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Henryk Nowicki
Nicolaus Copernicus University in Toruń, Poland
ORCID: 0000-0003-0392-2433
nowicki@umk.pl

Public-Law Nature of Public Procurement Law

Publicznoprawny charakter prawa zamówień publicznych

ABSTRAKT

In the contemporary legal system, we face more and more complex regulations, located in areas between traditionally established branches of law. Today, public procurement law is predominantly of a public-law nature. The fact that public procurement law is part of public law has been determined under EU law. The EU legislature provided for the need to achieve, in the performance of strategic contracts, certain strategic objectives aimed at pursuing the public interest. The currently applicable Act of 11 September 2019 – Public Procurement Law (PPL) is, for the most part, public law. Firstly, only those statutorily specified are obliged to apply its provisions. Contracting entities are public administration bodies that are appointed to perform public tasks, in the forms provided for by law. Public procurement is one of the legal forms of action of public administration. The contracting entity, especially at the stage of preparing the procurement procedure, exercises sovereign power when taking decisions. Secondly, contracts are awarded for the aim of performance of public tasks and are financed from public funds. Most of the provisions of the PPL concern the obligations of the contracting entity in terms of identifying purchase needs, preparing the procurement procedure, and its conduct. The contracting entity specifies the subject-matter of contract, which is subordinated to its needs and serves the public purpose, which is the consequence of the public tasks assigned to the contracting entity. The purpose of the law is therefore to protect the public interest. The reference to application *mutatis mutandis* of the provisions of the Civil Code, to the extent not regulated in the PPL, is irrelevant. The legislature assumed that such a reference is applicable only in the situation where the issue in question is not regulated by the provisions of the PPL and concerns the actions taken by the contracting authority, economic operators and contest participant in the procurement and contest proceedings as well as public contract agreements, and is of a civil law nature. The reference does not therefore concern all matters governed by the PPL, but is merely supplementary in nature.

Keywords: legal system; public procurement law; public procurement; public administration bodies; public interest

CORRESPONDENCE ADDRESS: Henryk Nowicki, PhD, Dr. Habil., Professor at Nicolaus Copernicus University in Toruń, Faculty of Law and Administration, Chair of Environmental Law and Public Commercial Law, Nicolaus Copernicus University in Toruń, Władysława Bojarskiego 3, 87-100 Toruń, Poland.

INTRODUCTION

The issue of the place of public procurement law in the legal system is one of important systemic issues. In the Polish literature on the subject, most authors do not address it at all, and only a few publications attempt to determine the affiliation of this regulation and its location within the legal system.[1] The private-law nature of this regulation is pointed to in a few publications, without in-depth analysis and in a very simplified manner. When attempting to locate this law, its complexity, resulting in that its content does not fit into the traditional "corset" of the division of law into public law and private law, is ignored.[2] For these reasons, it is even more difficult to classify this regulation into one of the branches of law. The development of legal regulations in this area requires an attempt to be made to locate the adopted normative solutions in the legal system, indicating also individual institutions of this law.[3] Research in this area must take into account the complexity and multidimensionality of this law. They must, in particular, take into account the basic theoretical and legal assumptions relating to research on the division of law into public and private.[4]

The research on the public procurement law of the European Union and the laws of other (than Poland) EU member states suggests that these regulations belong to public law. The issue which causes discussions in the context of Polish public procurement law, as noted by M.E. Comba, was basically resolved under EU law, which recognizes the contract award procedure as part of public law.[5]

An important argument supporting the thesis of the public nature of public procurement is the adoption of a strategic public procurement policy by the European

[1] See S. Fundowicz, *Miejsce Prawa zamówień publicznych w prawie administracyjnym*, [in:] *XV-lecie systemu zamówień publicznych w Polsce*, Toruń–Warszawa 2009, p. 36; H. Nowicki, *Prawo zamówień publicznych – pojęcie i zakres regulacji*, [in:] *XV-lecie systemu zamówień publicznych…*, p. 87; M. Szydło, *Prawna koncepcja zamówienia publicznego*, Warszawa 2014, especially chapter V (*Publicznoprawny i prywatnoprawny charakter zamówienia publicznego*, p. 243).

[2] See H. Nowicki, P. Nowicki, M. Wierzbowski, *Nowe dyrektywy zamówieniowe a polskie prawo zamówień publicznych. Uwagi de lege ferenda*, [in:] *Prawo zamówień publicznych. Stan obecny i kierunki zmian*, eds. H. Nowicki, P. Nowicki, Wrocław 2015, p. 19; H. Nowicki, *Nowe Prawo zamówień publicznych a system prawa zamówień publicznych. Integracji systemu*, [in:] *Dziś i jutro zamówień publicznych. XII konferencja naukowa, 7–8 października 2019 r.*, eds. M. Lemonnier, H. Nowak, Olsztyn–Warszawa 2019, p. 156 and the literature referred to therein.

[3] M. Szydło (*Prawna koncepcja…*, p. 246) points to the public-law and private-law character of that regulation.

[4] For the criteria of distinguishing branches of law, see L. Morawski, *Wstęp do prawoznawstwa*, Toruń 2009, p. 73 ff.

[5] In more detail, see M.E. Comba, *Contract Execution in Europe: Different Legal Models with a Common Core*, "European Procurement & Public Private Partnership Law Review" 2013, vol. 8(4), pp. 303–305.

