).

First of all, it is necessary to consider the situation in which the state acts as the ordering party. It means, that it becomes an ordinary participant of business transactions on the public procurement market. Such a state may pursue a specific and defined policy, as exemplified by regional policy constituting a component of development policy, in the context of the implementation of EU funds (e.g. a municipality building public roads from EU funds) (more on EU funds: Błasiak-Nowak and Rajczewska, 2013; Błasiak-Nowak and Rajczewska, 2014; Błasiak-Nowak and Rajczewska, 2015; Brackowska-Boroch, 2015; Kowalski, 2014; Łacny, 2015; Miemiec, 2012; Poździk, 2014; Poździk, 2016; Szymański, 2014a; Szymański, 2014b; Wieczorek, 2014). At the same time, it is possible to distinguish cases, when the contracting party-state participates in the public procurement procedure without connection with the designated policy (e.g. a municipality acquires equipment for the municipal office and staff building, which gives a real opportunity to effectively carry out its tasks).

Secondly, state policy should be considered without being associated with the role of a contracting body. In such a case, it is worth to note, above all, the determination of the public procurement procedure, which follows the introduction of specific legal regulations, including the implementation of EU law regulations. These activities can be treated in two ways. On the one hand, not as a policy but merely as a matter of creating a normative foundation, thanks to which the ordering party and contractors can exchange goods and services, whilst the state may conduct specific policies. On the other hand, as a key element of law compliance policy, the basic mechanism designated to ensure respect for legal regulations is their precise definition. An important role is also played by regulations regarding legal protection measures and institutions of the sphere of control and supervision over the public procurement market (e.g. the President of the Public Procurement Office or managing authorities (for more information on the subject of managing institutions in EU funds, Odachowski and Karwatowicz, 2011) and

intermediaries within the implementation system of projects co-financed from EU funds).

It should be recognized that the issue of ensuring compliance with the law in the sphere of implementation of procedures related to public procurements must be considered at the level of implementation of a given policy. Therefore, it is a policy aimed to ensure that all entities participating in the public procurement market (including those that control and supervise such market) perform their activities in accordance with the law, and thus the procurement granting was free of any relevant regulatory violations.

The indicated policy is also connected with the protection of interests of individual contractors, who hope that in the course of procedures related to orders, the law will be respected. Awareness of the existence of regulations in the field of public procurements including those ensuring competitiveness and equality, providing legal protection measures for contractors or regulating the functioning of institutions exercising control and supervision over the public procurement market positively affects these interests – regardless of whether in a particular case a given contractor obtains a public procurement or not.

Regarding the discussed area of the state's policy, it should be emphasized that – firstly - it is obligatory by nature, and therefore it is not dependent on the will and vision of the state. In this sense, other policies are optional. Secondly, it acts as a kind of foundation, on the basis of which the state is able to plan and implement other policies. This means that it is impossible to conduct them without securing the existence of mechanisms designated to protect compliance with the applicable law. Finally, the state can also create and conduct policies on other levels – this is where the legal institution of socially responsible public procurements should be located.

### **3. Socially responsible procurements in the perspective of state policy including the public procurement market**

While analyzing the field of socially responsible procurement, it should be considered taking into account the above deliberations regarding state policy on the public procurement market. The field belongs to the sphere of state policy – other than the policy of ensuring compliance with the law. It means that the state initiates it, and establishing appropriate legal provisions as the normative foundation for defining and regulating this policy is the instrument of activity.

At the same time, the above-specified policy should be considered in accordance with the issue of ensuring compliance with the law. It is necessary thus to draw attention to the lack of separation of both policies – each (different) policy designated by the legislator must remain within the framework of valid legal regulations. The task of the state is to ensure compliance with the law in the mentioned sphere of granting contractors specific legal protection measures, as well as assigning certain competences to control and supervision institutions. Therefore, it is impossible to recognize other policies as being more important than the compliance policy, as well as to operate without it.

In such a context, we have to see the plane on which the state acts as a contracting party. By introducing social criteria into a given order, they form part of the social policy set out at the level of legal regulations. It is impossible not to accept that all actions and activities of the ordering party must be implemented within the framework of the applicable regulations.

