

ECONOMIC SELF-GOVERNMENT AND PUBLIC PROCUREMENT IN POLAND

Ewa Przeszła*

Abstract: *In Polish law, economic self-government has not been regulated in an independent and uniform way, but it plays an important role in public procurement proceedings regulated by the Act of 29 January 2004, i.e. the Public Procurement Law. A specific group of economic self-government organisations should be, along with other entities, included in the category of participants in the field of public procurement. These entities may first of all make use of – to a certain extent – legal protection measures, thus ensuring the protection of the interests of the members of the organisation as well as the protection of the public procurement market against the malfunctioning of the entities awarding contracts.*

Economic self-government organisations may also participate in public procurement as contractors, despite the fact that such rights have not been clearly defined in the regulations. As follows from the acts determining the legal status of individual organisations of entrepreneurs, they have the opportunity to act as public procurement contractors. They meet formal requirements to perform such a role under the provisions of the Public Procurement Law.

Therefore, one should notice the need for uniform regulation of the legal status of economic self-government in Poland, postulate the possibility of active participation of the self-government concerned at each stage of the procedure for the award of a public contract and significantly extend the powers of self-government as part of the appeal procedure.

Keywords: *public procurement, contractor, economic self-government organisations, public procurement procedure, legal protection measures*

I. INTRODUCTION

Public procurement in Poland is an important element of the market economy, as it contributes to the increase in global demand and affects competition on the public procurement market.¹ The state strives to purchase goods or services in order to perform a public function, which is running a rational economy, implementing budgetary policy. Performing the above tasks of the state, through the use of public funds, must be carried out in accordance with certain rules, hence public procurement can function properly only in a free market economy, operating on the basis of basic principles, i.e. economic freedom, equality and free competition.

The essence of procurement results from the statutory definition (in accordance with the European Union legislation), which is contained in the Act of 29 January 2004 Public Procurement Law,² specifying procurement as paid contracts concluded between the awarding entity and the contractor, the subject of which are services, supplies or construction works (Article 2 (13) of the PPL Act).

Apart from the analysis of public procurement in the economy, the purpose and function of procurement, its role in shaping the market and a number of other issues that fall within

* Dr hab. Ewa Przeszła, Institute Faculty of Law and Administration University of Silesia in Katowice, Poland

¹ PANASIUK, A. Aim of Public Procurement. *Public Procurement Law*. 2007, No 2, p. 31.

² I. e. *Journal of Laws*. 2019, item 1843, hereinafter: “PPL Act”.

the concept of procurement, it is worth paying attention to the problem not regulated in the public procurement law, related to the subject scope of the Act, i. e. participation of economic self-government in public procurement. In the Polish legislation, economic self-government has not been regulated in an independent and uniform manner, but nonetheless it plays an important role in the public procurement procedure. Hence, it is worth trying to answer whether and to what extent the participation of local government in awarding public contracts is necessary and justified. To resolve the problem presented, it is undoubtedly necessary to define the legal status of economic self-government in Poland.

II. ECONOMIC SELF-GOVERNMENT IN POLAND

Business organisations operating in Poland have a diverse legal character. Some of them belong to the category of obligatory associations of entities dealing with similar economic activities (these are primarily corporate organisations, grouping natural persons practising liberal professions as entrepreneurs, voluntary organisations, associating entrepreneurs according to the territorial or industry criterion, as well as organisations collecting selected groups of entrepreneurs indicated by the legislator.

Because in the Polish legislation there is no uniform, coherent regulation specifying the principles for the creation, operation and cessation of economic self-government, and there is even a lack of a universally and uniformly recognized term concerning economic self-government (most often treating entities conducting economic activity in various spheres of the economy as economic self-government occurring beside local government), it should be pointed out that there are basic legal solutions that give the opportunity to determine the attributes of such self-government.

