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Possibility of changing the contractor of a public contract in the event of bankruptcy of the original contractor — Gloss to the judgment of the CJEU of 3 February 2022, case C-461/20

Możliwość zmiany wykonawcy zamówienia publicznego w przypadku upadłości pierwotnego wykonawcy — glosa do wyroku TSUE z 3.02.2022 r., C-461/20

Abstract

The aim of the article is to discuss the grounds for the exclusion of a public procurement contractor in the event of bankruptcy of the original contractor. The article presents the CJEU position on the acceptability of a change of contractor of a public contract in the event of bankruptcy of the original contractor. The issued ruling affects the application of the provisions of the Act of 11 September 2019 — Public Procurement Law as the national rules on amendments to the Public Procurement Law reflect the Art. 72 of the Directive 2014/24/EU. The CJEU examined whether in the light of Art. 72 para. 1(d)(ii) of the Directive 2014/24, a change of contractor is possible in the event of insolvency of the original contractor leading to its compulsory liquidation. Analysis of the position of the CJEU and the provisions of the Act of 28 February 2003 Bankruptcy Law¹ makes it possible to confirm that the permissibility of changing the public contract also includes insolvency as an extraordinary way of terminating economic activity.

Keywords: public procurement, contract change, bankruptcy of the contractor, succession

JEL: K

Introduction

The commented judgment in case C-461/20 concerns the very relevant issue of public procurement practice, namely

Streszczenie

Celem artykułu jest omówienie podstaw wykluczenia wykonawcy zamówienia publicznego w przypadku upadłości pierwotnego wykonawcy. W artykule przedstawiono stanowisko TSUE w sprawie dopuszczalności zmiany wykonawcy zamówienia publicznego w przypadku upadłości pierwotnego wykonawcy. Wydane orzeczenie wpływa na stosowanie przepisów ustawy z 11.09.2019 r. — Prawo zamówień publicznych, gdyż krajowe przepisy dotyczące zmian w prawie zamówień publicznych odzwierciedlają art. 72 dyrektywy 2014/24/UE. TSUE zbadał, czy w świetle art. 72 ust. 1 lit. d) ppkt (ii) dyrektywy 2014/24 zmiana wykonawcy jest możliwa w przypadku niewypłacalności pierwotnego wykonawcy prowadzącej do jego przymusowej likwidacji. Analiza stanowiska TSUE oraz przepisów ustawy z 28.02.2003 r. — Prawo upadłościowe pozwala potwierdzić, że dopuszczalność zmiany zamówienia publicznego obejmuje również niewypłacalność jako nadzwyczajny sposób zakończenia działalności gospodarczej.

Słowa kluczowe: zamówienia publiczne, zmiana umowy, upadłość wykonawcy, sukcesja

the change of the subject of a public contract. The purpose of EU and national competition rules is to respect the principles of fair competition and equal treatment of economic operators. The change by substitution of the

original operator by an entity that did not participate in procurement procedure violates the principle of fair competition and equal treatment of economic operators. According to recital 110 of the Directive 2014/24/EU, the awarded operator performing the contract should be given the opportunity, in particular where the contract is awarded to more than one contractor, to undergo structural changes, such as purely internal restructurings, takeovers, mergers and acquisitions or insolvency. Such structural changes should not automatically require new procurement procedure for all contracts performed by that operator.

The CJEU in the commented judgment has ruled on the admissibility of a change of entity in the event of insolvency of the original contractor. The case, however, would not be cognizable before the CJEU due to the admissibility of amending the contract under the conditions of universal succession. However, it is important to note that the case heard before the CJEU concerned the insolvency of the original contractor leading to the termination of its business activities. The CJEU was considering whether, under Art. 72 para. 1(d)(ii) of the Directive 2014/24, amendment to a contract is possible where the new operator only assumes the rights and obligations arising from a framework agreement concluded with a contracting authority and does not take over all or part of the business of the original contractor falling within the scope of that framework agreement.

