

REPAIR OF PROCUREMENT DAMAGE: DISCUSSION ON THE BASIS OF THE SUPREME COURT'S RESOLUTION OF 25 FEBRUARY 2021 (III CZP 16/20)

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ABSTRACT

The text discusses the judgement of Supreme Court's resolution regarding compensation for damages resulting from violations of public procurement laws by contracting authorities. The resolution clarifies that contractors can seek damages without first obtaining rulings from appeal or complaint procedures. The absence of specific regulations in both previous and current legislation regarding compensation claims further underscores the importance of this ruling. The text examines the implications of the ruling on the public procurement system, emphasizing the need for alignment with EU directives and consideration of civil law liability for damages. Author also suggests the necessity of legislative amendments to address the legal gap and ensure effective remedies for aggrieved contractors, echoing similar practices in other European countries.

KEYWORDS

public procurement, compensation, tort liability, harmonization of law with the EU

1. INTRODUCTION

The goal of any bidder participating in a public procurement procedure is to win the contract. However, sometimes they cannot achieve this goal as a result of actions or omissions of the contracting authority that violate the provisions of the Public Procurement Law of 11 September 2019.¹ In this situation, the aggrieved contractor may be interested in compensation for the damage that resulted from the contractor's failure to obtain a contract that they fully counted on (had a real interest in obtaining).

The above issue was the subject of the titular resolution of the Supreme Court of 25 February 2020 (ref. III CZP 16/20)². The question addressed to the Supreme Court was whether it is possi-

1 Ustawa z dnia 11 września 2019 r. – Prawo zamówień publicznych [Public Procurement Law of 11 September 2019] [2019] JoL 2019; hereinafter referred to as the 'PPL'.

2 Judgment of the PSC III CZP 16/20 [2020], <https://www.sn.pl/sprawyl/SitePages/Zagadnienia_prawne_SN.aspx?ItemSID=1355-301f4741-66aa-4980-b9fa-873e90506a11&ListName=Zagadnienia_prawne&Rok=2020> accessed 15 Dec 2023.

ble for a contractor to seek damages without first establishing a violation of the PPL in an appeal or complaint procedure. The question was formulated as follows: ‘Does the recovery of damages by a contractor whose bid was not selected as a result of a violation by the contracting authority of the provisions of the Act of 29 January 2004³ [...] require that the violation of the provisions of this Act be first established by a legally valid ruling of the National Board of Appeals or a legally valid court ruling issued after recognising a complaint against the ruling of the National Board of Appeals?’ In response, the Supreme Court issued the following resolution: ‘A claim for damages by a contractor whose offer was not selected because the contracting entity violated the provisions of the Act of 29 January 2004 [...] does not require that a violation of the provisions of this Act be first established by a final ruling of the National Board of Appeals or a final court ruling issued after recognising a complaint against a ruling of the National Board of Appeals’.

The subject of this article assesses whether the ruling of the Supreme Court is correct. Although this ruling was made under the previous legislation (before the so-called ‘big amendment’ to the Public Procurement Law of 11 September 2019), it still remains relevant. Neither the previous nor the current legislation contain specific regulations on compensation claims of participants in a public tender against its organiser (the contracting entity).

2. RESOLUTION OF THE SUPREME COURT

In the factual case that the ruling referred to, the contractor brought action against the public procurer and demanded payment of compensation for damage caused by unlawful actions and omissions in the public procurement procedure, i.e. a *de facto* inability to select his bid as the most favourable one and to obtain the contract.

In the public procurement procedure, the contractor appealed twice to the National Board of Appeals (NAC), demanding that the actions by the contracting authority – the unlawful discontinuance of the procedure – be corrected and challenging the selection of a competitive bid. As for the second appeal, which was filed by the plaintiff company demanding that its bid be selected as the most advantageous, the appeal proceedings were discontinued following a decision to withdraw the appeal.

The court of first instance dismissed the claim for damages on the grounds that the plaintiff, in asserting their claim, should present a prejudication in the form of a decision of the NAC or a court adjudicating a complaint against a ruling of this body. In turn, the plaintiff’s withdrawal of the appeal resulted in the proceedings being discontinued without a substantive ruling (prejudication).