Union.[6] The achievement of strategic objectives is: the implementation of horizontal policies, the pursuit of sustainable development, the promotion of innovation, and achieving social and environmental objectives through the public procurement system. It is assumed that the state's participation in the public procurement market is not aimed at earning and maximising profit.[7] The public-private nature of public procurement is pointed out by C. McCrudden[8] who emphasizes the apparent conflict between the (public) objectives achieved through public procurement and the costs incurred due to its award. The implementation of public objectives must embrace their economic efficiency, and the above-mentioned apparent nature of this conflict stems the fact that it is not possible to compare a public purchase directed towards achieving so-called non-purchase objectives with purchases on the private market and cost-cutting.[9] "In the public market, the state strives to pursue the public interest and seek opportunities to improve social welfare and to carry out necessary public tasks, often even at a higher cost".[10] K. Horubski points out that public procurement should be made a tool of administrative management for the achievement of a number of objectives serving the common good of specific groups of people or communities in a narrower or broader sense.[11] Noteworthy is the view presented by M. Szydło, who holds that public procurement should be treated as a tool of state intervention carried out in the public interest, which highlights its public-legal (or at least hybrid) nature, and considers the transfer of practices characteristic of the private sector to public procurement as inappropriate.[12]

[6] See Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Single Market Act. Twelve levers to boost growth and strengthen confidence "Working together to create new growth", Brussels, 13.4.2011, COM(2011) 206 final; Communication – Europe 2020: "A strategy for smart, sustainable and inclusive growth", Brussels, 3.3.2010, COM(2010) 2020 final, p. 5.

[7] See C. Bovis, *The Liberalisation of Public Procurement and Its Effects on the Common Market*, Dartmouth 1998, p. 5.

[8] See C. McCrudden, *Buying Social Justice: Equality, Government Procurement and Legal Change*, Oxford 2007, p. 14.

[9] P. Nowicki, *Aksjologia prawa zamówień publicznych. Pomiędzy efektywnością a instrumentalizacją*, Toruń 2019, p. 291.

[10] *Ibidem*, p. 294.

[11] K. Horubski, *Administracyjnoprawne instrumenty realizacji zamówienia publicznego*, Warszawa 2017, p. 56.

[12] M Szydło, *Udzielanie zamówienia publicznego jako pomoc państwa w rozumieniu art. 87 ust. 1 Traktatu ustanawiającego Wspólnotę Europejską*, "Kwartalnik Prawa Prywatnego" 2007, no. 2, p. 372.

HISTORICAL DEVELOPMENT OF THE POLISH PUBLIC PROCUREMENT REGULATIONS FROM THE PUBLIC-LAW PERSPECTIVE

The introduction in the Polish legal system of regulations related to governmental purchases[13] was accompanied by linking these provisions directly with public law. A specialized public administration body was established, which, having collected information on the purchasing needs of the government administration, distributed the purchase orders and placed them with suppliers as appropriate. Such an approach of the lawmakers to purchasing activities clearly indicated their public-law nature, also in connection with the use of legal forms of activity characteristic of public administration in these purchases. Administrative entities were obliged to identify their purchasing needs, and then these needs were centralized within the Distribution Office, which distributed these purchase orders among suppliers. In this case, there were legally defined procedures obliging administrative entities to perform specific activities and then conferring powers on the Office to assign these tasks to contractors. Orders for supplies to the army were regulated in a similar way.[14] For the purposes of these purchase orders, the General Army Supply Office was established, which centralized purchasing needs, ensuring their financing, and assigned their implementation to individual factories in Poland. In 1920, orders for the army were included in the scope of responsibilities of the Ministry of Military Affairs.[15] The Polish Act of 15 February 1933 on supplies and works for the State Treasury, local government and public-law institutions[16] and the secondary legislation issued on the basis of it[17] served the purpose of unifying Polish public procurement regulations. The provisions of the Act of 1933 introduced a number of obligations imposed on public entities with regard to the contract awarding methods and conditions. These obligations included the awarding contracts to domestic entities in the first place and using domestic raw materials and products in the first place.[18] An obligation was introduced to grant preference, where there are the same terms of contract, to contractors from the local market of the place of supplies or works, and to craftsmen, farmers, etc.[19]. Contractors whose tenders were

[13] Decree of 7 December 1918 on the establishment of the Distribution Office in order to centralise government procurement (Journal of Laws 1919, no. 19, item 55).

[14] Act of 11 April 1919 on the establishment of the General Army Supply Office (Journal of Laws 1919, no. 32, item 265).

[15] Act of 18 December 1920 on the reorganisation of the matters related to army supplies (Journal of Laws 1920, no. 6, item 33).

[16] Journal of Laws 1933, no. 19, item 127, hereinafter: the Act of 1933.

[17] Regulation of the Council of Ministers of 29 January 1937 on supplies and works for the State Treasury, local government and public-law institutions (Journal of Laws 1937, no. 13, item 148), hereinafter: the Regulation of 1937.

[18] Article 2 of the Act of 1933.

[19] See §§ 13 and 14 of the Regulation of 1937.

rejected were deprived of the right to pursue claims against contracting entities.[20] The procurement procedure used to be concluded with the signing of an agreement, the mandatory elements of which were defined by the provisions of the regulation.[21] Also, with regard to the implementation of certain provisions of the agreement, an obligation to obtain the consent of the second instance authority or supervisory authority in relation to the contracting entity was introduced.[22]

Those provisions in the field of public procurement that were in force during the Second Republic of Poland present the public-law nature of these regulations, and the reference to the provisions of private law was of a limited nature and concerned the code of obligations.[23] On the other hand, disputes related to the implementation of contracts were subject to the jurisdiction of the courts specified in the agreement concerned.[24] Achieving specific public objectives within the framework of awarded contracts and the introduction of legal regulations in the field of procurement was the responsibility of competent ministers[25].

