

**INNOVATIVE PROCUREMENT IN POLAND IN THE LIGHT OF THE REPORT  
ON THE EVALUATION OF PUBLIC PROCUREMENT FUNCTIONING  
AFTER THE AMENDMENT OF THE PUBLIC PROCUREMENT LAW OF 2016**

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### **Abstract**

**Research background:** Public procurement for innovation has increasingly been the subject of EU policy makers. A lot of changes in the European directives and Polish law have been observed that facilitate the process required for the public procurement of innovation.

**Purpose:** The purpose of the paper is an attempt to study a functioning public procurement system as a sourcing mechanism for innovative products and services in Poland.

**Research Methodology:** Review of the existing legislation concerning public procurement especially the Public Procurement Law in Poland after its amendment of 2016 and analysis of the results of a survey conducted among contracting entities and contractors of public procurement.

**Results:** The empirical study suggests that there is a deficit of knowledge of both contracting entities and contractors, concerning awareness and application of legal provisions facilitating procuring innovative products. The existing scale of innovative solutions' application by contracting entities is very low, resulting from a lack of needs or due to the business profile, which does not contribute to increasing the demand for innovative products.

**Novelty:** There is a lack of similar investigations in the Polish and European literature. It is worth stressing that public procurement viewed as a special case of innovation which is distinct from the procurement of a regular market. The empirical results are based on a study conducted in 2018 by the Public Procurement Office in Poland.

**Keywords:** legal provisions, pro-innovative elements of public procurement system, report of a survey

**JEL classification:** H57, O35

## **Introduction**

Public procurement is a powerful tool of the economic policies of individual countries, and the value of all the examples of public procurement is estimated to be of 13 to 20% of the world's GDP. The issue of the public sector's demand conducive to innovativeness as an important element of demand was underlined already in the Lisbon Strategy, in which an emphasis was put on the competitiveness of EU countries. The importance of public procurement as a tool of an economic policy in individual EU countries is diversified. The effects of pro-innovative public procurement are mostly to be observed in Great Britain and in Scandinavian countries, while the least effects are noticed in new member states of EU and Mediterranean countries. Most EU member states have started to incorporate innovation generation as an element in public procurement policies (Rolfstam, 2009).

New Union directives become crucial to the development of innovative public procurement: Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

The year 2016 was particularly significant for functioning of the public procurement system in Poland. New provisions of an Act of 22<sup>nd</sup> June 2016 amending the provisions of the Public Procurement Law (PPL) (The Act of 29 January 2004) came into life on 28<sup>th</sup> July 2016. This Act introduced above-mentioned provisions of Union directives, concerning in particular adjustments in awarding public procurement, to the Polish legislation. The use of innovation is associated with a strong impact of barriers and restrictions and a much higher risk than in regular procurement (OECD, 2015).

The process of public spending, including public procurement, may be aimed at fulfilling a few aims. The main purpose is awarding public procurement. Secondary effects may include the creation of contracting entities' behaviours focused on fulfilling social and economic aims. Supporting actions conducive to companies' innovativeness may stimulate economic development, which in turn enhances the economy's competitiveness and increases the quality of life. Awarding a public procurement contract enables, without additional spending, influencing the behaviour of the contracting entities. The degree of public spendings' impact on the economic development depends, among others, on the contracting entities' culture, their knowledge, experience, and possibilities of the public procurement system. Because

of the considerable amounts of funds, flowing through the public procurement, both in Poland and in the EU, there is a great and untapped potential of public procurement as an innovative policy tool. A crucial task is to identify factors that hinder this process and indicate solutions to eliminate existing barriers (Starzyńska, Wiktorowicz, 2012).

The aim of this paper is to identify elements of the public procurement system being results of the amended PPL in 2016 that could be used by the main public procurement market participants: the contracting entities and contractors. Research covered the period directly subsequent to the enforcement of the PPL, i.e. from 28<sup>th</sup> July 2016 to 30<sup>th</sup> April 2018. The Polish Public Procurement Office (PPO) [*Urząd Zamówień Publicznych (UZP)*] published a Report on the Evaluation of Public Procurement System Functioning in 2018 (PPO, 2018). The main research hypothesis is following: there are still insufficient awareness and little knowledge of legal provisions solutions of both contracting entities and contractors facilitating procuring innovative products.

## **1. Public procurement elements conducive to the innovativeness of tenders**

The first action to undertake by a contracting entity in a public procurement awarding process is the preparation of the description of the subject of the contract. The Act requires the subject of the contract to be described unambiguously and comprehensively, using detailed and understandable definitions, including all the requirements and aspects that may affect the preparation of a tender. The Act prohibits describing a product with the usage of trademarks, patents or origin, unless it is justified by the specification of a product, which precludes it from being described in a detailed way. The Act permits the existence of so-called equivalent tenders, which enable the contractors to propose innovative solutions according to the requirements specified by the contracting party. In practice it may lead to manufacturing a product that meets all the requirements of the contracting entity, but with enhanced performance. Similarly, the subject of the offer description may be done with technical and quality characteristics, maintaining existing standards.