When reviewing the appeal, the second-instance court decided to refer the above-mentioned legal issue to the Supreme Court in connection with the requirement that a violation of the PPL by the contracting authority must first be established.

The appeals court pointed out that the PPL does not include provisions for claims for damages. According to the court, ‘the public procurement law was enacted pursuant to implementation of Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures for the award of public contracts. Article 2(6) of Directive 89/665/EEC allowed for the possibility of stipulating that where compensation is sought for an unlawful

3 Ustawa z dnia 29 stycznia 2004 r. Prawo zamówień publicznych [Public Procurement Law of 29 January 2004] [2019] JoL 1843 [consolidated text].

decision, the decision in question must first be annulled by an authority with the competent powers with the guarantee that any unlawful measures taken by the review body, if any, or any failure in the exercise of the powers conferred on it may be subject to judicial review'. The court's doubts were caused by a loophole in the PPL, which, although it contains regulations pertaining to legal protections that offer the possibility of correcting various defective actions or omissions of the contracting authority, does not eliminate all forms of harm that a contractor may suffer when participating in a tender procedure. Nor does the PPL require that confirmation of the contracting authority's violation of the provisions of this law be obtained by any substantive ('adjudicatory') body prior to asserting a claim for damages.

In ruling on the issue, the Supreme Court noted that legal regulations in special laws, of which the PPL Act is undoubtedly one, must contain such explicit provisions in order for them to temporarily exclude court action, such as in cases for damages for violating the procedures stipulated in those laws; temporal inadmissibility of court action cannot be subject to extensive interpretation.

Since there is no unambiguous statutory regulation in the PPL that excludes, even temporarily, the admissibility of court proceedings, there are no grounds, in the view of the Supreme Court, for rejecting a suit for damages against the contracting authority brought by a bidder, even if the bidder has not exhausted the remedies available under the PPL against the contracting authority's violation of the provisions of that law. Thus, it is not possible to infer from judicial interpretation alone the requirement to exhaust the appeal procedures before the NAC or the public procurement court as a condition for taking legal action for damages against the contracting authority. This would constitute a restriction of the exercise of the right to a court that is guaranteed by the Constitution (Art. 45(1) PPL in conjunction with Art. 31(3) of the Polish Constitution⁴). The need for the contractor to obtain a preliminary ruling from the NAC should be regarded in the same way.

In addition to this constitutional limitation, the Supreme Court argued that there is no procedural provision in the Polish legal system that would make the possibility of pursuing a civil claim regarding a violation of public procurement regulations conditional on the prerequisite that a relevant arbitration board, by way of a legally binding decision or a legally valid award – or a court, as part of a judicial review of a ruling issued by such an arbitration board – finds that there has been a breach of those regulations.

Such a procedural provision could apply as a result of the implementation of the provision of Article 2(5) of Directive 89/665/EEC, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007. It stipulates that 'the Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers'.

The said ruling of the Supreme Court, despite the unequivocal answer to the question, does not necessarily dispel all doubts regarding the contracting authority's liability for damages; in fact it adds to those doubts. The Supreme Court, citing one of the German Federal Court's rulings,⁵ indicated that its conclusion 'does not mean, however, that the contractor's failure to take advantage of the system of legal remedies under the Public Procurement Law has any relevance in a proceeding before a common court against the contracting authority for compensation for damages caused by actions by the contracting authority in the public procurement

⁴ Konstytucja Rzeczypospolitej Polskiej z 2 kwietnia 1997 r. [Polish Constitution of 2 April 1997] [1997] JoL 78, 483.

⁵ Judgment of the German Federal Court X ZR 124/18 [2019], <<https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=edd18be659e623bfccb2e2317ff9649a&n=101051&pos=0&anz=1>> accessed 15 Dec 2023.

procedure that are inconsistent with the provisions of that law, or by its failure to take actions that the contracting authority was obliged to take. This issue may prove to be important for the assessment of the conditions for civil law liability for damages as well as the determination of the amount of damage’.