Facts

National (Swedish) Agency awarded four framework agreements under a restricted procedure with a reopening of competition for the purchase of various computer equipment. In the procedure, seventeen candidates qualified for the selection, including Advania, Dustin and Misco AB. Misco was awarded framework agreements in the four areas and Dustin only in two areas. By letter of 4 December 2017, Misco requested the contracting authority to authorise the transfer to Advania the agreements which it held. On 12 December 2017 Misco was declared insolvent and, on 18 January 2018, its insolvency administrator signed a contract with Advania providing for the transfer of those framework agreements — which the contracting authority authorised. Dustin brought an appeal before the Administrative Court in Stockholm seeking that the framework agreements between Advania and the contracting authority be declared invalid. The Administrative Court dismissed the appeal, therefore Dustin brought an appeal which was upheld. The Court pointed out that Advania could not be regarded as having replaced Misco universally or partially, since, with the exception of the framework agreements at issue, Misco had transferred virtually no business to Advania. Advania and the contracting authority each brought an appeal against the judgment in which: (1) they did not dispute the appeal court's assessment of the nature and extent of the elements

covered by the transfer at issue; (2) they contended that such a transfer satisfies the condition of universal or partial succession under Swedish law. The Supreme Administrative Court stayed the proceedings and decided to refer the questions to the CJEU.

Proceedings before the CJEU

The CJEU recalled at the outset that substitution of the original contractor initially awarded the contract constitutes the change of the essential term of the public contract which must give rise to a new award procedure in accordance with the principles of transparency and equal treatment². That premiss is codified in Art. 72 para. 4(d) of the Directive 2014/24. (later as "Directive").

It follows from the CJEU case-law that the principle of equal treatment and the obligation of transparency resulting therefrom preclude, following the award of a contract, the contracting authority and the successful tenderer from amending the provisions of that contract in such a way that those provisions differ materially in character from those of the original contract³. By way of exception, Article 72 para. 1(d)(ii) of that Directive provides that a new contractor may, without a new procurement procedure in accordance with that directive, replace that to which the contracting authority initially awarded the contract following a universal or partial succession into the position of the original contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established, provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of the Directive.

Considering the above, **the application of this exception is possible when the replacement of the original contractor is due to the universal or partial succession which occurs following company restructuring**. The CJEU remarked that — as regards to the wording of Art. 72 para. 1(d)(ii) — the replacement of the contractor is authorised only as a result of the take-over of all or only part of the assets of the initial contractor, therefore only the transfer of the public contract or of the framework agreement making up the assets of the initial contractor⁴. Furthermore, the transfer of the public contract or the framework agreement is, in any event, subject to the condition not to constitute a means of excluding application of that directive⁵. Furthermore, while it is true that such an interpretation of the concept of "partial succession" is not sufficient in itself to ensure that the new contractor performs the contract or framework agreement in question with an equivalent capability to that of the original contractor, the fact remains that that provision provides that such succession is subject to the condition that the new contractor fulfils the qualitative selection criteria initially established.

The CJEU considered that it is apparent from the wording of Art. 72 para. 1(d)(ii) of the Directive that the

concept of "insolvency", falling within the concept of "restructuring operations", encompasses structural changes to the original contractor, in particular insolvency which includes insolvency resulting in liquidation. Therefore, it is necessary to examine whether the scope of the concept of "insolvency" presupposes that the new contractor takes over all or part of the business falling within the scope of the framework agreement. The CJEU noted that although the first three situations of "restructuring operations" (takeover, merger and acquisition) may involve the continuation of at least part of the original contractor's business, the fact remains that the provision also lists insolvency as an example of restructuring, which may lead to the dissolution of the insolvent company⁶.

However, there is no indication in the wording of that provision that the concept of "insolvency" must be understood not in its usual meaning, but as being limited to situations in which the business of the original contractor which enables the performance of the public contract is pursued, at least in part. Nor is there any such indication in recital 110 of the Directive, which mentions insolvency together with purely internal restructurings, takeovers, mergers and acquisitions, as situations involving "certain structural changes" of the tenderer. The CJEU noted that Art. 72 para. 1(d)(ii) of the Directive, and thus the concept of "insolvency", must be interpreted strictly, as it sets out an exception. However, that interpretation, cannot render the exception ineffective (*effet utile*)⁷. Therefore, the scope of the concept of "insolvency" cannot be limited solely to a situation in which business of the original contractor falling within the scope of the framework agreement was taken over by the new contractor, at least in part.

