

Formalization, Discretion, and Trust on Public Procurement Market

Abstract

A public contract is a contract to which the parties are the contracting authority and the contractor. The public procurement process is a legal category of a dynamic nature made up of three stages: preparation, award and fulfilment of the public contract. This is a highly formalized legal category. Formalizing has the objective of ensuring economic viability of the whole of the public procurement system, its transparency and integrity of the participants of the public procurement markets. At the same time, an excessively high degree of formalization may prove to be harmful and ineffective for the achievement of these objectives, because it limits the flexibility of the contracting entity's and contractor's activities. Therefore, being aware of the existence of the dilemma of formalization, the lawmakers face the need to balance these two groups of values. The compromise understood in this way is expressed by the presence in the public procurement law of a certain degree of discretion that facilitates and makes the flow of information between the parties to the agreement more effective and simultaneously creates space for the emergence of a relationship of trust between the contracting authority's and the contractor's institutions. The article is limited to the examination of the extent of discretion at the stage of preparation and award (conclusion) of the contract.

Keywords

public contract, discretion, trust, credibility

1. Introduction

A public contract is subject to a special legal regime, a contract which the buyer, conventionally known as the contracting authority or the contracting institution, concludes with the contractor (or contractors)¹ to satisfy the demand for particular goods that it wants. The good that the contracting authority wants is a specific performance from the contractor, namely such conduct of the contractor that leads to satisfying the contracting authority's specific needs and brings it an immediate economic benefit. However,

¹ The contracting institution (contracting authority), as a party to the public contract, is a specific natural person, a group of natural persons or an organizational unit, which is qualified by the provisions of public procurement law as a contracting institution. The contractor's institution (contractor), as a party to the public contract, is a specific natural person, a group of natural persons or an organizational unit, which is formally qualified by the provisions of public procurement law as a contractor. The contracting authority, together with the contractor's institution, are two constitutive entities to the public contract.

frequently, the contracting authority's needs and the economic benefits it obtains are not so much its needs and individual (personal) benefits, but are of the nature of public needs and public interest and, therefore, are important because of the public interest and the common good. This may be the case, particularly when the given public contract is awarded by the contracting authority in order for the given contracting authority to perform its specific public tasks, under a separate legal title. In exchange for the service provided (or in exchange for the good supplied), the Contractor has the right to receive a fee, which may, in particular, be payable from public funds which are at the contracting authority's disposal (including public funds) or may be generated as a result of the contractor taking advantage of a performance constituting the object of the given public contract or the object of that performance².

Public procurement is a sequential and simultaneously dynamic process in the sense that it passes through successive stages: preparation, award and performance of the public contract³. The stage of preparing the public procurement encompasses the period when the contracting authority starts to create the appropriate conditions for the formal initiation in the future of the public procurement procedure. The public procurement stage encompasses the period from the formal initiation by the contracting authority of the public procurement proceedings until the formal conclusion of the public contract. The public procurement stage constitutes the period from the conclusion of the contract until the moment that the performance of the object of trust ends definitively. The commitment (rights and duties) of the contracting authority and the contractor is different in each of these stages. At the stage of preparing the public procurement, the contracting authority's activity dominates, while there are relatively few rights and duties of the contractor, which are usually of a sparse nature. At the stage of the award of the public contract, the level of the contracting authority's commitment increases, with the simultaneous intensification of the contractor's commitment, i.e. the contractor's duties enabling it to actively participate in the procurement proceedings, including, *inter alia*, the exchange of information with the contracting authority, are increased. At this stage, the contractor's duties may include the submission of all documents and explanations required by the contracting authority's institution and the requirement to participate in specific activities conducted by the contracting institution (e.g. in negotiations). At the

² K.S. Benson, O.O Asere, K.O Lamidi, *Correlational analysis of public procurement policy and utilisation of public funds for service delivery in Ondo State (2017-2013)*, "Public Administration Research" 2017, Vol. 6, p. 31-39; E. Prier, C.P. McCue, *The implications of a muddled definition of public procurement*, "Journal of Public Procurement" 2009, Vol. 9, p. 326-370; G.A. Rasheli, *Procurement contract management in the local government authorities (LGAs) in Tanzania: A transaction cost approach*, "International Journal of Public Sector Management" 2016, Vol. 29, p. 545-564.

³ K.V. Thai, *Public procurement re-examined*, "Journal of Public Procurement" 2001, Vol. 8, p. 224-355.

stage of performance of the contract, the contractor's activity dominates, which may, however, also imply the contracting authority's commitment. For instance, the contractor has the right to demand that the contracting authority actively cooperates during the period of performance of the object of the public procurement.

Public contracts are an important component of modern business trading, which, based on various types of cooperation, is one of the forms of public order. Cooperative relations are a far broader category than relations of trust. Trust is just one of the foundations for taking up formalized cooperation under various types of contract. In cooperative relations, including contractual cooperation, trust is always considered a relationship that appears between at least two entities. Trust can only emerge as a result of interaction between the parties to the contract and, therefore, trust can only arise if both parties to the contract can demonstrate commitment at the individual stages related to the conclusion and performance of the contract. The framework of this article prevents a detailed discussion of the issue of trust in all three of the stages mentioned constituting the public procurement process.

It should be pointed out that trust is a prerequisite for discretion on the part of either party. Without trust, the discretion of either party would lead to the parties not entering into any form of cooperation.

The objective of the article is to show the extent of the contracting authority's discretion, within which mechanisms that are appropriate to the construct of trust can be activated. At the same time, the article attempts to present discretion from the perspective of the extent of formalization of the public procurement system.

2. Literature. Context of the analysis

A review of the literature on the subject of trust indicates that there is a shortage of studies that take into account the context of the situation to which trust applies. Such a direction of analysis is justified, as trust is a construct that is highly dependent on the context.