In Poland, until 1949, the regulations from the inter-war period were formally in force, and then were replaced by regulations incorporating public procurement into the central planning system and thus had little to do with market economy regulations.[26] It was only the political and economic transformation which started in 1989 that became the basis for a new shape of the sphere of public purchases.

PUBLIC-LAW NATURE OF THE REGULATION IN THE AREA OF PUBLIC PROCUREMENT ADOPTED IN POLAND SINCE 1994

Doctrinal considerations concerning the place of procurement law within the legal system must be accompanied by awareness of the widespread application of these provisions. The multitude of entities required to apply purchasing procedures makes the proper understanding of the institutions of that law a very practical issue. I will limit the research to successive acts directly governing the award of public contracts.[27] Therefore, in my analysis, I accept the restriction by omitting

[20] § 30 of the Regulation of 1937.

[21] § 40 of the Regulation of 1937.

[22] § 44 of the Regulation of 1937.

[23] § 40 (1) (6) of the Regulation of 1937. This is about the Regulation of the President of the Republic of Poland of 27 October 1933 – Code of Obligations (Journal of Laws 1933, no. 82, item 598).

[24] § 40 (1) (14) of the Regulation of 1937.

[25] Article 4 of the Act of 1933.

[26] As an example, the following laws may be mentioned: Act of 19 April 1950 on plan-based contracts in the socialist economy (Journal of Laws 1950, no. 21, item 180); Act of 28 December 1957 on supplies, works and services for state entities (Journal of Laws 1958, no. 3, item 7).

[27] Act of 10 June 1994 on public procurement (original text, Journal of Laws 1994, no. 76, item 344), hereinafter: the Act of 1994; Act of 29 January 2004 – Public Procurement Law (original text,

other acts which I classify as included in the system of public procurement law.[28] The Act of 1994 introduced the first obligations to apply purchasing procedures was addressed in the first place to the central government administration and only subsequently to local government. The changing legal environment, including the pursuit for EU membership, resulted in numerous amendments to this act. The next act – the 2004 PPL – was a compact legal regulation relating to an important part of social and economic relations, which was addressed to a wide range of entities obliged to apply it.[29] To an even wider extent, the fulfilment and completeness of public procurement regulations and their compliance with European Union law are contained in the PPL (2019). The adopted structure of this act is typical of public law, containing provisions of a systemic, substantive-law and procedural nature, and the adopted method of regulation is the public-law method.

When conducting research on the classification of public procurement law as part of public law, one should first of all refer to the theory of attribution, according to which the entities obliged to apply the norms contained in a specific act are indicated. According to the adopted construction of the PPL, the legislature listed, i.a., the entities obliged to apply its provisions[30] and the authorities competent in matters of procurement.[31] The entities obliged to apply the provisions of the act include contracting authorities,[32] sectoral contracting entities[33] and subsidised contracting entities.[34] The regulation adopted by the Polish legislature in this respect corresponds to EU regulations which define the scope of entities, e.g. in the so-called Classical Directive,[35] stipulating that the procedures for awarding contracts are applied by contracting authorities, which are the state, regional or local authorities and entities governed by public law. Bodies governed by public law, in accordance with the will of the EU legislature, are bodies established for the specific purpose of meeting needs in the general interest, which do not have an industrial or commercial character, have legal personality and are financed, for the most part, by the state, regional or local authorities or other bodies governed by public law. In the absence of financing by contracting authorities, a condition for

Journal of Laws 2004, no. 19, item 177), hereinafter: the 2004 PPL; Act of 11 September 2019 – Public Procurement Law (consolidated text, Journal of Laws 2021, item 1129, as amended), hereinafter: PPL.

[28] See H. Nowicki, *Prawo zamówień publicznych*..., pp. 92–94.

[29] *Ibidem*, p. 94.

[30] Article 1 (1) PPL.

[31] See S. Fundowicz, *op. cit.*, p. 36.

[32] In the 2004 PPL, previously in force, the legislature only listed the entities that were required to apply its provisions, without defining them as contracting authorities. See Article 4 PPL.

[33] Article 5 PPL.

[34] Article 6 PPL.

[35] See Article 2 (1) (1) to (4) of 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).

inclusion in the group of bodies governed by public law is that the management of the body is subject to supervision by the contracting authorities, or that more than half of the members of its administrative, management or supervisory body are appointed by the contracting authorities. This means that public procurement rules, both national and EU, oblige contracting entities (contracting authorities) to apply procedures related to the purchase of supplies, services or works. Under EU rules, both sectoral contracting entities and subsidised contracting entities are subject to the application of the PPL due to the public tasks they perform or tasks of public significance.[36] The public law nature of the PPL manifests itself in the obligation of public entities to apply certain purchasing procedures[37] and other obligations imposed by the law. Thus, we are dealing with the fulfilment of one of the basic requirements for classifying the norms of the PPL as belonging to public law. Only statutorily listed entities are obliged to apply the PPL, and no other entity may invoke these provisions as binding in connection with its own purchases of supplies, services or works. For private entities, the provisions of the PPL are relevant only if they have established a specific legal relationship with contracting entities in connection with the preparation or conduct of the public procurement procedure and, subsequently, the performance of the public procurement contract.