The concept of "restructuring" also includes insolvency resulting in liquidation. That literal interpretation is also consistent with the principal objective pursued by the Directive 2014/24, as set out in recitals 107 and 110 thereof. According to those recitals, the Directive seeks to clarify the conditions under which changes to a contract during their performance require a new contract award procedure, while taking into account the relevant case-law of the Court and the principles of transparency and equal treatment.

The CJEU emphasised that this interpretation: (1) is based on the usual meaning of the concepts in that provision, without requiring, additional criteria not included therein; (2) takes into account the relevant case-law of the CJEU⁸ from which it follows that internal reorganisation of the initial contractor can constitute as insubstantial changes in the terms of the public contract concerned which do not require the opening of a new procurement procedure. In recital 110, insolvency is listed without reservation as one of the examples of structural changes to the original contractor not being contrary to the principles of transparency and equal treatment on which that case-law is based. The insolvency of the original

contractor which results in its winding-up proceedings, represents an extraordinary circumstance⁹, before the occurrence of which the public contract or framework agreement at issue has already been opened to competition in accordance with the Directive 2014/24 and, under Art. 72 para. 1(d)(ii) of that directive, can neither lead to any other substantial modifications, in particular those relating to the qualitative selection criteria initially established, or aimed at circumventing the application of that directive.

The interpretation adopted by the CJEU is also supported by the specific objective of the exception provided for in Art. 72 para. 1(d)(ii) of the Directive, which is to introduce a degree of flexibility in the application of the rules in order to respond pragmatically to all the extraordinary instances, such as the insolvency of the successful tenderer, which prevents it from performing the public contract at issue¹⁰. **The insolvency — as shown by the facts of the judgment — may mean the liquidation of the contractor's business which does not mean that the situation of such contractor should be assessed differently.** In the view of the CJEU, the problem created by insolvency, which the EU legislature sought to address, does not arise differently depending on whether the business of the tenderer which has become insolvent is continued, at least in part, or is totally stopped¹¹.

On those grounds, the CJEU ruled that Art. 72 para. 1(d)(ii) of the Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing the Directive 2004/18/EC must be interpreted as meaning that an economic operator which, following the insolvency of the initial contractor which led to its liquidation, has taken over only the rights and obligations of the initial contractor arising from a framework agreement concluded with a contracting authority must be regarded as having succeeded in part to that initial contractor, following corporate restructuring, within the meaning of that provision.

Impact of the judgment on Polish public procurement law

The ruling issued affects the application of Polish provisions of the Act of 11 September 2019 Public Procurement Law¹², since the CJEU ruled on the permissibility of modification to a public contract. At the outset, it should be emphasised that the amendment of the subject to the public contract is a change of the essential nature, unless the change of the operator is an amendment defined in Art. 455 of the Public Procurement Law. The indicated provision reflects the provision of Art. 72 of the Directive 2014/24/EU. The EU legislator and, following it, the Polish legislator recognised that a change to the public

procurement contract during its term is, in principle, inadmissible if it has not been preceded by conducting a new public procurement proceeding (Sieradzka, 2020, p. 496).

It should be remembered that a change of contractor results in a transfer of all the contractor's rights and obligations to the new entity. Thus, also the rights and obligations arising from the concluded public procurement contract or framework agreement. According to art. 311 para. 2 of the Public Procurement Law, prerequisites for admissibility of amendments to the agreement also apply to the framework agreement.

Change of contractor as a prerequisite for the admissibility of an amendment to a public procurement contract

Under Art. 455 para. 1(2)(a) of the Public Procurement Law, a modification to the agreement shall be admissible without conducting new contract award proceedings when a new contractor is to replace the existing contractor if such a possibility has been provided for in the contractual provisions. The restriction of subjective changes results from the necessity to comply with the rules of public procurement. A public contract is awarded to a contractor selected in accordance with the provisions of the Act. According to the provisions of fair competition and equal treatment of economic operators, any change in this regard by substituting for the contractor to whom the contracting authority originally awarded the contract in a competitive procedure a new contractor, in particular a contractor who did not participate in that procedure, constitutes a breach of those principles. Art. 17 para. 2 of the Public Procurement Law provides that the contracts shall be awarded to the contractors selected in accordance with the provisions of the Act. The substitution of the operator under Art. 455 para. 1(2)(a) of the Public Procurement Law cannot be arbitrary. This means that all the conditions in it must be met (Gawrońska-Baran, 2021).