To sum up, it must be recognized that there is a connection between the considered category of procurements and the issue of policy that the state is pursuing. Their essence manifests itself through conducting a specific policy; on the other hand, it may be considered that the will of state to pursue a specific policy has led to the introduction of legal institution under consideration in the current normative order.

The above considerations must take into account the legal structure of public supervision over the public procurement market. First of all, it is worth emphasizing that the key meaning within the mentioned market is attributed to compliance policy that is implemented through the mechanism of the said supervision.

At the same time, this supervision does not mean a ban on pursuing other policies - including social policy, with socially responsible procurements becoming a tool. Nevertheless, every other policy must be subject to this supervision. Due to the fact that the utmost policy is the compliance policy (setting the hierarchy of all policies), social procurements have to be

subjected to supervision, which is supposed to safeguard it.

Supervision, on the one hand, limits the implementation of social policy of the state (the issue of the obligation to comply with applicable legal regulations), since the desire to achieve positive social effects in the abovementioned way cannot have a higher rank than the obligation to comply with the law.

At the same time, however, the supervision system allows for an effective implementation of the discussed policy, as it ensures that the interests of procuring entities and contractors are protected. It is particularly important in relation to the issue of initiating relevant activities by both mentioned categories (including contractors – without whom it would not be possible to carry out the procurements in question).

#### **4. Participation of contractors in the state policy concerning socially responsible procurements**

The above-outlined relationship therefore means that the state has the opportunity to influence the widely understood social sphere not only through the classical, typical policy, conducted in particular by central state administration bodies such as the policy in the scope of social security, support for large families, social aid, unemployment allowances etc, but also through the functioning of the public procurement market. It therefore implies a specific inclusion of the participants of the abovementioned policy market: procuring entities (including those entities and institutions that are not formally associated with the state) and contractors.

In particular, it is worth noting that contractors on the whole, while pursuing their particular interest (and not the interest of the state related to dealing with social problems), applying for or implementing orders with a focus on profits (where the conduct of the discussed policy is essentially not characterized by such attitude) and often being private entities (without any formal connection with the state structures), participate in the discussed scope in the implementation of the above policy.

Their participation is conditioned, however, by the existence of a procedure providing for the criteria in question (which consists of legal regulations and the intentions of the procuring entities, unless situations in which the ordering party is obliged to apply the relevant regulations - also as a result of a commitment imposed by Council of Ministers (2017), taking part in it and, in practice, only obtaining the order. If these conditions are not fulfilled, it can be in fact assumed that the given contractor does not participate in the implementation of the policy in question. In contrast to this, the state pertinent policy is fixed and permanent, as it is difficult to imagine that nowadays the state gives up entirely the implementation of social policy. It does not change the fact that its content (specific goals, tools, etc.) may be subject to modifications.

What is more, the activity of a given contractor is limited to a specific procurement implemented by him; in turn, the state must be interested in all of its territory and populations living in it, as well as all activities provided for this policy. It applies in particular to those areas that are not included in the public procurement market.

There is no doubt that the use of public procurement by the state for the purpose in question leads to the involvement of contractors, because the essence of procurement is its implementation precisely by them. Hence, the will to conduct social policy through the abovementioned plane means a specific "dependence" on this category of procurement entities.

In a situation where the state decides to conduct social policy through the use of social procurements, this is done by taking into account the legal structure of public supervision over the public procurement market. This means that the above-mentioned issues; the will of the contractor for the implementation of social procurements, participation in the implementation of this policy, as well as the above-mentioned "addiction" cannot be considered as separate from this arrangement.

#### **5. The impact of the state on the contractors**

The analyzed category of public procurement can also be recognized as an agreement between the state and specific contractors, consisting in admitting them to the public procurement market

(both to the participation in a given procedure, as well as to the implementation of the procurements in question) in exchange for adapting its activity (business, business activities, etc.) to the requirements of socially effective procurements.

Therefore, in the area of procurement in question, one can see the influence of the state (through its policy) on shaping the profile of contractors. The state assumes - by allowing the use of social criteria - a model of their activities, as well as values subject to promotion and dissemination.