Procurement law determines the tasks of the authorities competent in procurement matters, which are public administration bodies. The legislature refers, among others, to the President of the Council of Ministers, the Minister competent for economy, the President of the Public Procurement Office, the President of the National Appeals Chamber, the National Appeals Chamber, the Committee for Public Procurement Audit, the Public Procurement Council, the authority supervising the contracting entity.[38] Competent authorities within the meaning of the PPL should include those that are competent and responsible for auditing public procurement.[39] Regarding membership of the European Union, the competent authorities, as defined in the provisions of the PPL, are the competent EU organs, including the EU auditing authorities. The introduction of a system of legal remedies entailed, under EU law,[40]

[36] See Articles 8 to 14 of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94/243, 28.3.2014).

[37] See Article 44 (4) of the Act of 27 August 2009 on public finance (consolidated text, Journal of Laws 2021, item 305, as amended).

[38] See Article 444 PPL.

[39] See Articles 495 and 596 PPL.

[40] These issues are addressed in Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ L 335/31, 20.12.2007); Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395/33, 30.12.1989); Council Directive

subjecting the activities of the contracting authority to judicial review. Thus the competent authorities in the procurement matters, specified by the PPL, are the District Court in Warsaw – the public procurement court,[41] the Supreme Court,[42] arbitration courts,[43] and common courts.[44] The legislature, while defining the group of entities covered by the provisions of the PPL, simultaneously determines their responsibilities, powers and duties, we can therefore refer here to subjective distinguishing.[45] The contracting entity is a public administration body – a public authority, a body governed by public law, which acts on the basis of and within the limits of the law, which defines its public tasks and legal forms of their performance.[46] The public contract award proceedings always serve the performance of a public task that requires the purchase of a supply, service or works. Within the scope of their activities related to the award of public contracts, public authorities are always required to exercise statutorily defined powers.[47] The system of modern public administration comprises, alongside public authorities, also other entities, including private ones. In the context of the PPL, the concept of public authorities should be understood broadly and should be understood as, apart from public authorities in the strict sense, other central or local authorities when these exercise public authority functions.[48] This group of entities also comprises sectoral contracting entities who are entrusted, in various legal forms, such as e.g. by granting special rights, with the performance of public tasks. Delegation of public tasks to a private entity may also entail public funding of those tasks. In this case, we will be dealing with subsidized contracting entities whose purchases will serve the public tasks entrusted. The legal form of carrying out these purchases by sectoral contracting entities and subsidized contracting entities is the public procurement contract agreement. Prior to the conclusion of the agreement, the sectoral contracting entity and the subsidized contracting entity are obliged to apply

92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 76/14, 23.3.1992).

[41] Article 580 (1) PPL.

[42] Article 590 PPL.

[43] Article 591 (1) PPL.

[44] Articles 459 and 460 PPL.

[45] On the criteria for distinguishing branches of law, see L. Morawski, *op cit.*, p. 78 ff.

[46] See J. Boć, *Działalność konsensualna (dwustronna i wielostronna)*, [in:] *System Prawa Administracyjnego*, vol. 5: *Prawne formy działania administracji*, eds. R. Hauser, Z. Niewiadomski, A. Wróbel, Warszawa 2013, p. 234 ff.

[47] At this point, it is worth recalling the still valid view presented by J. Łętowski (*Niewładcze działania administracji państwowej*, [in:] *Prawo administracyjne. Zagadnienia podstawowe*, Warszawa 1990, p. 203 ff.), who points to a misunderstanding in the field of referring to the autonomy of a public administration body modelled on autonomy in private law. The administrative body performs tasks of a government nature and is deprived, i.a., of the freedom to contract, it never acts on its own account and does not bear its own risk and always acts in the public interest.

[48] *Konstytucja RP*, t. 1: *Komentarz*, eds. M. Safjan, L. Bosek, Legalis 2016.

appropriate procedures defined by the PPL in order to select the economic operator with whom the agreement will be concluded.

The subject-matter of the provisions of the PPL, in its basic scope, are regulations concerning public contract award proceedings, the purpose of which is to conclude a public procurement contract agreement and its implementation. Most of the provisions of the PPL concern the obligations of the contracting entity in terms of identifying purchase needs, preparing the procurement procedure, and its conduct. The contracting entity specifies the subject-matter of the contract accordingly to its needs and intended to achieve public goals, which are a consequence of the public tasks assigned to the contracting entity. It is the legislator who defines public tasks that are within the responsibility of the statutorily listed public entities. To fulfil many of these tasks, it will be necessary to purchase supplies, services or works, and in this case, the appropriate procurement procedures defined by the PPL will apply. This is a requirement resulting from the rule of law. Public entities, which are part of public authority, operate on the basis and within the limits of the law. The principles of legality and the rule of law defined by the provisions of the Polish Constitution point to the obligation to act on the basis of the law and to comply with the law.[49] The consequence is the fact that "every action of public administration bodies should have a legal basis and may not be contrary to other norms of the legal order in force".[50] This means that when fulfilling public tasks, it is required to demonstrate the legal basis for a specific action and to apply legal forms in which public administration may act.[51] It is the provisions of the PPL that define the legal framework for managing public funds and property and point to agreements as a legal form of procurement. Indication by the legislature that the provisions of the Civil Code apply to the activities undertaken by the contracting entity and operators in the public contract award proceedings and public procurement contract agreements, do not constitute a reason for classifying the PPL as part of civil law. The legislature clearly decided that civil law provisions may only be applied to the extent not regulated by the provisions of the PPL.[52] This means the possibility of applying the provisions of private law, in this case the Civil Code, only in matters "unregulated by the Act and having a civil nature, and not to all matters covered by the Act, but not regulated by it".[53]