As follows from the Constitution of the Republic of Poland of April 2, 1997,³ pursuant to art. 17, it is possible to create, by means of a legal act, professional self-governments, in other words, organisations of entrepreneurs who practice liberal professions representing persons practicing professions of public trust.⁴

These self-governments should oversee the proper performance of these professions within the limits of the public interest and for its protection. Other types of self-government may also be created by means of a legal act, but they cannot violate the freedom to practice a profession or restrict the freedom of undertaking business activity.

Pursuant to the Act of 30 May 1989 on professional self-government of some entrepreneurs,⁵ they may be identified as organisations of entities conducting business activity in the field of: trade, gastronomy and services, transport, as well as other (not specified) types of activity.⁶ However, entities with the status of craftsmen have been excluded from this

³ *Journal of Laws*. 1997, No. 78, item 483 as amended.

⁴ RĄCZKA, P. *Legislative Activity of Professional Self-governments in Poland*. Toruń, Wydawnictwo "Dom Organizatora", 2013.

⁵ Act of 30 May 1989 on the professional self-government of some entrepreneurs, *Journal of Laws* from 1989, No. 35, item 194 as amended.

⁶ See KMIĘCIAK, R. Professional Self-government. In: W. Skrzydło – M. Chmaj, (eds.). *Encyclopaedia of Political Science. State Systems*. Vol. 2, Kraków: Zakamycze 2000, pp. 356–357.

scope. Organisations of indicated entrepreneurs may be created voluntarily as trade and service associations, transport associations, as well as unnamed by law but defined as other organisations of entrepreneurs.

The above clearly shows that any entrepreneur can be actually a member of the “professional self-government of some entrepreneurs” (including the statutory exclusion of craftsmen) and at the same time all entrepreneurs (also excluding craftsmen) can create within this self-government organizations of an unspecified status and character. The task of associating is, in particular, to strengthen environmental ties, attitudes consistent with the principles of ethics and dignity of the profession, as well as conducting cultural, educational and social activities for the members, establishing and operating credit unions and assistance and loan funds, as well as representing the interests of the members before public administration bodies.

Another type of economic self-government are chambers of commerce, which – according to the Act of May 30, 1989 on chambers of commerce⁷ – may include (on a voluntary basis) all entrepreneurs⁸. There are no restrictions in this matter resulting from the provisions of the Act on Chambers of Commerce. Therefore, they can be entrepreneurs belonging to individual professional self-governments, as well as entrepreneurs – craftsmen and entrepreneurs having the opportunity to create associations and other organisations qualified to the so-called professional self-government of some entrepreneurs. Each chamber of commerce is referred to as an economic self-government organisation representing the economic interests of its entrepreneurs, in particular vis-à-vis public authorities.

The purpose of the chambers is to shape and disseminate principles of ethics in business, in particular to develop and improve the standards of fair conduct in business transactions. The tasks of the chambers, pursuant to the provisions of the Chamber of Commerce Act (Articles 4-5), include in particular: – expressing opinions on draft solutions related to the functioning of the economy and participating in the preparation of draft legal acts in this respect; – evaluating the implementation and functioning of legal provisions regarding the conduct of business; – contributing to creating conditions for the development of economic life and supporting economic initiatives of the members; – delegating their representatives, at the invitation of state bodies, to participate in the work of advisory and opinion-making institutions on matters concerning manufacturing, commercial, construction and service activity; – organising and creating conditions for settling disputes by means of amicable and conciliation proceedings and participating in court proceedings in connection with the economic activity of the members; – expressing opinions on the existing business practices as well as informing about the functioning of entrepreneurs and expressing opinions on the state of economic development in the area of operation of a given chamber. These tasks may be carried out by the chambers, although they are not obliged to undertake them (see Article 5 (2)).

⁷ Act of May 30, 1989 on chambers of commerce, i.e. Journal of Laws from 2019 item 579.

⁸ See more on forms of associating entities conducting business activity KOPACZYŃSKA-PIECZNIAK, K. *Corporation. Elements of Legal Structure*. Warsaw: Wolters Kluwer, 2019.