Precondition of the modification of the contract — from Art. 455 para. 1(2)(b) thereof — concerns the events involving so-called universal succession, namely the successor's assumption of all rights and obligations. It concerns the situation of a takeover, merger, division, transformation, bankruptcy, restructuring, succession under inheritance law or acquisition of the existing contractor or its enterprise. However, it should be emphasised that a change of the operator in circumstances leading to such succession is permissible if the new contractor fulfils the conditions for participation in the proceedings, the grounds for exclusion do not apply thereto, and this does not entail any other material amendments to the agreement, and does not aim to avoid the application of the provisions of the Act.

Operator's bankruptcy

One of the grounds for permissible modification to a public contract is bankruptcy of the economic operator. However, the Public Procurement Law does not define this term which means that it is necessary to refer to the Bankruptcy Law. Under Art. 10 of the Bankruptcy Law, a declaration of bankruptcy shall be issued in respect of a debtor who has become insolvent. According to the Art. 11 para. 1 of the Bankruptcy Law, a debtor shall be insolvent if he has lost the ability to fulfil his matured pecuniary liabilities. A debtor shall be presumed to have lost the ability to fulfil his matured pecuniary liabilities where the delay in fulfilling the pecuniary liabilities more than three months¹³. As a result of the declaration of bankruptcy, there is no transformation or transfer by another entity of all the rights and obligations of the bankrupt operator. The term restructuring may include structural changes to the original operator, including insolvency, leading to liquidation¹⁴.

Considering the above, under the Art. 72 para. 1(d)(ii) of the Directive 2014/24/EU, new operator may — without a new procurement procedure — replace the one to which the contracting authority had initially awarded the contract as a consequence of universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator (Kidyba, 2007, p. 1050) that fulfils the criteria for qualitative selection initially established provided that this not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive. The application of this exception was made subject to the condition that the replacement of the previous operator is due to universal or partial succession following a restructuring, including insolvency.

Succession due to bankruptcy

It should be noted that a permissible personal change, i.e. a change in the operator of the contract is only possible in the case of universal or partial succession. In the commented judgment, the CJEU was considering whether Art. 72 para. 1(d)(ii) of the Directive 2014/24 must be interpreted as meaning that an economic operator which, following the insolvency of the initial contractor which led to its liquidation, has taken over only the rights and obligations of the initial contractor arising from a framework agreement concluded with a contracting authority must be regarded as having succeeded that initial contractor under the conditions referred to in that provision. It is worth noting that bankruptcy of the contractor as a prerequisite for changing the contractor for a public contract is not treated differently depending on whether the activity of the contractor that has become

insolvent is carried out, at least in part, or whether that activity has ceased altogether¹⁵.

In the case of insolvency of the contractor resulting in liquidation, different entity may take over the rights and obligations of the original operator. Its substitution occurs as a result of succession. In fact, a change of person by substitution of the contractor to whom the contracting authority originally awarded the contract is permitted only "as a result of universal or partial succession of the original contractor".

At this point, it must be determined whether the concept of universal or partial succession includes:

1) the right to take the place of the original contractor in the rights and obligations arising from a given contract or a given framework agreement, or

2) not only the rights and obligations arising from the contract, but also the transfer of activity or the transfer of assets.

Examining the above, one cannot lose sight of the regulations of the Bankruptcy Law. Under Art. 98 para. 1 of the Bankruptcy Law, if on the date of the declaration of bankruptcy liabilities under a mutual contract remain outstanding in whole or in part, the trustee may, subject to consent of the judge-commissioner, discharge the bankrupt's liability and demand that the other party render the mutual performance, or he may rescind the contract, effective as of the date of the declaration of bankruptcy. A declared bankruptcy does not result in a transformation or takeover by another entity of all the rights and obligations of the contractor who has been declared bankrupt.

Therefore, takeover (succession) of rights and obligations under a public contract or framework agreement concluded with a contracting authority does not imply a takeover of the activities of the initial contractor. The above, is confirmed in Art. 72 para. 1(d)(ii) of the Directive 2014/24. As the CJEU rightly pointed out the replacement of the contractor to whom the contracting authority initially awarded the contract is only acceptable in the event of "universal or partial succession into the position of the initial contractor".