Trust is a multidimensional and interdisciplinary construct. A review of the literature on research into trust presents numerous ambiguities, both in terms of understanding and defining this notion, which encompasses a wide range of human existence. The term "trust" is one such scientific construct that is very difficult to define and agree upon a common position regarding the method of understanding because of the high level of generalization. The controversy surrounding this issue appears not only within various social sciences, but also applies to representatives of the same fields of knowledge. It seems that this is mainly caused by focusing on various aspects of trust and the interdisciplinary

nature of this notion. Trust is expressed differently in the science of the law, where it is rather a homogeneous term, and differently in the field of sociology and political science, which deal with various attempts to conceptualize, just as in management. This particularism deepens with the increase in the amount of research, causing increasingly greater differences. Modern science has not yet created a universal concept of trust that would be applicable to all fields of science. Depending on the context of the analysis, emphasis is placed on separate aspects and dimensions of trust. The context of the analysis of trust in the public procurement system has defined the choice of literature, which was dictated by the need to ensure representativeness, understood as a reflection of various research points of view. The article contains provisions of the Public Procurement Law (PPL), judgements of the National Appeal Chamber (NAC) and publications on law, administration, sociology and management.

The analysis of trust in the public procurement system is related to the need to take into account three types of context in which the category of the contract, as a public contract, is embedded. Account should first be taken of the institutional context.

The institutional context is related to the fact that a public contract is a contract which is subject to highly formalized legal regulations. The high degree of formalization restricting the discretion of the contracting authority is seen to be an instrument that has the objective of ensuring economic efficiency of public procurement and integrity of contracting authorities and contractors, including a reduction in the risk of corruption. At the same time, the negative consequences of a high degree of formalization can be seen as the prevention of the flexible synchronization of the contracting authority's needs with the contractor's proposal. The institutional context is in line with the discussion in the literature on the advantages and disadvantages of formalization⁴.

The axiological context is also important to public procurement, as it contains the issue of ethics and integrity of the contracting authority and the contractor. Ethics and integrity are expressed, in particular, in the contracting entities and contractors, as well as their affiliates not allowing corruptive conduct at any stage of the public procurement, or other fraudulent practices (such as bid rigging), with the simultaneous lack of suspicious conflict of interest⁵. Reference to the axiological context of public procurement enables

⁴ P. Aucoin, *The design of public organizations for the 21st century: Why bureaucracy will survive in public management*, "Canadian Public Administration" 1997, Vol. 40, p. 290-306; J.P. Olsen, *Maybe it is time to rediscover bureaucracy*, "Journal of Public Administration and Theory" 2006, Vol. 16, p. 1-24.

⁵ K. Hunsaker, *Ethics in public procurement: buying public trust*, "Journal of Public Procurement" 2009, Vol. 9, p. 411-418; M.W. Ishak, J. Said, *The role of anti-corruption initiatives in reducing lobbyist involvement in E-Procurement: A case study of Mardi*, "Procedia Economics and Finance" 2015, Vol. 31, p. 485-494; M. Szydło, *Prawna koncepcja zamówienia publicznego* [Legal concept of public procurement], C.H. Beck, Warszawa 2014; A. Chrisidu-Budnik, J. Przedąńska, *The agency theory approach to the public procurement system*, "Wrocław Review of Law, Administration and Economics" 2017, Vol. 7, p. 154-165.

two types of trust to be distinguished: trust in the public procurement system and trust within the public procurement system⁶. Trust in the public procurement system is a manifestation of institutional trust⁷, the addressees of which are not only contracting institutions and contractors, but all public procurement entities, namely contracting authorities, contractors, as well as public supervision authorities on public procurement markets and bodies that settle legal disputes between contracting authorities and contractors. Trust in the public procurement system suits the broader stream of contemporary research on trust, focusing more on the action and interactions of social entities than on abstract systems and legal regulations⁸. Trust in the public procurement system is inter-organizational trust between the contracting authority's and the contractor's institutions. The axiological context of these two types of trust refers to the principles contained in the public procurement law of fair competition, equal treatment, transparency, impartiality and objectivity of the award of the contract only to the contractor chosen in accordance with the provisions of the Act.

In order to analyse the phenomenon of trust in public procurement, reference needs to be made to the contractual context. The contractual context refers to each of the three stages of public procurement referred to in this article: preparation, conclusion of the contract and performance of the contract. The first two stages form a pre-contractual stage, encompassing the activities of the parties which have the objective of selecting the contractor of the contract, establishing a dialogue with him, exchanging information, agreeing on the content and concluding the public contract. The third stage is the post-contractual stage, which takes place after the conclusion of the contract and involves its performance. Given the limits of the scope of the analysis set out in the introduction, I am limiting myself hereafter to the description of just the pre-contractual stage. The contractual context consists of two elements: risk and asymmetry of information. The risk of contracting in public procurement is strictly related to the deficit of information and the costs of obtaining information. The asymmetry of information is understood as the inequality of knowledge of the parties to the contract and the non-equivalence of the

⁶ S.L. Schooner, *Desiderata: Objectives for a system of Government Contract Law*, "Public Procurement Law Review" 2002, Vol. 11, p. 103-117.

⁷ L.G. Zucker, *Production of trust: Institutional sources of economic structure, 1840-1920*, "Research in Organizational Behavior" 1986, Vol. 8, p. 53-111; D. Rousseau, S.B. Sitkin, R.S. Burt, C. Camerer, *Not so different after all: A cross-discipline view of trust*, "Academy of Management Review" 1998, Vol. 23, p. 393-404.