When adopting the 1994 Public Procurement of Act, the legislature stated that one of crucial and most urgent elements of the reform of public administration in

[49] S. Biernat, M. Niedźwiedź, *Znaczenie prawa międzynarodowego i unijnego dla prawa administracyjnego i administracji publicznej w świetle Konstytucji RP*, [in:] *System Prawa Administracyjnego*, vol. 2: *Konstytucyjne podstawy funkcjonowania administracji publicznej*, eds. R. Hauser, Z. Niewiadomski, A. Wróbel, Warszawa 2012, p. 106.

[50] *Ibidem*.

[51] *Ibidem*, p. 114.

[52] Article 8 (1) PPL.

[53] S. Fundowicz, *op. cit.*, p. 39.

Poland was the creation of fundamental institutional mechanisms for regulating the procedures and principles of public procurement (purchase).[54] As early as in relation to the provisions of the Act of 1994, the Supreme Court stated that the purpose of the Act was to protect the public interest and therefore the norms contained therein have the nature of public norms.[55] Analysing the evolution of the public procurement law of the European Union and Polish national law, one can point to the broadening of the area of public tasks covered by the regulation in question. Public procurement law is no longer just a set of procedures[56] to be adhered to by the contracting authority in order to select the most advantageous tender and to conclude an agreement. The EU legislator, by introducing so-called strategic public procurement,[57] draws attention to the achieving, through the public procurement system, of a number of objectives serving the common good. This approach of the EU and national legislators also points to the criterion of interest as the basis for distinguishing public procurement regulations and qualifying them as public regulation aimed at public goals. The basic structure and content of the PPL concern the contracting entity's obligations at various stages of preparing and conducting the public contract award procedure.[58] The contracting entity's obligations in relation to available legal remedies, the review, and the performance of the contract are also important in the context of the research.[59] In performing its duties, the contracting entity, particularly at the stage of preparing and conducting the public contract award procedure, uses its sovereign powers to make decisions. In this case, the decisions made by the contracting entity form part of the legal forms of its action,[60] which should be assessed and qualified in the context of management of public property or an administrative act.[61] The public law

[54] From the explanatory memorandum to the draft Act on public procurement of 1994 (not published).

[55] Judgment of the Supreme Court of 13 September 2001, IV CKN 381/00.

[56] See comments on this topic in H. Nowicki, *Podstawy prawne systemu zamówień publicznych w Polsce*, [in:] *System zamówień publicznych w Polsce*, ed. J. Sadowy, Warszawa 2013, p. 55.

[57] P. Nowicki, *op. cit.*, p. 291.

[58] M. Romańska (*Charakter czynności zamawiającego podejmowanych w postępowaniu o udzielenie zamówień publicznych*, [in:] *Procedura zamówień publicznych*, ed. J. Niczyporuk, Lublin 2019, p. 169) points to the "special status of the contracting entity according to the Public Procurement Law".

[59] J. Niczyporuk (*Sprawa udzielenia zamówienia publicznego*, [in:] *Procedura zamówień publicznych…*, p. 83), when analysing the public procurement procedure under the Act of 2004, distinguishes the public contract award procedure, the appeal procedure and the judicial procedure, the first two having, according to him, the nature of an administrative-law procedure.

[60] It is worth mentioning at this point the position expressed in the judgement of the Polish Constitutional Tribunal of 4 December 2001 (SK 18/00, OTK 2001, no. 8, item 256): "The exercise of public authority concerns all forms of activity of the state, local government and other public institutions which cover very diverse forms of activity".

[61] See J. Niczyporuk, *Forma prawna wyboru najkorzystniejszej oferty*, [in:] *Funkcjonowanie systemu zamówień publicznych – aktualne problemy i propozycje rozwiązań*, eds. M. Stręciwilk, A. Panasiuk, Warszawa 2017, p. 81.

nature of the PPL is also demonstrated by the fact that the entities carrying out public procurements use (as a rule) public funds, and the disbursement thereof, through purchases made, is a management of public property.[62] The legislature pointed out that a breach of the provisions of the PPL, in the course of a public contract award procedure, may entail considering such action as an infringement of public finance discipline[63] and constitute grounds for prosecution for violation of law.[64] The legislature, when introducing regulations on review of the award of public procurement contracts, determined, first and foremost, the administrative review exercised in this process. This is evidenced not only by the granting of audit tasks to the President of the Public Procurement Office, but also by the appointment of the Committee for Public Procurement Audit,[65] and pointing to other administrative auditing bodies.[66] The introduction of legal remedies and the possibility of reviewing the actions of the contracting entity by filing an appeal with the National Appeals Chamber do not change the legal nature of this review as a pre-trial review.[67] This review is exercised by an adjudicating body functioning within the structure of public administration,[68] and the appeal procedure itself is governed exclusively by the provisions of the PPL.[69] It is only in the case of the second remedy, namely a lawsuit, that we have direct reference to the relevant provisions of the Civil Procedure Code.[70] Likewise, the legislature refers to the relevant provisions of the Civil Procedure Code in connection with the right to file a cassation appeal with the Supreme Court.[71] Judicial review of decisions of the public administration exercised by the District Court in Warsaw – the Public Procurement Court and by the Supreme Court as a result of filing a cassation appeal is part of the system of administrative review.[72]

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[62] See M. Guziński, [in:] A. Borkowski, A Chełmoński, M. Guziński, K. Kiczka, L. Kieres, T. Kocowski, *Administracyjne prawo gospodarcze*, Wrocław 2003, p. 269.