The element that may create innovativeness is undeniably criteria, which will be followed by the procurer when choosing a tender – the most advantageous offer, presenting the best balance of price or cost and other criteria considering the subject of the public procurement contract. The Act includes a provision regarding criteria other than price or cost, like quality, social, environmental, and innovative aspects, organisation, professional qualifications and experience of people assigned to performing the contract, if they may considerably influence the quality

of a performance of a procurement, after-sales service, technical support, terms of delivery, i.e. date of delivery, means of delivery, or period of performance (Uyarra et al., 2014).

The contracting entity defines the aspects, vital for the procurers, which will be included in the signed contract, in the specification of essential terms of the contract. The contents of the specification receive particular importance according to the Article 44(1) of PPL, which provides the possibility to change the provisions of a signed contract or a framework agreement with respect to the offer that was the basis of the contractor's choice, in the circumstances there described. This aspect is quite relevant in relation to procurement, where the period of completion covers a few years, in which new and more innovative methods of procurement completion may appear. Anticipating such circumstances while preparing the specification of essential terms of the contract, the contracting entity has a possibility to introduce changes (preserving the other act's provisions) and increase the innovativeness (Nowicki, 2016).

An innovative element of the Act is the possibility to submit variant offers. The variant offer has to meet the minimal requirements, specified by the contracting entity. Submitting a variant offer results in the possibility to choose the most advantageous tender, with a particular focus put on non-price aspects. Introducing other tender evaluation criteria gives the contracting entity an opportunity to sign a contract with the contractor, who offers a more innovative solution than those predicted by the contracting party.

Provisions creating innovativeness in public procurement are also the procedures themselves, mainly a negotiated procedure or competitive dialogue. Procurement performed under a negotiated procedure with publication may refer mainly to clarification or supplementation of the terms of the public procurement contract. Article 55(1)(6) indicates a lack of solutions available on the market, which could meet the expectations of the contracting entity. Innovativeness of this procedure may be highlighted through an innovative clarification of the subject of the contract.

Competitive dialogue is also an innovative procedure, which can be applied if circumstances provided in Article 55(1) occur. The competitive dialogue leads to the closest cooperation between the contracting party and the contractor in the scope of the subject of the contract. This procedure enables the contractors to introduce solutions more innovative to those determined in the specification of essential terms of the contract and that were of an undefined nature or were previously not specified by the contracting party.

The newest innovative procedure provided by the amended in 2016 PPL Act is innovative partnership. This is a procedure where the contracting entity, in response to a public contract notice, invites the contractors to admitted to the procedure to submit their initial offers, negotiates

with them, and then invites them to submit offers for the development of an innovative product, services or construction works, unavailable on the market, and the sale of these. PPL specifies also the concept of innovative product, service or construction work (Article 77a(3)).

## **2. Changes in the public procurement system caused by the amendment of PPL of 22<sup>th</sup> June 2016**

The pro-innovative solutions, proposed by the amendment of PPL, include:

- a) provisions regarding the description of the subject of the contract, i.e. innovative aspects of contract fulfillment (Article 29 of PPL), the performance of functional requirements (Article 30a of PPL), certificates (Article 30b of PPL), technical dialogue (Article 31a and 31n of PPL);
- b) provisions concerning the selection of contractors, e.g. relating to the conditions of being admitted to the procedure (Article 22 of PPL);
- c) provisions shaping the new formula of tenders' evaluation criteria (Article 91 of PPL) and life cycle definition (Article 2(1a) of PPL);
- d) provisions referring to the previously existing procedures, including changes in negotiated procedures, mainly in competitive dialogue (Article 60a and 60n of PPL) and single-source procurement when the acquisition of items manufactured only for scientific (research, experiments, development) reasons (Article 67(1)(1b) of PPL);
- e) provisions introducing a new innovation partnership, dedicated to the purchase of innovative products, services and construction works (Article 73a of PPL);
- f) provisions regarding variant offers (Article 83 of PPL);
- g) provisions specifying exemptions from the application of the PPL regarding procurement for research and development services (Article 4(31i) and Article 4(31t) of PPL).

The most important law changes concern the description of the subject of the contract where innovative aspects could be best-described by the use of functional requirements, certificates or resulting from technical dialogue. Another important change is more precise conditions for selecting the best contractors. Others changes concerns the criteria for the evaluation of the most advantageous offer, where the price weight cannot exceed 60%. However the most important changes focus at the introduction of a new procedure - innovation partnership and the possibility of using variant offers.

