

E-administracja

Skuteczna, odpowiedzialna i otwarta
administracja publiczna
w Unii Europejskiej

REDAKCJA

Sławomir Dudzik · Inga Kawka · Renata Śliwa

Krakow Jean Monnet Research Papers



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Kraków 2022

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ALEKSANDRA SOŁTYSIŃSKA¹

E-PROCUREMENT AND THE PRINCIPLE OF TRANSPARENCY IN PUBLIC PROCUREMENT IN THE EUROPEAN UNION

ABSTRACT: Public procurement is one of the areas of government activity where the process of electronization began early in this century. The creation of e-procurement promotes the effective implementation of the principle of transparency from the perspective of contractors, citizens and the internal market of the European Union. Free access to procurement documents equalizes the chances of economic operators in accordance with the principle of fair competition and allows for easier investigation of possible violations. Increased confidence in the public procurement system contributes to the development of competition on the internal market of the European Union. In addition, access to contract notices and the outcomes of tender procedures allows citizens to follow the process of spending public funds from the budget and to report possible objections to competent control bodies.

KEYWORDS: public procurement, e-procurement, the principle of transparency, procurement documents, electronization of procurement

E-ZAMÓWIENIA A ZASADA PRZEJRZYŚĆCI W ZAMÓWIENIACH PUBLICZNYCH W UNII EUROPEJSKIEJ

ABSTRAKT: Zamówienia publiczne są jednym z obszarów działania administracji, na którym proces elektronizacji rozpoczął się już na początku obecnego wieku. Stworzenie

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e-zamówień sprzyja efektywnej realizacji zasady przejrzystości z perspektywy wykonawców, obywateli oraz rynku wewnętrznego Unii Europejskiej. Swobodny dostęp do dokumentów zamówienia wyrównuje szanse wykonawców zgodnie z zasadą uczciwej konkurencji i pozwala na łatwiejsze śledzenie ewentualnych naruszeń prawa. Wzrost zaufania do systemu zamówień publicznych przyczynia się do rozwoju konkurencji na rynku wewnętrznym Unii Europejskiej. Dodatkowo dostęp do ogłoszeń o zamówieniach oraz o wynikach procedur przetargowych pozwala obywatelom na śledzenie procesu wydatkowania środków publicznych z budżetu i zgłaszanie ewentualnych zastrzeżeń właściwym organom kontroli.

SŁOWA KLUCZOWE: zamówienia publiczne, e-zamówienia, zasada przejrzystości, dokumenty zamówienia, elektroniczna zamówienia

1. Introduction

Transparency is first and foremost a principle of public law empowering EU citizens to actively participate in the democratic community. EU law only touches on transparency without providing a uniform definition, and Member States enjoy a wide margin of discretion, resulting in different levels of protection and different legal solutions.² In public procurement, the principle of transparency promotes equal treatment of economic operators, fair competition and the opening of national markets. Transparent contracting behaviour is conducive to fighting corruption and spending public funds efficiently. Transparency is closely linked to increasing the role of democratic communities in the procurement process. Citizens and other stakeholders, such as taxpayers, have a legitimate interest in public procurement procedures being conducted in a sound manner and should be able to report possible violations of the law to the competent institutions.³ An important role of the society in public procurement is related to the control of expenditures of public funds, which is facilitated by the transparency of tender procedures.⁴

The principle of transparency in public procurement can be considered from three perspectives:

- economic operators interested in participating in tenders;

² K.M. Halonen, *Many Faces of Transparency in Public Procurement* [in:] *Transparency in EU Procurement: Disclosure within Public Procurement and Public Contract Execution*, K.M. Halonen, R. Caranta, A. Sanchez Graells (eds), Cheltenham 2019, pp. 9-10.

³ Recital 122 of the preamble to Directive 2014/24/EU.

⁴ For more on the role of society in the process of control and efficiency of public procurement cf. C. Cravero, *Rethinking the Role of Civil Society in Public Procurement*, "European Procurement & Public Private Partnership Law Review" 2019, vol. 14, no. 1, p. 33.

- citizens who have an interest in the efficient spending of public funds from the budget and the elimination of corruption;
- the internal market, which is based on fair competition.

In the case of contractors, they have tools dedicated to them in the form of appeal procedures for eliminating violations found in the course of public procurement. The interest of citizens is usually realized by the competent national administrations in the field of control and monitoring of public procurement.