[63] See idem, *Środki prawne w ustawie Prawo zamówień publicznych*, [in:] *Środki prawne publicznego prawa gospodarczego*, ed. L. Kieres, Wrocław 2007, p. 31.

[64] Act of 17 December 2004 on the liability for infringement of public finance discipline (Journal of Laws 2005, no. 14, item 114, as amended).

[65] Article 493 PPL. Especially it is worth noting the composition of the Committee – Article 495 PPL.

[66] Article 596 (1) PPL.

[67] See Article 2 (9) of the Council Directive 89/665/EEC.

[68] See H. Nowicki, *Krajowa Izba Odwoławcza w systemie kontroli zamówień publicznych. Uwagi de lege ferenda*, [in:] *Prawo administracyjne wobec współczesnych wyzwań. Księga Jubileuszowa dedykowana Profesorowi Markowi Wierzbowskiemu*, Warszawa 2018, p. 693.

[69] The only reference to the provisions of the Code of Civil Procedure are those on the declaration of enforceability of the decision of the National Appeals Chamber (Article 652 (1) PPL) and the provisions on recording the course of proceedings (Article 570 (3) PPL).

[70] Article 579 (2) PPL.

[71] Article 590 (2) PPL.

[72] See S. Jędrzejewski, H. Nowicki, *Kontrola administracji publicznej. Kontrola a nadzór, struktura systemu, instytucje*, Toruń 1995, p. 26; H. Nowicki, *O potrzebie zmian w systemie kontroli zamówień publicznych*, [in:] *Funkcjonowanie systemu zamówień publicznych…*, p. 87 ff.

CONCLUSIONS

The research focused on the basic issues in the field of distinguishing public procurement law as a public-law regulation with pointing to subjective and objective distinctions. The history of Polish public procurement law indicates that these regulations were related to the spending of public funds, their addressees were public administration, they served the implementation of specific public tasks and also served to achieve other public (economic, social) goals.

The evolution of public procurement law in 2004 and 2019 expands its public-law nature, with a particular reference to additional public objectives that can be achieved through purchases. The holding and spending public funds by the contracting entity through purchases should be defined as the management of public property. Public procurement as a tool for purchasing and public fund spending is an element of economic policy and can serve various other (non-purchasing) objectives assumed by the legislature. Purchases carried out through a public procurement system serve and are directly linked to the performance of public tasks. The content and form of the PPL contains essentially public-law regulations, while the reference to private-law regulations is complementary. Public procurement law is a system of legal regulations which is consistent in both "subjective" and "objective" terms. The public-law nature of the PPL is emphasized and confirmed by the fact that its norms are addressed to public authorities and entities, and the award of a public contract is always related to the performance of a public task, while public procurement contract agreements (including in-house agreements, whether statutory or excluded) are the legal form of performance of these tasks.[73]

The attempts to classify the PPL under a "branch" approach seem not very useful, because the modern legal system is characterised by an increasing number of regulations located on the borderline of hitherto defined branches of law,[74] and this is the reason why we can point to the so-called hybrid approach of certain statutory regulations.

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[73] On the legal form of action of the public administration, see E. Ochendowski, *Prawo administracyjne*, Toruń 2005, p. 169 ff. More broadly, see *Podmioty administracji publicznej i prawne formy ich działania. Studia i materiały z konferencji jubileuszowej Profesora Eugeniusz Ochendowskiego*, Toruń 2005.

[74] H. Nowicki, P. Nowicki, M. Wierzbowski, *op. cit.*, p. 19; J. Niczyporuk, *Skuteczność postępowania odwoławczego w zamówieniach publicznych*, [in:] *Zamówienia publiczne jako instrument sprawnego wykorzystania środków unijnych*, eds. E. Adamowicz, J. Sadowy, Gdańsk–Warszawa 2012, pp. 33–42; T. Kocowski, *Administratywizacja przepisów regulujących postępowanie o udzielenie zamówienia publicznego*, [in:] *Modernizacja zamówień publicznych. Geneza nowelizacji ustawy Prawo zamówień publicznych z 22 czerwca 2016 roku*, eds. M. Kania, P. Nowicki, A. Piwowarczyk, Warszawa 2017, p. 51; P. Bogdanowicz, *Modyfikacja umowy w prawie zamówień publicznych Unii Europejskiej*, Warszawa 2019, p. 4; E. Przeszło, *Kontrola udzielania zamówień publicznych*, Poznań 2013, p. 97; P. Nowicki, *op. cit.*, p. 349.

REFERENCES

Literature

Biernat S., Niedźwiedź M., *Znaczenie prawa międzynarodowego i unijnego dla prawa administracyjnego i administracji publicznej w świetle Konstytucji RP*, [in:] *System Prawa Administracyjnego*, vol. 2: *Konstytucyjne podstawy funkcjonowania administracji publicznej*, eds. R. Hauser, Z. Niewiadomski, A. Wróbel, Warszawa 2012.

Boć J., *Działalność konsensualna (dwustronna i wielostronna)*, [in:] *System Prawa Administracyjnego*, vol. 5: *Prawne formy działania administracji*, eds. R. Hauser, Z. Niewiadomski, A. Wróbel, Warszawa 2013.