### 3. Changes in the public procurement system viewed by the market participants

In 2018 the PPO conducted a co-financed by the EU research among the contracting entities, contractors and institutions controlling proceedings of awarding a public procurement contract. The research regarded cases of public procurement awarded between 27.07.2016 and 30.04.2018 (21 months). The aim of the research was to collect and analyse the information on the public procurement system functioning in Poland, after the above-mentioned amendment of PPL of June 2016. The research was conducted with the application of CATI (computer-assisted telephone interviewing) and TDI (telephonic deeper interview). The CATI method was used to examine (PPO, 2018):

- a) 700 contracting entities, including 683 state and local government entities and 17 utilities procurers;
- b) 300 contractors, including 102 from the construction works' sector, 108 from the goods' sector, 90 from the services' sector;
- c) 30 controlling institutions.

The TDI method was used to examine:

- a) 75 contracting entities, including:
  - 73 state and local government entities,
  - 2 utilities contracting entities;
- b) 40 contractors, including:
  - 14 from the construction works' sector,
  - 14 from the goods' sector,
  - 12 from the services' sector;
- c) 15 controlling institutions.

The sampling list for testing the procurers was prepared on the basis of annual reports on public procurement. The base of procurement entities was determined by the means of announcements published by the Public Procurement Bulletin and in the Official Journal of the European Union, and databases made available by the Public Procurement Office. The sampling list for testing contractors was prepared on the basis of tender documentation by compilation of contact details of contractors resulting from notices of awarded public contracts.

At the initial stage of the research, the participants representing the contracting parties were asked to assess their knowledge concerning provisions conducive to procuring innovative products (see Figure 1).

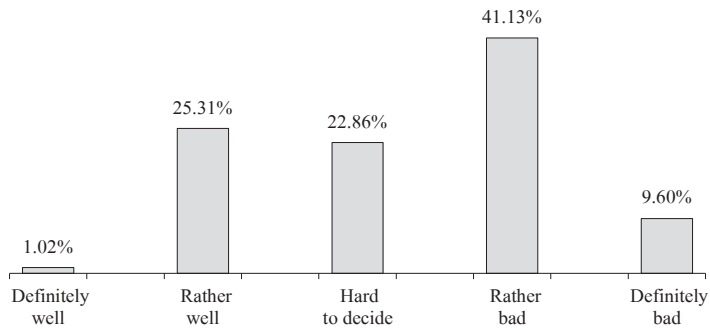


Figure 1. Assessment of the knowledge of the contracting entities on provisions conducive to procuring innovative products in percents (700 answers)

Source: own study based on PPO (2018), p. 65.

More than 50% of the contracting entities assess their knowledge on provision conducive to procuring innovative products negatively. Only slightly more than 26% of the procurers assess their knowledge well or rather well.

Slightly different indicators in the scope of using pro-innovative solutions were observed in case of the contractors, who, in the analysed period, applied pro-innovative solutions at a high or very high scale (more than 14% of the respondents). On average, this level was determined at over 40%. More than 41% of the asked contractors indicated the application of pro-innovative solutions at a very low scale or no application of them (see Figure 2).

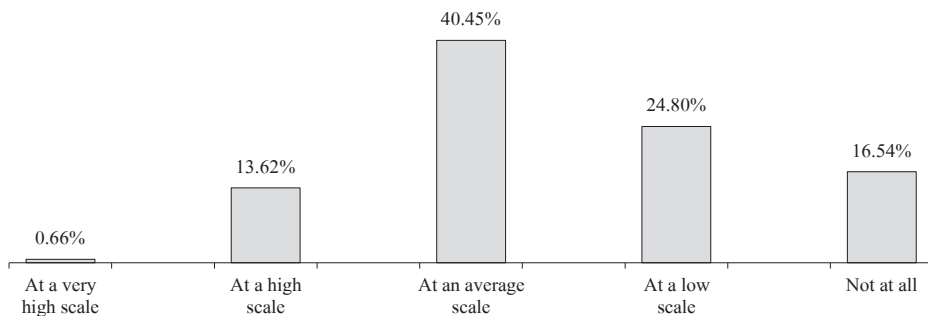


Figure 2. The level, at which the contractors applied pro-innovative solutions under the amendment of PPL of 2016 in percents (300 answers)

Source: own study based on PPO (2018), p. 67.

Using rank order correlation coefficient, the relationship between the level of knowledge of contracting entities and level of application of pro-innovative solutions by the contractors

is relatively moderate (0.50) which means that there is low level of understanding between expectations of procurers and pro-innovative solutions offered by the contractors.