⁸ P. Sztompka, *Trust. A sociological theory*, Cambridge University Press 1999; G. Möllering, *Trust: Reason, routine, reflexivity*, Amsterdam: Elsevier 2006; R. Gulati, J.A. Nickerson, *Interorganizational trust, governance choice, and exchange performance*, "Organization Science" 2008, Vol. 19, p. 688-708; C. Chen, C. Saparito, C.L. Belkin, *Responding to trust breaches: The domain specificity of trust and the role of affect*, "Journal of Trust Research" 2011, Vol. 1, p. 85-106.

costs of obtaining information⁹. One of the functions of the public procurement law is to create legal mechanisms enabling the reduction of transaction costs, limiting risk and reducing the asymmetry of information¹⁰. There is no universally accepted definition of trust, although the review of the literature on the subject enables the demonstration of an element that is common to most definitions constituting a *sine qua non* condition for the emergence of a relationship of trust – risk. Risk is the perceived likelihood of a loss that is estimated by the decision-maker, which can but does not have to materialize¹¹. The significance of risk in the relationship of trust was also presented by O. Williamson, who claimed that the relationship of trust is based on a calculation and should therefore be described in the language of the calculation for which the term risk is most appropriate¹². The elimination of risk should primarily involve the provision of knowledge to the entities involved in conducting the transaction. Legal regulations can help eliminate information deficits and reduce the costs of obtaining information. Two types of legal mechanisms should be indicated here. The first type is legal regulations providing for the obligatory conduct of the parties to the contract; this applies to the obligations imposed by law, the implementation of which by the partners to the contract, to some extent, allows for the elimination of information deficits. The second type is legal regulations providing for the optional behaviour of the parties to the contract and therefore taking them up depends on the discretionary decisions of the parties to the contract. Both mechanisms create the possibility of reducing transaction costs, according to the so-called Coase theorem – the law should be defined in such a way as to eliminate difficulties in concluding contracts¹³.

3. Discretion in public procurement

The public procurement process is highly formalized. Formalization of conduct on the public procurement market has the purpose of (1) ensuring the protection of the public interest, (2) rationalizing the spending of public funds and (3) increasing the

⁹ S. Khoman, *Asymmetric information: A case study in potential public procurement pitfalls*, [in:] K.V. Thai (Eds.), *Global Public Procurement. Theories and Practices*, Springer International Publishing 2016, p. 328-352; J. Zheng, N. Caldwell, *An asymmetric learning in complex public – private projects*, “Journal Of Public Procurement” 2008, Vol. 8, p. 334-355.

¹⁰ C.W.L. Hill, *Cooperation, opportunism, and the invisible hand: Implications for transaction cost theory*, “Academy of Management Review” 1990, Vol. 15, p. 500-513.

¹¹ T.H. Chiles, J.F. McMackin, *Integrating variable risk preference, trust, and transaction cost economics*, “Academy of Management Review” 1996, Vol. 21, p. 73-99.

¹² O.E. Williamson, *The mechanism of governance*, New York: Oxford University Press 1996.

¹³ P. Machnikowski, *Prawne instrumenty ochrony zaufania przy zawieraniu umowy* [Legal instruments of trust security when concluding an agreement], Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław 2010.

transparency of the public procurement process. The objective of formalization is to define the public procurement law and the activities of the individual contracting authorities and contractors in a way that leads to the optimization of the stage of awarding (concluding) a public contract. Simultaneously, mechanisms enabling contracting authorities to take up discretionary conduct are included in the provisions of the law. Discretion means the ability to choose, discretion, the freedom (independence) of the contracting authority to make the optimal choice in the specific conditions of the offer¹⁴. Discretion creates a space within which it is possible to make the provisions of the law more flexible, so that contracting authorities are able to adjust their needs to the actual market capabilities, as well as to modify the content and award criteria¹⁵. The legal sanctioning of the discretion of the contracting authority's actions creates the ability to activate the mechanisms of cognitive trust in the public procurement system. Selected areas of discretion in public procurement, which create the possibility of removing the information deficit, reduce risk and consequently lead to the economic efficiency of public procurement through the ability to launch a mechanism of trust at the stage of awarding the contract, have been presented below.

Discretion in the criteria for assessing the value of the good purchased by the contracting authority

Discretion is related to the contracting authority's freedom specified by law to assess (in public procurement) the value of the good being purchased and accept adequate award criteria. The award of discretionary rights to the contracting authority arises from the fact that this assessment must be subjective, i.e. performed by the contracting authority itself, as public contracts and purchases made within them primarily serve the purpose of satisfying the needs of the contracting authority itself (although these needs of the contracting authority are usually public needs and then the contracting authority acts as a representative of the public interest). Therefore, the contracting authority itself is able to most appropriately assess the value of the good it is purchasing, using the criteria (measures) it selects for this and assigning preferred weights to each of the criteria it applies, as well as specifying the award criteria, which are appropriate to a specific public contract. From the point of view of the issue of trust, the assessment of the value of the purchased good, namely the good itself and aspects strictly related to that good, creates the possibility of calculated trust to form, which is based on the valuation, the

¹⁴ D. Coviello, A. Guglielmo, G. Spagnolo, *The effect of discretion on procurement performance*, "Management Science" 2018, Vol. 64, p. 715-738.

¹⁵ M. Jędrzejczak, *Element dyskrejonalności organu administracyjnego na poszczególnych etapach stosowania prawa* [Elements of the administrative discretion at different stages of application of the law], "Przegląd Prawniczy, Ekonomiczny i Społeczny" 2013, nr 2, p. 4-18.

economic calculation of potential profits and losses arising from the contracting authority's purchase of a particular good¹⁶. However, the assessment of the institution responsible for providing that good, i.e. its resources, skills and knowledge, is not included within the scope of the discretion of the criteria for assessing the values of the good being purchased.