3. LIABILITY FOR DAMAGES IN EU PUBLIC PROCUREMENT LAW

The matter of the indemnity liability of a public procurer for violation of procedural rules is regulated by EU legislation. Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC on improving the effectiveness of appeal procedures for the award of public contracts⁶ explicitly indicates that ‘Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to: (c) award damages to persons harmed by an infringement’. Subsequently, paragraph 6 of this provision says that ‘Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers’. In turn, the second sentence of paragraph 7 indicates that except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract in accordance with Article 1(5), paragraph 3 of this Article or Articles 2a to 2f, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement.

The aforementioned provisions of the directive establish a certain minimum standard for a route to compensation from the contracting authority, which means that Member States can retain or introduce more far-reaching measures. The principle of procedural autonomy of Member States entitles them to introduce a national procedural rule that would regulate in detail the right to award damages to contractors for unlawful acts or omissions of contracting authorities. The Polish legislative body, despite dozens of different amendments to the Public Procurement Law, has not exercised the authority to regulate the matter in question.

4. CONSEQUENCES OF THE SUPREME COURT’S RULING FOR THE PUBLIC PROCUREMENT SYSTEM

The ruling of the Supreme Court deserves full approval. The *de lege lata* absence in the Public Procurement Law of an unambiguous statutory regulation excluding, even temporarily, the admissibility of a court route to seek damages from the contracting authority, even if only in connection with the requirement to use the legal remedies available under the PPL due to the contracting authority’s violation of the provisions of that law, does not give grounds to reject a suit for damages. The opposite reasoning would constitute a restriction of the constitutionally guaranteed right to a court.

Section IX of the PPL Act governs legal protection measures. According to these regulations, legal remedies include an appeal and a complaint to the court. An appeal is heard by the National Appeals Chamber, while a complaint may be filed against rulings of the NAC and the decision

⁶ Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC on improving the effectiveness of appeal procedures for the award of public contracts [2007] OJ EU L 335/31.

of the NAC president to dismiss an appeal. The complaint is heard by the District Court in Warsaw: the public procurement court. Parties and participants in the complaint procedure are also entitled to file a cassation complaint.

The NAC is a specialised quasi-judicial body. This was confirmed, among other things, by the Court of Justice of the European Union in its judgment of 13 December 2012 (C-465/11)⁷, in which the Court stated that ‘the Krajowa Izba Odwoławcza [NAC], which is a body established by the Act on public procurement, has been granted exclusive jurisdiction to hear and determine at first instance disputes between economic operators and competent authorities, and whose operation is governed by Articles 172 to 198 of that law, does constitute a court or tribunal, within the meaning of 267 TFEU⁸, in the exercise of its jurisdiction in relation to those provisions, as is the case in the main proceedings.’ The NAC has jurisdiction over three types of cases:

- (1) the adjudication of appeals against the contracting authority’s actions in the contract award procedure, tender, system of qualifying contractors or the failure to perform an action to which the contracting authority is obliged under the Act, against draft provisions of a public procurement contract and the failure to award a contract under the Act, in spite of the fact that the contracting authority was obliged to do so;
- (2) the adjudication of motions to lift the prohibition on the conclusion of a contract;
- (3) the adoption of resolutions containing an opinion on the contracting authority’s objections to the outcome of prior review and summary review.

Only the District Court in Warsaw – the Public Procurement Court – has jurisdiction to hear the complaint (Art. 580(1) of the PPL Act). According to the explanatory memorandum to the PPL, a single court specialised and appointed to hear public procurement complaints is expected to help reduce the time it takes to hear cases and ensure the highest quality of court rulings.

As has already been noted, there is no specific legal regulation in the PPL Act that guarantees the right to claim damages from the contracting authority – the organiser of the tender – for violations of the procedural requirements set forth in the Act (the normatively defined jurisdiction of the NAC and the public procurement court does not include adjudication of claims for damages). Nevertheless, the NAC as a first-instance body and the procurement court as a second-instance body have the power to assess whether the contracting authority’s actions or omissions are in accordance with the procedural requirements of the PPL Act, both during the public procurement procedure (NAC) and after its completion, including the signing of the contract (NAC or court). According to Art. 554(3)(3) of the PPL Law, ‘when granting the appeal, the Chamber may, if the contract is concluded in the circumstances permitted by the law, declare the infringement of the provisions of the Act’. The same power applies to the Public Procurement Court (see Article 588(2), sentences 1 and 2 of the PPL Law: ‘If the complaint is taken into account, the court amends the contested decision and decides on the substance of the case and, in other cases, gives a ruling. The provisions of Article 553 to Article 557 and Article 563 to Article 567 shall apply accordingly.’