In the context of public procurement, organisations of craftsmen, i.e. crafts self-government organisations, such as guilds, chambers of craft and the Polish Crafts Association,⁹ operating on the basis of the Crafts Act,¹⁰ are significant. Crafts organisations are created on the initiative of the members on a voluntary basis. As crafts do not include commercial activities, hotel services, transport activities, services offered by liberal professions, medical services as well as the production and service activities of visual artists and photographers, as a consequence, craft organisations do not embrace entrepreneurs carrying out the indicated economic activities. The tasks of the crafts economic self-government include, in particular: – promotion of economic and socio-professional activities of the craft; – supervision over the organisation and course of the professional preparation process in crafts; – providing assistance to craftsmen and other entrepreneurs associated in crafts economic self-government organisations, and representing the interests of the crafts environment in relation to public administration bodies.

III. PARTICIPANTS IN THE PROCEDURE FOR AWARDING PUBLIC CONTRACTS/TENDERS

When indicating the subjective scope of public procurement law, the parties to the public procurement contract are most often mentioned, i.e. the contracting authority and the contractor.

The contracting entity has been defined in the act¹¹ and specified by creating a catalogue in art. 3 of the Public Procurement Law.¹² The PPL also indicates in the statutory definition who can be a contractor¹³ and creates grounds for joint bidding by several contractors (e.g. in the form of a consortium, a civil law partnership).¹⁴ Thus, undoubtedly, the contractor is an entrepreneur who as a business entity,¹⁵ can participate in public procurement as a contractor and who can be a party to the public procurement contract with all the resulting consequences.

It should be noted, however, that the circle of participants involved in public procurement is very wide and varied. Undoubtedly, it is possible to indicate entities that are in various relations with the parties themselves at the stage of preparation of the proceedings or their course (e.g. appraisers, experts, third parties “cooperating” with the parties) or the

⁹ BANDERZEWSKI, K. *Economic self-government in Polish law. Legal study*. Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2014. SZUSTEK, A. *Self-government – Economic Self-government – Other Types of Self-government. Conceptual Grid, Theoretical Approach and Methodological Issues*. Warsaw: Oficyna Wydawnicza ASPRA-JR, 2017.

¹⁰ Act of 22 March 1989 on crafts, i.e. Journal of Laws of 2018, item 1267 as amended.

¹¹ According to the content of art. 2 point 12 of the PPL Act, the contracting authority is a natural person, legal person or an organizational unit without legal personality obliged to apply the Act.

¹² Art. 3 section 1 of the PPL Act.

¹³ According to art. 2 point 11 of the Public Procurement Law, a contractor is a natural person, legal person or an organizational unit without legal personality who is applying for the award of a public contract, submitted an offer or concluded a public procurement contract/tender.

¹⁴ Art. 23 of the PPL Act.

¹⁵ POWAŁOWSKI, A. In: A. Dobaczewska – A. Powałowski – H. Wolska. *Entrepreneurs' New Law*. Warsaw: C. H. Beck 2018, pp. 1–25.

implementation of the contract. In addition, all public administration bodies that perform control and supervisory functions, the EU bodies that participate in procedures and other entities that may be present at the stage of public procurement implementation (e.g. common courts) should be listed.

Undoubtedly, economic self-government organisations should also be included in the category of participants in the field of public procurement (the legislator did not use the above term in the Public Procurement Law, but only pointed to the organisations listed in specific legal acts in connection with the possibility of lodging appeals).¹⁶

As follows from art. 179 (2) of the PPL Act, legal protection measures are also available to organisations entered on the list kept by the President of the Public Procurement Office, for which entities may apply operating pursuant to the provisions on: 1) chambers of commerce; 2) crafts; 3) professional self-government of some entrepreneurs; 4) employers' organisations; 5) professional self-governments of architects and construction engineers (article 154a (1) of the Public Procurement Law).

It should be clearly stated that the appeal protection measures in force may be lodged by the said organisations only with respect to the contract notice and the specification of the essential terms of the contract/tender, and in addition there must always occur a total of three premises allowing for the initiation of an appeal procedure, i.e. the appellant has or has had an interest in obtaining a given contract, – the contracting authority has violated the provisions of the Public Procurement Law,¹⁷ – the appellant has suffered or may suffer damage resulting from a violation of the provisions of the Public Procurement Law (with a causal relationship between the damage and the breach of interest by the contracting authority).