Discretion regarding the award criteria

The criterion for selecting a proposal should be understood as factors serving as the basis for its assessment. The award criteria are measures enabling the objective and rational comparison of proposals (judgement of the NAC of 11 March 2014, case reference KIO 220/140). The award criteria are criteria which are primarily specified by the provisions of the public procurement law. The regulations set a list of applicable assessment criteria, leaving the contracting authorities the freedom to select them for the needs of individual procurement proceedings. The provisions of the law do not specify the method of choosing the award criteria; nor do they specify the rules for assessing the proposal. It should be emphasized that, according to the public procurement law, the criteria specified by the contracting authority for selecting proposals should apply to the object of the contract. This means that the contracting authority cannot use just any award criteria, but only those that individually apply to the specified contract. The criteria for the assessing proposals should be described by the contracting authority precisely and unambiguously, so that it is possible to choose the best proposal (judgement of the NAC of 12 August 2008, case reference KIO 784/08). The contracting authority has a large amount of freedom in choosing the award criteria, which, however, should not be equated with discretion. When specifying the criteria for assessing proposals, the contracting authority must take into account the fact that, as a result of the assessment of their fulfilment, it has to select the best proposal, namely the one that best satisfies the contracting authority's needs (judgement of the NAC of 16 June 2003, case reference KIO 1213/02)¹⁷. Non-price award criteria may include:

¹⁶ R. Lewicki, B.B. Bunker, *Developing and maintaining trust in work relationships*, [in:] R. Kramer; T.R. Tyler (Eds.), *Trust in organizations: Frontiers of theory and research*, Thousand Oaks, CA: Russell Sage Foundation 1996, p. 114-139.

¹⁷ The provisions on the award criteria contained in national law are referred to in the provisions of the classical directive 2004/18/EC¹⁷ and sectoral directive 2004/17/EC¹⁸, from which it transpires that the criteria on the basis of which contracting institutions award public contracts are either exclusively the lowest price or, if the contract is awarded on the basis of the economically best proposal from the contracting authority's point of view, various criteria referring to a given public contract, such as quality, price, technical value, aesthetic and functional properties, environmental aspects, costs of use, profitability, after-sales service, technical value and technical assistance, delivery date or delivery or fulfilment time, commitments regarding the supply of spare parts and security of supply.

- a) quality, including technical value, aesthetic and functional properties, availability, design for all users, social, environmental and innovative features, trading and its conditions;
- b) the organization, qualifications and experience of the staff designated for fulfilling the given contract, if the properties of the designated staff can have a significant impact on the level of fulfilment of the contract;
- c) after-sales service and technical assistance, delivery conditions, such as delivery date, method of delivery and delivery lead time or fulfilment time and the proposed warranty or guarantee period.

The ability to apply non-price criteria has the objective of enabling the contracting authority to flexibly assess a given proposal, which should contribute to contractors proposing solutions that significantly deviate from the proposals of the competition. The search for innovative, creative proposals on the public procurement market through the use of non-price criteria simultaneously creates a space for the *ex-ante* verification of the credibility of the contractor's institution¹⁸. The literature on the subject points out that the evolution of cooperation between partners is determined by the initial terms of the cooperation. By taking into account the connection between the initial conditions and the later quality of cooperation, it can be seen that the correct (appropriate to the object of the contract) choice by the contracting authority of specific award criteria usually determines the later quality of fulfilment of the contract¹⁹. Essentially, the award of discretion to the contracting authority in this respect and, similarly, the possibility of *ex-ante* verification of the contractor's credibility have the purpose of optimizing the fulfilment of the contract. In this sense, discretion in the choice of criteria for assessing the value of the good ordered and the award criteria constitute preliminary conditions for cooperation, which will be reflected in the contract performance phase. Simultaneously, the legal sanctioning of the flexible matching of criteria to a specific object of the public procurement in the preparation phase of the contract creates the opportunity for negative and positive selection. Negative selection involves the preliminary elimination of

¹⁸ The Public Procurement Law gives the contracting authority a reasonably large amount of freedom to verify the contractor's credibility. For example, it is at his discretion that he takes advantage of the ability to check the given bidder's tax arrears or whether he is in liquidation.

¹⁹ It seems important to note that the contracting authority's unjustified use of purely the price criterion can create a temptation for the contractor to commit an abuse. The review of the tender documentation suggests that contractors often understate the value of the object of the contract in the proposals that they submit so that their proposal is selected as the best. The temptation of abuse is potentially present at the stage of order fulfilment, when the contractor may try to "recover" the understated value of the contract, e.g. by supplying lower quality equipment and giving the impression that it meets the technical requirements contained in the description of the object of the contract. The factor that is conducive to such conduct is that the contracting authority does not have the appropriate knowledge to assess the quality of the good that is delivered within the framework of the public procurement.

contractors who do not have adequate resources to fulfil a specific order. Positive selection involves the selection of those candidates whose resources are adequate for fulfilling a specific object of the procurement and can therefore become potential contractors. Cognitive trust appears in the positive selection process, which is based on knowledge related to the perception of resources, skills, knowledge and abilities of the potential contractor of the procurement²⁰. In the public procurement system, discretion increases the probability of making the optimal choice of proposal and simultaneously enables the other party to the cooperation (contractor) to be considered trustworthy²¹. Three stages of trust can be found in the relations between the contracting authority and the contractor: from calculated trust through knowledge-based cognitive trust to identification-based trust²². In the first stage (the assessment of the value of the good being purchased), trust develops on the basis of a calculation – the economic calculation of the purchase. If the calculation proves to be attractive for the contracting authority, it can potentially lead (provided that appropriate award criteria are used) to the activation of trust based on the knowledge of the contractor's resources and potential. In the phase of implementing so-called relational contracts, it is possible to activate identification-based trust, i.e. mutual agreement, modification of the conditions of performance of the contract²³.

²⁰ D.J. McAllister, *Affect and cognition-based trust as foundations for interpersonal cooperation in organizations*, "Academy of Management Journal" 1995, Vol. 38, p. 24-59.

²¹ It is important to note that cognitive trust on the public procurement market also exists between the contractors themselves. Entities interested in participating jointly in specific proceedings (e.g. in the form of a consortium) are required to verify the credibility of the potential partner to the cooperation in terms of experience, human resources, machinery and other prerequisites for taking part in the proceedings. The positive verification of the credibility of the partners to the cooperation and the cognitive trust developed on its basis are sine qua non conditions for the concluding a consortium agreement, whereby the consortium will be involved in the public procurement proceedings as one business entity.

²² R. Lewicki, B.B. Bunker, *op. cit.*, p. 114-139.