Thus, succession (as a prerequisite for a change of contractual entity) may mean, first, that the new contractor takes over all of the original contractor's assets (including rights and obligations under the public procurement contract), or second, that the new contractor takes over only a portion of the original contractor's assets, i.e. only the rights and obligations under the public procurement contract.

Regardless of the above, an *ad casu* assessment should be made, i.e. whether the conditions for a change of entity

are met. **The new contractor must independently fulfil the conditions for participation in the procedure, and the change may not have the effect of worsening the competitive situation of other contractors participating in the same procedure**¹⁶. Succession is subject to the condition that the new contractor meets the initially established criteria for qualitative selection¹⁷. Transfer of rights and obligations under a public contract or framework agreement is always subject to meeting the conditions specified in Art. 455 para. 1(2)(b) of the Public Procurement Law. The new contractor must meet the conditions for participation in the procedure, there can be no grounds for exclusion against it, and the change cannot result in other significant modification to the agreement, and it cannot be aimed at evading the provisions of the Act. Taking into account the above prerequisites, the national and EU legislators have made the transfer of a public contract or framework agreement depend on the condition that is not aimed at circumventing the application of the law.

Commentary

The CJEU, in its judgment of 3 February 2022 in case C-461/20 Advania Sverige AB, examined the permissibility of a new contractor taking over the rights and obligations under a framework agreement. Succession following bankruptcy is a permissible premise for the modification of a public contract. However, even though national and EU law set out the conditions for such a change, a doubt arose as to whether succession was permissible where only the public contract or framework agreement included in the original contractor's assets was taken over. The CJEU confirmed that Art. 72 para. 1(d)(ii) of the Directive 2014/24 allows for the replacement of the contractor to whom the contracting authority originally awarded the contract only as a result of universal or partial succession of the original contractor. The CJEU confirmed that a personal change is permitted where, as a result of succession following the bankruptcy of the original contractor leading to its liquidation, the new contractor has merely assumed its rights and obligations under the framework contract concluded with the contracting authority. In addition, a change of entity under universal or partial succession is permissible where the new contractor meets the initially established criteria for qualitative selection, provided that this does not entail other substantial modifications to the contract and is not intended to circumvent the application of the Directive 2014/24/EU.

Przypisy/Notes

¹ Act of 28 February 2003 Bankruptcy Law, Journal of Laws 2003 no. 535 (2022) (Poland). <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20030600535/T/D20030535L.pdf>

² See to that effect, judgment of the CJEU of 19 June 2008 r. in case presstext Nachrichtenagentur, C-454/06, EU:C:2008:351, paras 40, 47.

³ See, to that effect, the judgment of the CJEU of 7 September 2016, Finn Frogne, C-549/14, EU:C:2016:634, para 28.

- ⁴ Opinion of Advocate General Henrika Saugmandsgaard Oe delivered on 9 September 2021 in case C-461/20, para. 43.
- ⁵ To that effect, opinion of the Advocate General Henrika Saugmandsgaard Oe..., op. cit., para. 95.
- ⁶ *Ibidem*, para. 47.
- ⁷ *Ibidem*, para. 62.
- ⁸ In particular judgment of the CJEU of 19 June 2008 in case presstext Nachrichtenagentur, C-454/06.
- ⁹ Opinion of Advocate General Henrika Saugmandsgaard Oe..., op. cit., paras 84 and 85.
- ¹⁰ *Ibidem*, paras 82 and 83.
- ¹¹ *Ibidem*, para. 83.
- ¹² Act of 11 September 2019 Public Procurement Law, Journal of Laws 2019, item 2019 (2022) (Poland). <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20190002019/T/D20192019L.pdf>
- ¹³ Pursuant to Art. 601 of Bankruptcy Law following the declaration of bankruptcy the entrepreneur shall use in trading the old business name, adding the label "under bankruptcy".
- ¹⁴ Para. 31 of the judgment.
- ¹⁵ Advocate general in para. 83 of the opinion.
- ¹⁶ The CJEU in the judgment of 24 May 2016 in case C-396/14, indicated that the principle is that the legal and substantive identity of the economic operator at each stage of the procurement procedure. However, it allowed the possibility of easing this requirement in order to ensure the adequate level of competition.
- ¹⁷ Para. 25 of the judgment.

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