The question considered should be understood broadly – firstly, in the aspect in question. Intentional influence of the state does not apply only to those contractors who have received the procurement. It also applies to those who participated in a specific procedure (socially responsible procurements), and yet failed to obtain the procurement - in order to conclude a relevant civil law agreement, they should have met the conditions of participation in it.

What is more, one may be tempted to state that the abovementioned influence of the state may also apply to those entities that did not take part in the given proceedings (but took part in any proceedings - even those not covered by the criteria considered). They may be interested in socially responsible procurements in the future. In this situation, the entity becomes aware that it is necessary to meet the relevant requirements. Similarly, one can refer to the case where a given entity has not taken part in any proceedings so far (but plans to participate). You can consider whether such an impact could also occur if the entity was not interested in public procurement at all.

To sum up, the following terms should be considered in the sphere of the state policy - "promoting", "supporting", "encouraging" or "propagating". The state impact in question must therefore be broadly recognized - not only regarding the selected contractors, but also regarding other mentioned entities. The state's influence is primarily of direct nature. Lack of effective influence – understood as failure to meet the required criteria related to socially responsible procurements - must consequently lead to the fact that the contractor will not receive the procurement. Hence, his interest will not be realized – if they have already made adequate financial preparation (collection of financial resources), technical (acquiring the necessary technical equipment), staff (employment of appropriate employees) or the acquisition of various contractors.

On the other hand, indirect influence should also be taken into account – the impact on the contractors' awareness. It is not as effective as the above, but it may be of significance – especially in a broader perspective (participation in other proceedings in the future). The subsequent aspect is the aspect of time. The discussed impact should inherently be of "present" nature - it should apply to contractors who apply for a procurement in the given period of time or are currently implementing it. The next temporary plane is 'the future – oriented' plane. This therefore determines the goal – that is, shaping attitudes and profiles of contractors in the context of taking appropriate actions in the future (in particular with regard to other orders).

State impact on contractors should also be considered against the public supervision of the public procurement market. Regardless of the adoption of a specific "agreement" between the state and the contractors, the latter are subject to supervision. It means that their positive and necessary participation in the process of achieving the intended social effects is not a premise that repeals the obligation to fall subject to proper supervisory activities.

It should be noted that while the abovementioned impact may be attempted to be broadly recognized (also with regard to entities not involved in proceedings subject to social criteria), the legal structure of supervision over the procurement market in relation to the analyzed procurement category may concern only entities that participate in such proceedings. Nevertheless, it should be pointed out that the existence of supervision may be of great importance 'for the future' – in the form of promoting behaviors consistent with the applicable law, including promoting social procurements.

## **6. State policy in socially responsible procurements versus interest of individual entities**

The discussed issues can also be presented by taking into account the issue of the interests of

individual entities operating within the socially responsible market procurements. On the one hand, contractors generally pursue their individual interests (subject to compliance with the law – the policy of complying with the law), which are protected by the state. The existence of these interests triggers the necessity for the contractors to undertake efforts in order to obtain public contracts. On the other hand, specific interests of awarding entities must be distinguished, which cause them to initiate specific procedures. Thirdly, it is necessary to pay attention to the issue of state interest, which is reflected in the different policies.

It is worth to consider the hierarchy of particular interests mentioned above. There is no doubt that the interest of the state is of fundamental importance, the reflection of which is the need to ensure compliance with the law. It can be considered that it is also the interest of individual procuring entities and contractors. Subsequently, it is necessary to indicate the subject of socially responsible public procurement captured in the context of the state policy, and hence its interest. These procurements may only be implemented in accordance with applicable legal regulations. Thus, it sets the hierarchy of both manifestations of country's interest treated as specific policies.

Finally, the interests of procuring entities and contractors must be taken into account – all their intentions must remain within the framework of the existing legal provisions. At the same time, the introduction of socially responsible procurements by the state allows the procuring entities – if they define their interest as such (where these procurements have a facultative dimension) or simply requires it (where these procurements have an obligatory dimension) – to determine the appropriate requirements under a specific procurement procedure. Thus, any contractor wishing to obtain a given procurement must meet the relevant conditions. This means that his interest must include all of the above.