²³ As mentioned in the introduction of the article, the issue of trust in the phase of performance of the public contract has not been considered. However, it is important to emphasize that, in many cases, a detailed description of the desired conduct that should be taken up at the stage of performance of the contract is so complex that it cannot be included in a contract or regulated by the provisions of the law. Even if it were to be possible to prepare such provisions, this would entail such high transaction costs that would make the conclusion of the public contract unprofitable. Many public contracts are performed over a longer time and, when they are concluded, all events and circumstances that may be of importance to the optimal performance of the contract cannot be predicted. Informal coordination mechanisms apply in these cases, arising precisely from the fact that certain new obligations arise during the contract performance phase, which are not explicitly stated in the contract. Such informal mechanisms of coordination are relational contracts, the essence of which is the modification of certain provisions of the contract during its performance. Informal means are used in relational contracts to encourage the contracting authority and the contractor to be flexible in order to effectively fulfil the contract. Identification-based trust then appears, which is an instrument supporting the fulfilment of the contract by establishing new obligations not directly arising from the contract. 25. I.R. Macneil, *Relational contract theory as sociology: A reply to Professors Lindberg and de Vos*, "Journal of Institutional and Theoretical Economics" 1987, Vol. 143, p. 272-290; S. Macaulay, *Non-contractual relations in business: A preliminary study*, "American Society Review" 1963, Vol. 28, p. 55-67; Ch.J. Goetz, R.E. Scott, *Principles of relational contracts*, "Virginia Law Review" 1981, Vol. 67, p. 1089-1150.

Discretion in the preparation of the Terms of Reference is the fundamental and most important document in public procurement proceedings. The ToR specify the rights and duties of the parties arising from entering the proceedings. The ToR is an invitation for contractors to submit proposals. It enables contractors to find out exactly what the contracting authority expects of them, whether they are able to fulfil the given contract and what the conditions are for taking part in the proceedings. The ToR are of the nature of the contracting authority's commitment to provide all the components which are necessary for the fulfilment of the contract, which were specified by the contracting authority as being imperative. Therefore, contractors cannot suffer negative consequences as a result of non-compliance with unclear requirements of the ToR and any interpretation doubts in this respect should be settled to the favour of the contractors (judgement of the NAC of 11 August 2014, case reference KIO 1557/14). The ToR can be considered an instrument through which the contracting authority communicates with the contractor. The contracting authority communicates what benefits it expects after conclusion of the contract by describing the object of the procurement. Based on the description of the object of the procurement, the contractor is able to assess whether the knowledge, skills and resources at its disposal are adequate for fulfilling the contract and thereby make a decision undertaking to fulfil the performance if its proposal is selected as the best. Similarly, a comparison of the performance offered by the contractor with the description of the object of the contract (the method and timing of its performance) indicates whether the content of the proposal submitted by the contractor corresponds to the content of the ToR prepared by the contracting authority. The ToR should reliably, completely and unambiguously specify all information regarding the conditions and the object of the proceedings, so that contractors can prepare proposals that satisfy the contracting authority's requirements. In this sense, the ToR are a kind of instruction and a road sign for contractors on how to prepare a correct proposal. The analysis of the ToR in the context of trust is related to the issue of dimensions of trust originating from various ontological research perspectives²⁴. Trust analysed in the behavioural dimension, which is reflected in the quality of communication between the parties to the cooperation²⁵ which is related to effective information flow is of fundamental significance. The insertion of a mechanism such as the ToR into the wording of the provisions of the law is an attempt to protect the value of the effective exchange of information between the contracting institution and

²⁴ A. Chrisidu-Budnik, *Dimensions of trust in inter-organisational networks*, "International Journal of Contemporary Management" 2016, Vol. 15, p. 67-85; D. Malhotra, *Trust and reciprocity decisions: The differing perspectives of trustors and trusted parties*, "Organizational Behavior and Human Decision Processes" 2004, Vol. 94, p. 61-73; T. Oliveira, M. Alinho, P. Rita, G. Dhillon, *Modeling and testing consumer trust dimensions in e-commerce*, "Computers in Human Behavior" 2017, Vol. 71, p. 153-164.

²⁵ Ybarra C.E., Turk T.A., *The evolution of trust in information technology alliances*, "Journal of High Technology Management Research" 2009, Vol. 8, p. 62-74.

the contractor. The ToR consists of obligatory elements (e.g. precisely specified conditions for taking part in the proceedings, a description of the method of assessing compliance with these conditions, a list of declarations or documents that contractors will have to present to confirm that they satisfy the conditions for taking part in the proceedings) and optional elements. And it is precisely in the optional area that the discretion of the contracting institution can be found, which can reduce the perceived risks accompanying the potential cooperation within the framework of public procurement. In addition to the ability to precisely and exhaustively formulate the ToR, which creates the ability to reduce contractual risk, legal instruments enabling an improvement in the quality of the ToR, which is the technical dialogue, also play an important role.

The technical dialogue is an instrument enabling the identification of market conditions regarding the object of the future order, as well as the characteristics of the competition on the given market in order to specify the appropriate conditions for taking part in the public procurement proceedings or the proposal assessment criteria, as well as the terms of the future public contract. A dialogue enables the contracting authority to avoid preparing tender documentation incorrectly, i.e. restricting competition, as well as to find out about the expectations / preferences and rules of operation of entities in the given industry. It also has the objective of obtaining detailed and specialist information on the specification of the object of the procurement, as well as advanced production methods or the best solutions related to the object of the procurement. The technical dialogue is a certain optional stage preceding the initiation of the public procurement proceedings. The decision on whether this stage will be activated lies within the contracting authority's discretion. The technical dialogue is a form of communication provided for by law between the contracting authority and the contractor²⁶. The use of the technical dialogue enables the contracting authority to always obtain a benefit in the form of specific know-how of other entities, whereas potential contractors who take part in the proceedings have the opportunity to gain knowledge of specific aspects of the contract that will be announced in the future. Similarly, these entities gain a competitive advantage over the contractors

