

Draft amendment of the Public Procurement Law.

On 12th February 2013 the Council of Ministers has adopted the draft of the act on amendment of the act – Public Procurement Law (*ppl*). The draft, which was prepared by the Public Procurement Office, envisages significant changes regarding regulations on sub-contracting on the field of public procurement. Among them, the most important ones are: introducing a legal definition of the sub-contracting agreement, a possibility of imposing to a contractor an obligation to perform the contract personally, as well as new guarantee mechanisms regarding payment of remuneration to sub-contractors.

Sub-contracting agreement

The draft of amendments introduces a definition of a sub-contracting agreement. Such agreement, in the written form and concluded against remuneration, has been defined as signed by the economical operator, chosen by the awarding entity, and a subcontractor – in case when provision of services, the supplies or construction works constitute the subject-matter of the contract. For the latter, a contract between a sub-contractor and a further sub-contractor shall also constitute a sub-contracting agreement.

Obligation to personally perform the agreement

On the basis of the amendments, the awarding party shall be granted wider possibilities of stipulating a contractor's obligation to personally perform the agreement. In the light of current legislation (art. 36 item 5 of *ppl*) this is only admissible for the reasons of specific character of the subject-matter of the public contract. The newly proposed art. 36a would make it possible for the awarding entity to stipulate an obligation to personally perform *key elements* of the contract, for the contracts related to provision of services or construction works, or *works connected to deployment or installations* – in case when the supplies are the subject-matter of the contract. It should be noted that the notion of *key elements of the contract* may turn out to be extremely capacious in practice, and different evaluations on the character of elements of the contracts may result in disputes.

Guarantee of payment of sub-contractor's remuneration

The draft introduces guarantee mechanisms for the sub-contractor as regards his receiving due remuneration. The awarding party shall be obligated to pay the remuneration directly to the sub-contractor in case the contractor fails to do so. However, the payment shall be made only provided that the sub-contractor had been accepted by the awarding party – in case of a construction works agreement – or that the sub-contractor submits a certified copy of his agreement (in other cases). The paid remuneration shall be then deducted from the contractor's fee, agreed upon in the main contract.

Moreover, according to a proposed art. 143c item 2, the awarding party shall be entitled to rescind from the public contract in a situation when the sub-contractors' remuneration that it has to pay directly, exceeds 2% of the value of the public contract. The same shall apply if the awarding party *shall have to repeatedly pay the remuneration directly to sub-contractor*. The wording of the second condition seems rather ambiguous, which may raise the doubts as to its practical application in the future.

According to the draft, the amended law would enter into force 14 days after its publication; however it is very difficult to estimate how long the works within the Council of Ministers shall take.