IV. ECONOMIC SELF-GOVERNMENT AS A PARTY TO THE PROCEEDINGS ON THE AWARD OF PUBLIC PROCUREMENT CONTRACTS/TENDERS

Analysing the legal status of economic organisations that have been listed in the PPL Act, one can formulate the thesis that the scope and role of these organisations in the area of public procurement is much broader and is not limited to the possibility of using legal protection measures and appearing only in appeal proceedings under public procurement, although the participation of organisations associating entrepreneurs (due to their legal status, goals or tasks) is not established in a complete and unambiguous manner.

It is reasonable and expedient to accept the thesis that entrepreneurs' organisations, just like entrepreneurs themselves – members of these organisations – may appear in legal transactions as entities of economic activity, i.e. as entrepreneurs. The formal and material basis of this is the legal personality of these organisations resulting from their entry in the National Court Register¹⁸ and activities confirmed additionally by specific provisions determining the legal status of individual organisations.

¹⁶ Possibility to lodge an appeal as well as a complaint treated as “appeal” in the context of a public procurement procedure.

¹⁷ Judgement of the National Appeals Chamber of November 2, 2010 reference number act KIO / UZP / 2275/10, LEX No. 736369.

¹⁸ Act of 20 August 1997 on the National Court Register, i.e. Journal of Laws of 2019, item 1500.

In addition, it should be noted that by accepting as an option (but not an obligation) lying on the side of the indicated organisations of entrepreneurs, and thus carrying out economic activities, organisations may act as public procurement contractors. In a situation where the order is realized for profit, in an organised and continuous manner, and on the entity's own behalf, it should be assumed that pursuant to the content of art. 3 of the Entrepreneurs' Law,¹⁹ a given entity carries out business activity and – in the light of Art. 4 sec. 1 of the aforementioned act – should be considered an entrepreneur.

As a consequence, however, the indicated entities – business organisations – can and should be treated as participants in economic transactions, and at the same time competitors on the relevant market.²⁰ It is highly probable that there will also be entrepreneurs on a given relevant market – members of a given economic organisation, i.e. a given economic self-government. Undoubtedly, this may mean that the organisation of entrepreneurs and the entrepreneurs themselves – members of this organisation, may be considered competitors, also in the field of public procurement. However, actual competition for the same public contract would entail – as it seems – a conflict of interest situation. Business organisations as economic self-government units should represent the interests of entrepreneurs. These entrepreneurs should, however, have guarantees of good and correct representation of their interests in every sphere of activity, including the area of public procurement. In practice, this means that the organisation of entrepreneurs – as the contractor of the contract should not undertake a “competitive fight” with the entrepreneurs – members of this organisation, and at the same time contractors, due to the aforementioned conflict.

In the considerations regarding the participation of business organisations in public procurement, it is also necessary to take into account all provisions regarding the conditions to be met by the contractor participating in the procurement procedure and art. 4 of the PPL Act, specifying the subject exclusions in the application of the said legal regulation.

After formulating the above thesis, it is worth analysing the tasks of these organisations, which are indicated in the PPL Act and indicating the forms of their participation in public procurement (mainly at the stage of appeal proceedings), as well as focusing on the objectives and possible legal consequences of their participation in the procedure.

As it results from the Public Procurement Law, the self-government of architects and construction engineers,²¹ inter alia, has the possibility of bringing legal protection measures as the one which was the only one mentioned among other professional self-governments in the content of art. 154a of the PPL Act. The right to lodge an appeal and a complaint corresponds, as it seems, to the tasks of the self-government of architects and construction engineers (these include in particular: – supervision over the proper and diligent performance of the profession by members of the self-government; – representing and protecting their professional interests; – setting the principles of professional ethics

¹⁹ Act of March 6, 2018, Entrepreneurs' Law, i.e. Journal of Laws of 2019, item 1292, as amended.