²⁶ Contractors obtain various types of information during the technical dialogue:

1. a hospital, which is planning to initiate proceedings to build a new ward, will look for answers on the impact of construction works on the functioning of the hospital and the possible resolution of related problems, which will indicate the scope of the contract to the participants of the dialogue before the proceedings are initiated;
2. a contracting authority, which uses the technical dialogue to try to dispel its doubts about the choice of materials from which the subject of the contract is to be made, will provide information on the subject matter of the contract and the materials to be obtained for its implementation;
3. a contracting authority, which has problems with setting the conditions for taking part in the proceedings, which assure competition and equal treatment of contractors, will present the proposed conditions to the participants of the dialogue, asking them for their opinion on them;
4. a contracting authority, which wants to award a contract for interactive marketing services, will look for information on modern forms of promotion to determine its needs.

who did not take part in the competitive dialogue. When considering the issue of the technical dialogue in the context of trust, it should be emphasized that it is a sign of the degree of commitment of the contracting authority and the contractor to streamlining the public procurement process. Commitment is a favourable / positive attitude to the cooperation and to making every effort to effectively achieve the objectives of the cooperation²⁷. Commitment in the technical dialogue enables the optimum decisions to be made regarding the purchase of the performance. In many cases, the aim to optimize the decision requires the contracting authority to gain knowledge about the broadly understood specifics of the market and therefore it can be accepted that a communication process with potential contractors needs to be activated before initiating the proceedings. Commitment understood in this way, as a manifestation of the behavioural dimension of trust, translates into the quality of communication between the contracting authority and the contractor, which has the opportunity to be reflected in the contract implementation phase in the future²⁸.

4. Discussion and limitations

Trust in public procurement is embedded in the dilemma of the extent of formalization of the system. The dilemma of the extent of formalization manifests itself in the problem that a high level of formalization of the public procurement system, which has the objective of ensuring honesty and transparency of conduct of the contracting authority and the contractors, simultaneously reduces its flexibility, i.e. the adaptability of the system to the changes taking place within it or in its surroundings. The greater the degree of formalization, the lower the ability to adapt to changes, e.g. future events, which were not anticipated in the contract, but which could be significant for the performance of the object of the contract by the contractor. However, an excessively low level of formalization increases the risk of corruption, reduces transparency of spending public funds and creates a threat to the achievement of the fundamental objective of public procurement, which is to attempt to make a public contract economically effective (namely to obtain value for money). The dilemma of the extent of formalization can be perceived as a conflict between two groups of values. The first group consists of security, predictability, transparency and supervision over public procurement markets. The second group consists of

²⁷ N. Nummela, *Looking through a prism – multiple perspectives to commitment to international R&D collaboration*, “Journal of High Technology Management Research” 2003, Vol. 14, p. 135-148; R.M. Morgan, S.D. Hunt, *The commitment – thrust theory of relationship marketing*, “Journal of Marketing” 1994, Vol. 58, p. 20-38; N. Clarke, *The relationships between network commitment, its antecedents and network performance*, “Management Decision” 2006, Vol. 44, p. 1183-1205.

²⁸ M.J. Robson, C.S. Katsikeas, D.C. Bello, *Drivers and performance outcomes of trust in international strategic alliances: the role of organizational complexity*, “Organization Science” 2008, Vol. 19, p. 647-665.

effectiveness, efficiency and economic efficiency of public procurement markets. As a result, when creating specific provisions of the law, especially those that create the ability of contracting authorities to behave in a discretionary manner, the lawmakers face the dilemma of establishing the optimum level of formalization and therefore balancing the above two groups of values. Awarding primacy to the former group means reducing the extent of discretion during public procurement proceedings. The appreciation of the significance of the latter group of values is expressed by an increase in the contracting authority's discretion. Therefore, the process of establishing the extent of discretion is dynamic, i.e. it is a search for the optimal level of formalization – a balance between two groups of values. The contracting authority's discretionary rights are directly reflected in the economic efficiency of public procurement through (1) the ability to reduce the risk accompanying contracting, e.g. the risk of not awarding the contract, the risk of breaching the provisions of the procurement act, the risk of prolonging the procurement proceedings, (2) the elimination of the deficit of information, *inter alia*, on the basis of the mechanisms of commitment of the contracting authority and the contractor. Within the formalization process, pre-contractual information obligations are imposed on the participants of the proceedings. However, the extent of the commitment of the participants of the public procurement proceedings to the information exchange process lies within their discretion. The law simultaneously requires and creates grounds for effectively providing information to the other party which is of relevance to making decisions on whether or not to conclude a public contract or the possession of which by only one party creates a contracting risk.

A restriction and, in principle, unsolvable problem is the matter of the methods of determining the optimal level of formalization of the public procurement system, i.e. the degree to which the public procurement system achieves the greatest economic efficiency. Essentially, the problem is even more complicated because the public procurement system consists of individual public procurement procedures that are of a heterogeneous nature, have various degrees of complexity and differing significance to public interest. Therefore, such an optimal level of formalization should be specified each time individually for every public procurement procedure. This is obviously not possible, because the very high transaction costs²⁹ would make it impossible to conclude any public contract.