Therefore, should the contractor’s failure to take advantage of special appeal and complaint procedures involving a specialised quasi-judicial public procurement authority or court in a specific public procurement procedure have no bearing on the effectiveness of claims for damages

⁷ Judgment CJEU C-465/11 EU:C:2012:801.

⁸ Treaty on the Functioning of the European Union OJ EU C 326/47 [2012].

that are subsequently brought against the contracting authority? This question is justified because, as cited above, the Supreme Court has itself clearly stated that a contractor's failure to avail itself of legal remedies under the Public Procurement Law 'may prove important with regard to the assessment of the prerequisites for civil liability for damages as well as the determination of the amount of damages'.

In one of its rulings, the Supreme Court, in reference to the issue of returning the bid bond in a tender procedure, indicated that '[t]he return of the bid security is possible only if it is established that the contractor cannot be accused of any negligence as provided for in Article 46 Section 4a of the Public Procurement Law. Given that the proceedings are conducted under a special procedure regulated by the Public Procurement Law and the appeal is filed by the participants with the National Board of Appeals, contrary to the suggestions in the cassation appeal, there is no basis whatsoever for excluding matters involving the retention of the bid security by the ordering party from the regulations of the Public Procurement Law. In view of this, in accordance with Article 198a of the PPL, it is only after the National Board of Appeals issues a ruling that the competence of the ordinary court comes into play. If it were to be considered that a common court could rule instantly in cases involving the return of a bid security, this would not only be inconsistent with the aforementioned regulations, but would in fact lead to a perversion of the design of the legal remedies provided for in the Public Procurement Law. A common court would have to replace the National Board of Appeals and interpret the prerequisites set forth in Article 46(4a) of the Public Procurement Law independently. Meanwhile, legal remedies in the public procurement process are designed in such a way that whether the law has been violated and a participant in the process has suffered damage is to be decided in the first instance not by a common court, but by a special body that specialises in the complex issues of public procurement. Therefore, it is unacceptable to allow public procurement cases to be adjudicated immediately by a common court. To do so would be to substitute the ruling of a specially appointed body for that court⁹. According to the Supreme Court, in order for there to be full compliance with the requirements of the PPL, it is first necessary for a specialist body to rule on the legality of actions taken in the public procurement process, and only secondarily for a common court to rule.

In the law underlying the ruling under discussion, as well as in the current law, the only regulation that provides a legal basis for a contractor's claim for damages is the provision of Art. 261 of the PPL Act (under the previous law, it was Article 93(4)), which stipulates that in the case where a procurement proceeding is conducted for reasons attributable to the contracting authority, contractors who submitted tenders that are not eligible for rejection are entitled to a claim for reimbursement of the reasonable costs of participation in the proceeding, in particular the costs of preparing the tender. The aforementioned legal basis is insufficient to meet the minimum standard under the directive, since, according to the wording of the Council Directive of 21 December 1989, on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (89/665/EEC), 'it is necessary to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken unlawfully and compensation of persons harmed by an infringement'¹⁰.

9 The ruling PSC IV CSK 115/14 [2014].

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

In the absence of a specific regulation, the legal basis for a claim for damages against the contracting authority must be based on the general provisions of civil law, as evidenced by the provisions of Art. 8(1) of the PPL. However, this is not an optimal solution, if only due to the need to take into account the specifics of public procurement. For example, basing a claim for damages on the provisions of Art. 471 of the Civil Code¹¹ *in fine* and Art. 415 of the Civil Code requires proof of a culpable action of the defendant (the contracting authority), whilst the principle in EU law is that it is impossible to make a claim for damages dependent on the premise of the fault of the contracting authority.