²⁰ See in this regard POWAŁOWSKI, A. *Prawo ochrony konkurencji*. Warszawa: Difin 2015, p. 54 et seq.

²¹ Act of 15 December 2000 on the professional self-government of architects and construction engineers, i.e. Journal of Laws of 2019, item 1117.

and supervision over its observance; – granting and withdrawing building qualifications, recognition of professional qualifications as well as granting and withdrawing the title of building surveyor; – cooperation with government administration bodies and local self-government bodies as well as with other professional self-governments and professional associations; – conducting proceedings in the field of professional and disciplinary liability of members of professional self-governments).

Each of the self-government's specific tasks may become a premise for the self-government to gather relevant, substantive and formal arguments that allow for proper, optimal support of the legal protection measure. Filing an appeal (Article 180 et seq. of the Public Procurement Law), followed by a complaint to the court (Article 198a et seq. of the Public Procurement Law) requires evidence proceedings (Article 190 of the Public Procurement Law), so in this respect professional self-government may undertake invaluable action.

In relation to the above, it seems that the same right to bring a legal protection measure should also be granted to other professional self-governments, which by representing the interests of their members would be able to support them in the course of appeal and complaint proceedings in public procurement. It is obvious that members of professional self-governments may participate in contracts as contractors if they act as entrepreneurs.

It is also worth noting that professional self-governments enjoy the status of legal personality and as a consequence of having, among others, this feature – they have the opportunity to run a business.²² Thus, professional self-governments may participate in public procurement as contractors.

Also business organisations explicitly mentioned in the PPL Act, conducting business activity being the subject of public procurement, may act as contractors. There are neither statutory restrictions in this respect, nor a resulting ban on business activities.

Similarly, a particular chamber of commerce, as another entity having the status of an appealing entity under the PPL Act, has the basis for making use of the option of being included on list of the President of the Public Procurement Office and taking action consisting in lodging an appeal (a complaint). It should also be noted that at the request or with the consent of the Chamber of Commerce, the Council of Ministers may, by regulation, entrust a specific chamber with the performance of certain tasks reserved in the provisions of law for state administration (Article 5 (3) of the Act on Chambers of Commerce).

One of the basic tasks of the crafts self-government organisation is, according to the Crafts Act (Article 12 (4)), representing the interests of members of these organisations before administrative bodies and courts, and in the case of the Polish Crafts Association also representing the interests of craftsmen as a specific professional group in the country and abroad.

Certainly, and in the case of crafts organisations, the tasks set out in the Crafts Act are a premise that creates the possibility for these organisations to participate in public procurement and to submit, on behalf of members of crafts self-government organisations, legal protection measures under Art. 154a of the PPL Act.

²² E.g. the aforementioned act on the professional self-government of architects and construction engineers (Article 7).

Crafts economic self-government organisations are subject to the obligation to be entered in the National Court Register and obtain legal personality upon entry into this Register. Similarly, as in the case of other entrepreneur organisations, legal personality gives an appropriate legal basis and creates the possibility for crafts organisations to conduct business activities, as it seems in the full scope (i.e. without restrictions referred to in Article 2 (4) of the Crafts Act), but this Act does not indicate *expressis verbis* for such a possibility.

Conducting business activities by crafts self-government organisations allows these organisations to participate in public procurement as contractors for a specific contract/tender.

Pursuant to the content of art. 154a in connection with art. 154 point 5 of the PPL Act, employers' organisations²³ may be added to the list of organisations authorized to bring legal protection measures. These organisations can be created by employers, i.e. entities referred to in the act on trade unions.²⁴ These are entities – natural persons, legal persons or organisational units without legal personality – employing employees or persons without the status of employees, regardless of the basis of employment. Therefore, these entities are distinguished from the others by employing persons performing work for them.²⁵ Employer organisations often associate entities carrying out economic activity and having the status of entrepreneurs, which also means that these entities are also employers. Consequently, some employers' organisations act as organisations associating entrepreneurs and thus constitute a *sui generis* economic self-government.