5. Conclusion

The high level of formalization of the system is subordinated to the basic objective of public procurement, which is the aim towards the situation in which the purchase of

²⁹ Transaction costs arise from the fact that the (institutional, axiological contracting) contexts in which particular public procurement proceedings are conducted have varying degrees of uncertainty.

a good constituting the object of the contract is made by the contracting authority in the most economically effective conditions possible. This means that formalization imposes obligations on the contracting authority leading to this economic efficiency being as high as possible. The formalization process simultaneously introduces the principles of fair competition, equal treatment, transparency, impartiality, objectivity, awarding the contract only to the contractor selected in accordance with the provisions of the Act, which, in addition to the main objective, also have the purpose of ensuring the integrity of contracting authorities and contractors. Therefore, formalization forms the basis for institutional trust in the public procurement system, which is addressed not only to the contracting authority and contractors, but also to bodies of public supervision of the public procurement markets and bodies that settle legal disputes between contracting authorities and contractors. The formal presence of these principles proves that, in the case of public contracts, which are contracts based on cooperation, relational roots are not and cannot be of any particular significance to the cooperation. Relational roots apply to the embedding of social relations, i.e. the reliance on acquaintances, camaraderie and interpersonal bonds is an important factor that affects the level of trust and assessment of the reliability of partners to civil contracts in such dimensions as know-how, integrity and benevolence³⁰. In the area of public procurement, the principle of relational rooting is excluded, because it breaches the above principles of impartiality and objectivity. The principles of impartiality and objectivity are paramount in public procurement. This means that people, whose relationships with a contractor justify the assumption that the contractor might want to favour them in the contract award procedure, should not be involved in the proceedings. The outcome of the proceedings would then be biased. These principles are inseparably related to the principles of fair competition and equal treatment of contractors: contractors cannot be treated fairly if one of them is favoured because of a financial or economic interest, or because of a previous positive cooperative relationship. The principle of impartiality on the part of the contracting authority applies equally to the contracting authority's human resources, as well as to third parties who provide services to the contracting authority with regard to the support of the contract (legal, technical and financial support). Relational roots in public procurement can generate a conflict of interests, thereby preventing the creation of optimal conditions for the effective achievement of the public procurement objective. The institutional and axiological context of public procurement results in the elimination of relational roots.

The contractual context defines the behavioural plane of the analysis, on which the aim is to make arrangements on the matter of the contracting authority's use of the

³⁰ R.C. Mayer, F.D. Schoorman, *An integrative model of organizational trust*, "Academy of Management Journal" 1995, Vol. 20, p. 709-734.

institution of discretion. The analysis of discretion at the behavioural level is part of a broader stream of contemporary research on trust, focusing more on the action and interactions of social entities than on abstract systems and rules of law³¹. Therefore, the analysis of discretion at the behavioural level refers to the inter-organizational trust between the contracting authority's institution and the contractor's institution. The decision to conclude each contract, including a public contract, is based on cognitive foundations that are a result of the processes of obtaining and exchanging information. The process of obtaining information encompasses the creative exchange of information between the parties (the contracting authority and potential contractors), the active acquisition of knowledge about the appropriate conditions and technologies for the production of the object of the contract. The information gained enables the formulation of criteria for assessing the value of the good being purchased which are adequate to the object of the specific public contract and the acceptance of appropriate award criteria, as well as enabling the preparation of the appropriate ToR. The cognitive basis is cognitive trust and, therefore, the contracting authority's conviction that the contractor selected in the tender procedure may be considered reliable. This applies to reliability in terms of tasks, activities and conduct making up the fulfilment of the contract, in accordance with the contracting authority's expectations and preferences. In fact, whether the decision to conclude a public contract is based on cognitive foundations largely depends on the attitude of the contracting authority itself, i.e. its commitment to and activity in the acquisition of information. The legal regulations protect cognitive trust, reduce the risks related to contracting and, to some extent, eliminate the deficit of information through two legal mechanisms, namely formalized obligations and discretion. Similarly, they enable public procurement proceedings to be conducted in such a way that, on the one hand, they best satisfy the needs of the contracting authority and, on the other hand, they are beneficial for the contractor.

References

Act of 29 January 2004 – Public Procurement Law (Journals of Laws 2017 item 1579).

Aucoin P., *The design of public organizations for the 21st century: Why bureaucracy will survive in public management*, "Canadian Public Administration" 1997, Vol. 40.

Benson K.S., Asere O.O, Lamidi, K.O., *Correlational analysis of public procurement policy and utilisation of public funds for service delivery in Ondo State (2007-2013)*, "Public Administration Research" 2017, Vol. 6.

³¹ R. Gulati, J.A. Nickerson, *op. cit.*, p. 688-708; C. Chen, C. Saporito, C.L. Belkin, *op. cit.*, p. 85-106.

- Chen C., Saporito C., Belkin L., *Responding to trust breaches: The domain specificity of trust and the role of affect*, “Journal of Trust Research” 2011, Vol. 1.
- Chiles T.H., McMackin J.F., *Integrating variable risk preference, trust, and transaction cost economics*, “Academy of Management Review” 1996, Vol. 21.
- Chrisidu-Budnik A., *Dimensions of trust in inter-organisational networks*, “International Journal of Contemporary Management” 2016, Vol. 15.
- Chrisidu-Budnik A., Przedańska J., *The agency theory approach to the public procurement system*, “Wroclaw Review of Law, Administration and Economics” 2017, Vol. 7.
- Clarke N., *The relationships between network commitment, its antecedents and network performance*, “Management Decision” 2006, Vol. 44.
- Coviello D., Guglielmo A., Spagnolo G., *The effect of discretion on procurement performance*, “Management Science” 2018, Vol. 64.
- Goetz CH.J., Scott R.E., *Principles of relational contracts*, “Virginia Law Review” 1981, Vol. 67.
- Gulati R., Nickerson J.A., *Interorganizational trust, governance choice, and exchange performance*, “Organization Science” 2008, Vol. 19.
- Hill C.W.L., *Cooperation, opportunism, and the invisible hand: Implications for transaction cost theory*, “Academy of Management Review” 1990, Vol. 15.
- Hunsaker K., *Ethics in public procurement: buying public trust*, “Journal of Public Procurement” 2009, Vol. 9.
- Jędrzejczak M., *Element dyskrejonalności organu administracyjnego na poszczególnych etapach stosowania prawa* [Elements of the administrative discretion at different stages of application of the law], “Przegląd Prawniczy, Ekonomiczny i Społeczny” 2013, Vol. 2.
- Judgement of the NAC of 11 August 2014, case reference KIO 1557/14.
- Judgement of the NAC of 4 May 2017, case reference KIO 763/11.
- Judgement of the NAC of 12 August 2008, case reference KIO/UZP 784/08.
- Judgement of the DC of 16 June 2003, case reference VCa 1213/02.
- Khoman S., *Asymmetric information: A case study in potential public procurement pitfalls*, [in:] K.V. Thai (Eds.), *Global Public Procurement. Theories and Practices*, Springer International Publishing 2016.
- Lewicki R., Bunker B.B., *Developing and maintaining trust in work relationships*, [in:] R. Kramer, T.R. Tyler (Eds.), *Trust in organizations: Frontiers of theory and research*, Thousand Oaks, CA: Russell Sage Foundation 1996.
- Macaulay S., *Non-contractual relations in business: A preliminary study*, “American Society Review” 1963, Vol. 28.