Bogdanowicz P., *Modyfikacja umowy w prawie zamówień publicznych Unii Europejskiej*, Warszawa 2019.

Bovis C., *The Liberalisation of Public Procurement and Its Effects on the Common Market*, Dartmouth 1998.

Comba M.E., *Contract Execution in Europe: Different Legal Models with a Common Core*, "European Procurement & Public Private Partnership Law Review" 2013, vol. 8(4), **DOI: https://doi.org/10.21552/EPPPL/2013/4/182**.

Fundowicz S., *Miejsce Prawa zamówień publicznych w prawie administracyjnym*, [in:] *XV-lecie systemu zamówień publicznych w Polsce*, Toruń–Warszawa 2009.

Guziński M., [in:] A. Borkowski, A Chełmoński, M. Guziński, K. Kiczka, L. Kieres, T. Kocowski, *Administracyjne prawo gospodarcze*, Wrocław 2003.

Guziński M., *Środki prawne w ustawie Prawo zamówień publicznych*, [in:] *Środki prawne publicznego prawa gospodarczego*, ed. L. Kieres, Wrocław 2007.

Horubski K., *Administracyjnoprawne instrumenty realizacji zamówienia publicznego*, Warszawa 2017.

Jędrzejewski S., Nowicki H., *Kontrola administracji publicznej. Kontrola a nadzór, struktura systemu, instytucje*, Toruń 1995.

Kocowski T., *Administratywizacja przepisów regulujących postępowanie o udzielenie zamówienia publicznego*, [in:] *Modernizacja zamówień publicznych. Geneza nowelizacji ustawy Prawo zamówień publicznych z 22 czerwca 2016 roku*, eds. M. Kania, P. Nowicki, A. Piwowarczyk, Warszawa 2017.

Łętowski J., *Niewładcze działania administracji państwowej*, [in:] *Prawo administracyjne. Zagadnienia podstawowe*, Warszawa 1990.

McCrudden C., *Buying Social Justice: Equality, Government Procurement and Legal Change*, Oxford 2007, **DOI: https://doi.org/10.1093/acprof:oso/9780199232420.001.0001**.

Morawski L., *Wstęp do prawoznawstwa*, Toruń 2009.

Niczyporuk J., *Forma prawna wyboru najkorzystniejszej oferty*, [in:] *Funkcjonowanie systemu zamówień publicznych – aktualne problemy i propozycje rozwiązań*, eds. M. Stręciwilk, A. Panasiuk, Warszawa 2017.

Niczyporuk J., *Skuteczność postępowania odwoławczego w zamówieniach publicznych*, [in:] *Zamówienia publiczne jako instrument sprawnego wykorzystania środków unijnych*, eds. E. Adamowicz, J. Sadowy, Gdańsk–Warszawa 2012.

Niczyporuk J., *Sprawa udzielenia zamówienia publicznego*, [in:] *Procedura zamówień publicznych*, ed. J. Niczyporuk, Lublin 2019.

Nowicki H., *Krajowa Izba Odwoławcza w systemie kontroli zamówień publicznych. Uwagi de lege ferenda*, [in:] *Prawo administracyjne wobec współczesnych wyzwań. Księga Jubileuszowa dedykowana Profesorowi Markowi Wierzbowskiemu*, Warszawa 2018.

Nowicki H., *Nowe Prawo zamówień publicznych a system prawa zamówień publicznych. Integracji systemu*, [in:] *Dziś i jutro zamówień publicznych. XII konferencja naukowa, 7–8 października 2019 r.*, eds. M. Lemonnier, H. Nowak, Olsztyn–Warszawa 2019.

Nowicki H., *O potrzebie zmian w systemie kontroli zamówień publicznych*, [in:] *Funkcjonowanie systemu zamówień publicznych – aktualne problemy i propozycje rozwiązań*, eds. M. Stręciwilk, A. Panasiuk, Warszawa 2017.

Nowicki H., *Podstawy prawne systemu zamówień publicznych w Polsce*, [in:] *System zamówień publicznych w Polsce*, ed. J. Sadowy, Warszawa 2013.

Nowicki H., *Prawo zamówień publicznych – pojęcie i zakres regulacji*, [in:] *XV-lecie systemu zamówień publicznych w Polsce*, Toruń–Warszawa 2009.

Nowicki H., Nowicki P., Wierzbowski M., *Nowe dyrektywy zamówieniowe a polskie prawo zamówień publicznych. Uwagi de lege ferenda*, [in:] *Prawo zamówień publicznych. Stan obecny i kierunki zmian*, eds. H. Nowicki, P. Nowicki, Wrocław 2015.

Nowicki P., *Aksjologia prawa zamówień publicznych. Pomiędzy efektywnością a instrumentalizacją*, Toruń 2019.

Ochendowski E., *Prawo administracyjne*, Toruń 2005.

Podmioty administracji publicznej i prawne formy ich działania. Studia i materiały z konferencji jubileuszowej Profesora Eugeniusz Ochendowskiego, Toruń 2005.

Przeszło E., *Kontrola udzielania zamówień publicznych*, Poznań 2013.

Romańska M., *Charakter czynności zamawiającego podejmowanych w postępowaniu o udzielenie zamówień publicznych*, [in:] *Procedura zamówień publicznych*, ed. J. Niczyporuk, Lublin 2019.