Table 1 presents solutions conducive to procuring innovative products applied by the contracting entities in theirs and contractors' opinion. Among the contracting parties, who declared application of solutions conducive to procuring innovative products, a small percentage, equalling 1.43% of procedures, was observed in the process of clarification of the subject of the contract and slightly more than 1% in the involvement of experts and almost 4% in pro-innovative tender evaluation criteria. Among the contractors, considerably higher percentage was observed in the process of clarification of the subject of the offer (more than 14%), and the much lower percentage was indicated in the case of pro-innovative criteria. An alarmingly high percentage, i.e. more than 93% of the contracting parties and more than 80% of the contractors, provided no answer. Using the data from the Table 1, the structure similarity indicator was calculated. The value of this coefficient was 86.6% what proved that the structure of answers both groups reviews were very similar.

Table 1. Solutions conducive to procuring innovative products in the opinion the contracting entities and contractors (answers in percents)

Solutions conducive to procuring innovative products	Contracting entities	Contractors
Process of clarification of the subject of the contract	1.43	14.16
Involvement of experts	1.12	0.44
The most advantageous offer model	3.88	2.00
Possibility to submit variant offers	2.04	–
Intellectual property rights system	0.62	–
Functional description of the subject of the contract	1.64	0.94
Public-private partnership	0.21	0.24
Innovation partnership	0.10	0.24
Concession	0.21	0.70
Not determined or no answer	93.27	81.31

Source: own study based on PPO (2018), p. 69.

In the TDI method, the contractors were asked to indicate the stages of the public procurement awarding proceeding at which they perceive the biggest problems connected to the preparation of the offer in the innovative procurement (see Figure 3).



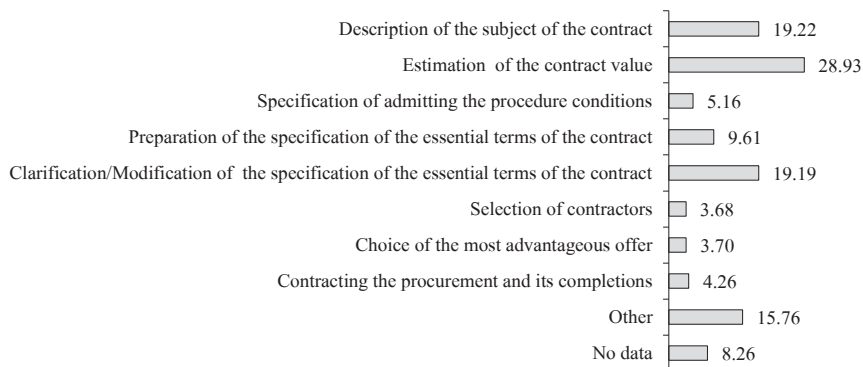


Figure 3. The stages of the public procurement awarding procedure at which procurers perceive the biggest problems connected to the preparation of innovative procurement (percent of answers)

Source: own study based on PPO (2018), p. 77.

Public procurement contractors notice the biggest problems connected with offering innovative public procurement at the stage of preparation of the procedure, i.e. description of the subject of the contract (more than 19% of procurers) and estimation of the subject of the contract value (about 29% of answers). A similar situation is observed in case of clarification/modification of the specification of the essential terms of the contract (over 19% of procurers). Some contractors were unable to identify the difficulties as they have insufficient experience in case of public procurement or they indicate other elements of the procedure of awarding a public procurement (total of 24%).

## Conclusions

The results of the conducted research show that the contracting entities are characterized by a weak or very poor level of knowledge concerning provisions conducive to procuring innovative products. The lack of contact with such procurement and the fact that innovativeness is often a novelty were mentioned among the reasons for this situation. The public procurement contractors, who were characterized by a much higher percentage of pro-innovative proceedings, achieve slightly better results. The current scale of application of innovative public procurement is very low, due to lack of needs or lack of opportunities due to the profile of activity, which is not conducive to the acquisition of innovative products. Also, most contractors did not see the interest of procuring innovative products/services in the period under consideration. Generally, there is an increased awareness of the demand for innovation, both contracting

entities and enterprises participating in public procurement proceedings, but they still do not reach a satisfactory level (Borowiec, 2013). The consequence of this is the lack or low level of mechanisms associated with innovative public procurement.

The paper distinguishes two groups of main participants: procurement entities and contractors. Presented analysis clearly illustrated the importance of cooperation between two groups of the procurement market participants. Different types of coordination at the particular stages of public procurement procedure may be required in order to enhance the effectiveness of public procurement as an innovation policy tool. The presented analysis is limited by the lack of access to the particular data coming directly from the survey. The results of the research are preliminary reasons for future investigation of innovative public procurement.

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