- Machnikowski P., *Prawne instrumenty ochrony zaufania przy zawieraniu umowy* [Legal instruments of trust security when concluding an agreement], Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław 2010.
- Macneil I.R. *Relational contract theory as sociology: A reply to Professors Lindberg and de Vos*, "Journal of Institutional and Theoretical Economics" 1987, Vol. 143.
- Malhotra D., *Trust and reciprocity decisions: The differing perspectives of trustors and trusted parties*, "Organizational Behavior and Human Decision Processes" 2004, Vol. 94.
- Mayer R.C., Schoorman, F.D., *An integrative model of organizational trust*, "Academy of Management Journal" 1995, Vol. 20.
- Mc Allister D.J., *Affect and cognition-based trust as foundations for interpersonal cooperation in organizations*, "Academy of Management Journal" 1995, Vol. 38.
- Möllering G., *Trust: Reason, routine, reflexivity*, Amsterdam: Elsevier 2006.
- Morgan R.M., Hunt, S.D., *The commitment – thrust theory of relationship marketing*, "Journal of Marketing" 1994, Vol. 58.
- Nummela N., *Looking through a prism – multiple perspectives to commitment to international R&D collaboration*, "Journal of High Technology Management Research" 2003, Vol. 14.
- Oliveira T., Alhinho M., Rita P., Dhillon, G., *Modeling and testing consumer trust dimensions in e-commerce*, "Computers in Human Behavior" 2017, Vol. 71.
- Olsen J.P., *Maybe it is time to rediscover bureaucracy*, "Journal of Public Administration and Theory" 2006, Vol. 16.
- Prier E., McCue C.P., *The implications of a muddled definition of public procurement*, "Journal of Public Procurement" 2009, Vol. 9.
- Rasheli G.A., *Procurement contract management in the local government authorities (LGAs) in Tanzania: A transaction cost approach*, "International Journal of Public Sector Management" 2016, Vol. 29.
- Robson M.J., Katsikeas C.S., Bello D.C., *Drivers and performance outcomes of trust in international strategic alliances: the role of organizational complexity*, "Organization Science" 2008, Vol. 19.
- Rousseau D., Sitkin S.B., Burt R.S., Camerer C., *Not so different after all: A cross-discipline view of trust*, "Academy of Management Review" 1998, Vol. 23.
- Schooner S.L., *Desiderata: Objectives for a system of Government Contract Law*, "Public Procurement Law Review" 2002, Vol. 11.
- Sztompka P., *Trust. A sociological theory*, Cambridge University Press 1999.
- Szydło M., *Prawna koncepcja zamówienia publicznego* [Legal concept of public procurement], C.H. Beck, Warszawa 2014.
- Thai K.V., *Public procurement re-examined*, "Journal of Public Procurement" 2001, Vol. 8.

- Ishak M.W., Said J., *The role of anti-corruption initiatives in reducing lobbyist involvement in E-Procurement: A case study of Mardi*, "Procedia Economics and Finance" 2015, Vol. 31.
- Williamson O.E., *The mechanism of governance*, New York: Oxford University Press 1996.
- Ybarra C.E., Turk T.A., *The evolution of trust in information technology alliances*, "Journal of High Technology Management Research" 2009, Vol. 20.
- Zheng J., Caldwell N., *An asymmetric learning in complex public – private projects*, "Journal of Public Procurement" 2008, Vol. 8.
- Zucker L.G., *Production of trust: Institutional sources of economic structure, 1840–1920*. "Research in Organizational Behavior" 1986, Vol. 8.

Formalizacja, dyskrecjonalność i zaufanie na rynku zamówień publicznych

Streszczenie

Zamówienie publiczne stanowi umowę, której stronami są instytucje zamawiającego i wykonawcy. Proces zamówienia publicznego jest kategorią prawną o charakterze dynamicznym, który konstytuują trzy etapy: przygotowania, udzielenia, wykonywania zamówienia publicznego. Jest to kategoria prawna w wysokim stopniu sformalizowana. Formalizacja ma zapewnić efektywność ekonomiczną całego systemu zamówień publicznych, jego transparentność, uczciwość zachowań uczestników rynku zamówień publicznych. Jednocześnie zbyt wysoki stopień sformalizowania może okazać się dla realizacji owych celów szkodliwy i nieskuteczny, ogranicza bowiem elastyczność działań zamawiającego i wykonawcy. Dlatego też ustawodawca, zdając sobie sprawę z istnienia dylematu formalizacji, staje przed koniecznością wyważenia tych dwóch grup wartości. Wyrazem tak rozumianego kompromisu jest obecność w prawie zamówień publicznych pewnego zakresu dyskrecjonalności, który ułatwia i czyni przepływ informacji pomiędzy stronami umowy bardziej skutecznym, a jednocześnie tworzy przestrzeń dla powstania relacji zaufania pomiędzy instytucjami zamawiającego i wykonawcy. W artykule ograniczono się do analizy zakresu dyskrecjonalności na etapie przygotowania i udzielenia (zawarcia) umowy.

Słowa kluczowe

zamówienia publiczne, dyskrecjonalność, zaufanie, wiarygodność