Safjan M. Bosek L. (eds.), *Konstytucja RP*, t. 1: *Komentarz*, Legalis 2016.

Szydło M., *Prawna koncepcja zamówienia publicznego*, Warszawa 2014.

Szydło M., *Udzielanie zamówienia publicznego jako pomoc państwa w rozumieniu art. 87 ust. 1 Traktatu ustanawiającego Wspólnotę Europejską*, "Kwartalnik Prawa Prywatnego" 2007, no. 2.

Legal acts

Act of 11 April 1919 on the establishment of the General Army Supply Office (Journal of Laws 1919, no. 32, item 265).

Act of 18 December 1920 on the reorganisation of the matters related to army supplies (Journal of Laws 1920, no. 6, item 33).

Act of 15 February 1933 on supplies and works for the State Treasury, local government and public-law institutions (Journal of Laws 1933, no. 19, item 127).

Act of 19 April 1950 on plan-based contracts in the socialist economy (Journal of Laws 1950, no. 21, item 180).

Act of 28 December 1957 on supplies, works and services for state entities (Journal of Laws 1958, no. 3, item 7).

Act of 10 June 1994 on public procurement (original text, Journal of Laws 1994, no. 76, item 344).

Act of 29 January 2004 – Public Procurement Law (original text, Journal of Laws 2004, no. 19, item 177).

Act of 17 December 2004 on the liability for infringement of public finance discipline (Journal of Laws 2005, no. 14, item 114, as amended).

Act of 27 August 2009 on public finance (consolidated text, Journal of Laws 2021, item 305, as amended).

Act of 11 September 2019 – Public Procurement Law (consolidated text, Journal of Laws 2021, item 1129, as amended).

Communication – Europe 2020: "A strategy for smart, sustainable and inclusive growth", Brussels, 3.3.2010, COM(2010) 2020 final.

Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Single Market Act. Twelve levers to boost growth and strengthen confidence "Working together to create new growth", Brussels, 13.4.2011, COM(2011) 206 final.

Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395/33, 30.12.1989).

Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 76/14, 23.3.1992).

Decree of 7 December 1918 on the establishment of the Distribution Office in order to centralise government procurement (Journal of Laws 1919, no. 19, item 55).

Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ L 335/31, 20.12.2007).

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).

Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94/243, 28.3.2014).

Regulation of the Council of Ministers of 29 January 1937 on supplies and works for the State Treasury, local government and public-law institutions (Journal of Laws 1937, no. 13, item 148).

Regulation of the President of the Republic of Poland of 27 October 1933 – Code of Obligations (Journal of Laws 1933, no. 82, item 598).

Case law

Judgment of the Supreme Court of 13 September 2001, IV CKN 381/00.

Judgment of the Constitutional Tribunal of 4 December 2001, SK 18/00, OTK 2001, no. 8, item 256.

ABSTRAKT

We współczesnym systemie prawnym mamy coraz częściej do czynienia z regulacjami kompleksowymi, usytuowanymi na pograniczu tradycyjnie ujmowanych gałęzi prawa. Współcześnie prawo zamówień publicznych ma w przeważającym zakresie charakter publicznoprawny. Przynależność prawa zamówień publicznych do prawa publicznego została przesądzona na gruncie prawa Unii Europejskiej. Prawodawca unijny przewidział konieczność osiągnięcia określonych celów strategicznych, nakierowanych na realizację interesu publicznego, przy realizacji zamówień strategicznych. Aktualnie obowiązująca ustawa z dnia 11 września 2019 r. – Prawo zamówień publicznych (PZP) ma, w przeważającej mierze, charakter publicznoprawny. Po pierwsze, tylko podmioty wskazane ustawowo są obowiązane do stosowania jej przepisów. Zamawiającymi są organy administracji publicznej, które są powołane do wykonywania zadań publicznych w przewidzianych prawem formach. Udzielanie zamówień publicznych jest jedną z prawnych form działania administracji publicznej. Zamawiający, szczególnie na etapie przygotowywania postępowania o udzielenie zamówienia, korzysta z władztwa w zakresie podejmowanych rozstrzygnięć. Po drugie, zamówienia udzielane są w związku z realizacją zadań publicznych oraz są finansowane ze środków publicznych. Większość przepisów PZP dotyczy

obowiązków zamawiającego w zakresie określenia potrzeb zakupowych, przygotowania postępowania o udzielenie zamówienia i jego przeprowadzenia. Zamawiający określa przedmiot zamówienia, który jest podporządkowany jego potrzebom i ma służyć realizacji celu publicznego, które to cele są konsekwencją zadań publicznych przypisanych zamawiającemu. Celem ustawy jest więc ochrona interesu publicznego. Nie jest rozstrzygające odesłanie do odpowiedniego stosowania, w zakresie nieuregulowanym ustawą, do przepisów Kodeksu cywilnego. Ustawodawca przyjął bowiem, że odesłanie takie ma zastosowanie jedynie w sytuacji, gdy dana kwestia jest nieuregulowana przepisami PZP i dotyczy czynności podejmowanych przez zamawiającego, wykonawców oraz uczestników konkursu w postępowaniu o udzielenie zamówienia i konkursie oraz do umów w sprawach zamówień publicznych oraz ma charakter cywilnoprawny. Odesłanie nie odnosi się więc do wszystkich spraw regulowanych ustawą, a jedynie ma charakter uzupełniający.

Słowa kluczowe: system prawny; prawo zamówień publicznych; zamówienia publiczne; organy administracji publicznej; interes publiczny