Supervision over the market of social procurements should be considered in terms of the hierarchy of individual interests. There is no doubt about the primacy of the state's interest in the policy of securing compliance with the law. This is the very essence and purpose of supervision. In further order, the policy regarding socially responsible orders is applicable. The necessity to supervise it determines its subordination towards the first of the above specified policies.

Finally, it must be emphasized that the interests of procuring entities and contractors must comply with the existing legal regulations, which is secured by the supervision institution. At the same time – considering the division into optional and obligatory social procurements. It should be noted that the role of supervision is primarily to ensure that if necessary legal solutions are required, the contractors will take appropriate measures.

Secondly, supervision is aimed at ensuring the appropriate usage of optional procurement regulations. In particular, this signifies the lack of forcing the contractors to use social procurements, as well as the need to use them in situations covered by the content of the Council of Ministers' Recommendations.

## **7. Conclusion**

Introduction into the legislation of the legal institution of socially responsible public procurement is connected with the issue of the so-called new approach to public procurement. It ought to be perceived as the will to achieve positive effects in the sphere of social policy not only through classical state policy (carried out in particular by the state administration bodies), but also with the use of the area in the scope of which an exchange of goods and services between procuring entities and contractors occurs.

In light of the above considerations, it should be emphasized that the discussed procurements should be considered in the context of the state's impact on the public procurement market. This impact manifests itself in the form of pursuing a specific policy – other than the policy of ensuring compliance with the law by all market participants. This means that the state (in addition to the issue of being in various procurement procedures) is not only an entity focusing on the topic of ensuring compliance with the law, but at the same time, it is an entity actively influencing the market in question.

Running a social policy by the state through the use of socially responsible

procurements must assume the activity of various entities. Firstly – of the state; then, it is necessary to emphasize the participation of procuring entities who may (and sometimes must) provide for appropriate social criteria within a particular procedure. In the end, one needs to pay attention to the participation of contractors.

Each of the indicated categories of entities plays a different role in the system under consideration. The role of the state (both in the sphere of the EU and national legislator) has become the creation of appropriate legal regulations, giving a normative foundation for the use of socially responsible procurements in the specific procurements of legal institutions.

In turn, commencing the discussed solutions requires appropriate actions on the side of the procuring entities. In the case of a voluntary option of using the solutions in question, an important role is assigned to the procuring entity who should decide whether to apply social criteria in a given situation (although this is modified in the case covered by the recommendations of the Council of Ministers). Whilst, where the use of socially responsible procurement is obligatory, decision in this regard – somewhat on behalf of the contractor – is made by the legislator. Finally, it should be emphasized that contractors participate in the process of achieving - through implementation of public procurement – positive social effects.

The state policy in the area under consideration is therefore associated with a deliberate impact on the behavior of contractors. This impact should be considered in a broad sense. First of all, it does not need to include only those contractors who have obtained public procurement that is covered by social criteria. It is necessary to pay attention to other categories of these entities – including those that did not take part in the given proceedings. Also in these cases, one can consider the impact of the state on the profile of their activity, expressed in their adhering to social criteria. What is more, not only "present" activities seem to be crucial, but also those "far-reaching". It should therefore be recognized that it is not just about the impact on the public procurement market in a specific case, but rather about shaping the market through promoting new solutions and attitudes.

The existence of public supervision over the public procurement market is substantial in the context of socially responsible procurement, because the most important policy of the state is compliance with the law policy, which in assumption is provided by the mechanism of abovementioned supervision. At the same time, every other state policy – including social policy, which is becoming a tool of socially responsible procurements – must be subject to this supervision.

Supervision of the public procurement market in relation to the matter presented above can be considered from two separate perspectives. First of all, it performs the function limiting the scope of interests of individual entities participating in this market. They can, however, be implemented only with the assumption of compliance with applicable regulations.

At the same time, however, the supervision system allows for the effective implementation of the discussed policy, as it ensures that the interests of procuring entities and contractors are protected. It is particularly important in relation to the issue of initiating relevant activities by both mentioned categories (including contractors – without whom it would not be possible to carry out the procurements in question).

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