Employers' organisations (according to the act on employers' organizations: employers' associations) have the right to form a federation and confederation as well as to join them, and each association, federation and confederation has the right to join international employers' organisations. All these organisations are self-governing and independent in their statutory activities from the organs of government administration, local government and other organisations.

The main task of employers' unions, their federation and confederation, is to protect the rights and represent the interests, including the economic ones, of the associated members vis-à-vis trade unions, authorities and government administration as well as local government bodies. Employers' unions participate in conducting collective bargaining, in concluding collective labour agreements and other agreements within the scope of their statutory tasks.

The employers' association is subject to registration in the National Court Register. It acquires legal personality on the day it is registered in the National Court Register. The legal personality of the indicated organisations is a premise for these organisations to carry out their business activities, of which the Act on Employers' Organizations only mentions in reference to gaining income. Income from business activities conducted by employers' associations as well as federations and confederations serves the purpose of car-

²³ Art. 1 (1) of the Act of May 23, 1991 on employers' organisations, i.e. Journal of Laws of 2019, item 1809.

²⁴ Art. point 2 of the Act of May 23, 1991 on trade unions, i.e. Journal of Laws of 2019, item 263.

²⁵ PIĄTKOWSKI, J. Commentary to Article 1 of the Act on Employers' Organizations. In: K.W. Baran (ed.). *Collective Employment Law. Commentary*. Warsaw: Lex, 2019.

rying out their statutory tasks and cannot be allocated to their members.²⁶ These organisations benefit from tax exemptions provided for associations.

In view of the above, employers' organisations engaged in economic activities may be treated as entrepreneurs under the provisions of the Act on Entrepreneurs' Law. If their business activity falls under the public procurement contracts in question, then they can be treated as contractors. This determination in no way changes the legal status of these organisations as unions, whose members are employers engaged in economic activities as well as employers not performing such activities.

At the same time, however, it should be assumed that the failure of employers' organisations to conduct business activities excludes them from the group of entrepreneurs and, consequently, also from public procurement contractors.

V. CONCLUSIONS

Freedom of association in social, professional and economic unions and organisations resulting from art. 12 and 59 of the Constitution of the Republic of Poland, fully extends to business entities – entrepreneurs. Entrepreneurs exercising their right to associate should, however, take into account not only this right, but also their benefits arising from belonging to various types of unions and organisations.

Business organisations are not subject to bans on participation in public contracts/tenders as contractors, although their tasks do not clearly indicate the possibility of such participation.

As it results from the acts determining the legal status of individual organisations of entrepreneurs, it is not explicitly stated that a given organisation – voluntary or obligatory – has the opportunity to act as a public procurement contractor. However, they meet the formal requirements to perform such a role under the provisions of the Act – Public Procurement Law, which has been attempted to show above.

In principle, there is no doubt as to the participation of the organisations in question in the procedure for bringing legal protection measures for economic operators and, at the same time, entrepreneurs associated in these organisations. Undoubtedly, the participation of these organisations as the appealing entity at the stage of the procedure related to the use of legal remedies ensures protection of the interests of the members of the organisation as well as protection of the public procurement market against incorrect activities of contracting entities.²⁷

At the same time, it should be noted that analogous solutions regarding the participation of business organisations, including employers' organisations, like those described above, resulting from the current Public Procurement Law Act, are also included in the newly adopted Act of 11 September 2019 of Public Procurement Law.²⁸

²⁶ Ibid.

²⁷ Judgement of the National Appeal Chamber of April 21, 2017 (KIO 625/17, LEX No. 2319191). Judgement of the National Appeal Chamber of June 15, 2015 (KIO 1040/15, 1043/15, LEX No. 1800078).

²⁸ Journal of Laws. 2019, item 2019, hereinafter: "PPL Act".

To sum up, one should notice the need for uniform regulation of the legal status of economic self-government in Poland, postulate for the possibility of active participation of the self-government concerned in the entire public procurement procedure (i.e. at every stage of the procedure), and significantly extend the powers of the self-government at the stage of appeal proceedings, mainly by increasing cases, which may be the subject of appeals or a later complaint lodged to a common court.