Apart from the above limitation, there is also the problem of defining the type of damage that would be eligible for compensation for a breach of the public procurement law, i.e. whether the possibility of claiming damages should cover only the costs incurred (actual damage) of participation in the proceedings, or the lost profit from the contract (lost profits).¹² In a recent opinion dated 7 December 2023, Advocate General of the Court of Justice of the EU Anthony Michael Collins indicated in the *Ingsteel* case (C-547/22)¹³ that it is up to the national laws of the Member States to determine the conditions under which a national court may rule on a claim for damages brought by a bidder unlawfully excluded from a public procurement procedure. According to the Advocate General, ‘these conditions include the burden of proof and standard of proof, causation and the calculation of the amount that can be awarded. The laws of the Member States governing them must comply with the principles of equivalence and effectiveness. The principle of effectiveness implies that a national court cannot invoke a practice that prevents a bidder unlawfully excluded from a public procurement procedure from claiming damages for the loss of a chance to win that contract’.

A claimant for damages must demonstrate that they have suffered harm and that this harm is the result of a violation of the Act by the contracting authority (in other words, there is a sufficient causal link between the harm and the contracting authority’s violation of the PPL Act).

This means that the bidder must prove that the contracting authority performed or omitted to perform a certain action in violation of the Act, which had a direct impact on the bidder’s inability to obtain the contract.¹⁴ Whether this condition was fulfilled (whether the contracting authority’s actions were unlawful) can be assessed by the court hearing an action for damages, with a *de facto* omission of the appeal-complaint path of the PPL, if the plaintiff has not previously used it. This means that the settlement of disputed issues in the field of public procurement, including the assessment whether the contracting authority’s actions or omissions are correct, can be carried out bypassing the adjudicating bodies that specialise in this area.

For this reason, a contractor’s failure to avail themselves of legal remedies under the PPL should

11 Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny [Civil Code of 23 April 1964] [2023] JoL 1610 [consolidated text].

12 The concept of damage and the issue of estimating damage are not covered by the body of EU directives; thus, Member States have full autonomy in regulating this matter. See the opinion of Advocate General P. Cruz Villalón C-568/08 EU:C:2013:325.

13 The opinion of Advocate General Collins EU:C:2023:967.

14 For example, German rulings clearly state that in an action for damages, the plaintiff must prove that it is the plaintiff who absolutely should have received the contract in question. See, for example, the judgment of the Federal Court of Justice XIII ZR 20/19 [2021], <<https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&nr=126099&pos=20&anz=833>> accessed 15 Dec 2023. In practice, this will only be possible if the only criterion for the award of the contract is the price and the plaintiff is able to demonstrate that they submitted a valid bid with the lowest bid price, or if there are other non-price criteria that can be objectively met by individual bidders.

have a direct impact on the assessment of the prerequisites for civil law liability for damages on the part of the contracting authority, as well as the determination of the amount of damages. This omission should be considered a contribution to the occurrence or increase of the damage by the injured party (the bidder; see Art. 362 of the Civil Code).

In fact, it is difficult to imagine that the assessment of the bidder's legal situation would not change with the assumption that the bidder, being aware of the existence of legal remedies in the procurement procedure ignores it for some reason, hoping that in future (during the statute of limitations period for its claims) they will be able to demand verification of the legality of the contracting authority's actions in a compensation lawsuit.

5. CONCLUSION

The Supreme Court resolution in question, although substantively accurate, showed that the Polish public procurement legal system has for years contained a legal loophole resulting in ineffective remedies. According to the preamble to Directive 89/665, 'in certain Member States, the absence of effective remedies or inadequacy of existing remedies deter Community undertakings from submitting tenders in the Member State in which the contracting authority is established; whereas, therefore, the Member States concerned must remedy this situation'.

In view of the above, it would be advisable to propose a *de lege ferenda* motion to make a possible claim for damages by a bidder against a contracting authority conditional on prior exhaustion of the appeal path defined in the specific regulations of the public procurement law. The use of the legal remedies envisaged by the law, inherent in the process of public procurement, would make it possible to assess whether and to what extent the contracting authorities violated the tender procedures and what impact this had on the winning of the contract by the claiming bidder. Such legislative tendencies are found in other European countries.¹⁵

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15 See, for example, the regulations of the Austrian Procurement Act of 2018 [2018] BVergG 65, which indicates in Section 373 that: '(2) An action for damages is permitted only if the competent procurement control authority has previously determined that: 1. the contract was not awarded to the bidder who submitted the lowest price or the technologically and economically most advantageous bid due to a violation of this Federal Law, relevant regulations or directly applicable Union law'.

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