2. Principle of Transparency in Public Procurement Law

The principle of transparency was placed by the EU legislator among other fundamental principles in Article 18 (1) of Directive 2014/24/EU⁵ stating that contracting authorities shall ensure equal and non-discriminatory treatment of economic operators and shall act in a transparent and proportionate manner. The principle of transparency is considered as a means to ensure that the above mentioned objectives are achieved in public procurement and as a source of certain obligations for contracting authorities. The principle of transparency should apply not only at the stage of the procurement procedure, but also during the performance of the public contract.⁶

The principle of transparency is distinguished in the literature from the principle of openness.⁷ Openness of the procedure guarantees unrestricted access to information about the course of the procedure and its outcome, which is embodied primarily in the contracting authorities' information obligations. The principle of transparency, on the other hand, requires that tender procedures be based on clear, unambiguous and

⁵ 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, OJ L 94, 28.3.2014, pp. 65-242. Similarly, Article 36 of 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, OJ L 94, 28.3.2014, pp. 243-374, Article 3 of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 94, 28.3.2014, pp. 1-64, and Article 4 of Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defense and security, and amending Directives 2004/17/EC and 2004/18/EC, OJ L 216, 20.8.2009, p. 76-136.

⁶ The Court of Justice verdict of 29.04.2004 in Case C-496/99 P, *Commission v CAS Succhi di Frutta*, ECLI:EU:C:2004:236.

⁷ For more on the principle of transparency and openness cf. A. Sołtysińska, H. Talago-Sławoj, *Zasady jawności i przejrzystości w procesie udzielania zamówienia publicznego: wybrane zagadnienia*, „Prawo Zamówień Publicznych” 2019, no. 1, pp. 3-21.

understandable conditions, guaranteeing equal treatment of economic operators and fair competition. The principle of transparency covers the principle of openness, as it concerns the ability to follow the contracting authority's decision-making process. The principle of openness can also be understood as a principle derived from the principle of transparency. The principle of openness is expressed in ensuring equal access to basic contract-related information, including access to the tenders submitted by economic operators. Equal access to information means an obligation on the contracting authority to make the same information available in the same manner at the same time. The extent of the information made available must allow the participants in the procedure to verify the contracting authorities' decisions related to the procedure. Openness of the public procurement process thus includes openness of the procedure conducted by the contracting authority, openness of tenders submitted in the procedure, and openness of public contracts. The principle of transparency in turn comes from the principle of equal treatment and non-discrimination.⁸

In the C-324/98, *Teleaustria*⁹ and C-458/03, *Parking Brixen*¹⁰ verdicts, the Court of Justice drew attention to the obligation of transparency, which should consist in ensuring “a sufficient level of publicity to enable the services market to be open to competition and to check the impartiality of the tendering procedures.”

The Procurement Directives focus on implementing the principle of transparency in a pro-active approach by providing legal solutions on how to publish notices and how to communicate effectively with economic operators. Transparency obligations arise in the award and performance phases of public procurement in the context of modifications to public contracts. The Procurement Directives harmonise rules on the publication and content of prior information notices,¹¹ contract¹² and award notices,¹³

⁸ The Court of Justice verdicts: of 19.12.2018 in Case C-216/17, *Autorità Garante della Concorrenza e del Mercato - Antitrust, Coopservice Soc. coop. Arl*, ECLI:EU:C:2018:1034; of 17.12.2015 in Joined Cases C-25/14 and C-26/14, *UNIS and Beaudout Père and Fils*, ECLI:EU:C:2015:821.

⁹ The Court of Justice verdict of 7.12.2000 in Case C-324/98, *Telaustria i Telefonadress*, ECLI:EU:C:2000:669.

¹⁰ The Court of Justice verdict of 13.10.2005 in Case C-458/03, *Parkin Brixen GmbH*, ECLI:EU:C:2005:605.

¹¹ Article 48 of Directive 2014/24/EU, Articles 67 and 68 of Directive 2014/25/EU on periodic information notices and notices on the existence of a qualification system, and Article 30 of Directive 2009/81/EC, which independently regulates notices in the defense and security sector.

¹² Article 49 of Directive 2014/24/EU, Article 69 of Directive 2014/25/EU, Article 31 of Directive 2014/23/EU.

¹³ Article 50 of Directive 2014/24/EU, Article 70 of Directive 2014/25/EU, Article 32 of Directive 2014/23/EU.

electronic availability of contract documents,¹⁴ information for candidates and tenderers on decisions taken in the course of a procurement procedure,¹⁵ the content of tender documents on award criteria,¹⁶ the advertising of certain modifications of procurement contracts¹⁷ and the storage of and access to high-value procurement contracts.¹⁸ Publicly and easily accessible information on the rules applicable to a given tender procedure allows interested economic operators to assess whether there is an infringement of the law in the proposed selection criteria and in the selection of the most advantageous tender that can be corrected at an early stage of the tender procedure. Publication of procurement notices is particularly important when a non-competitive procedure is selected, when other potentially interested economic operators can assess the legality of the choice of such a method for concluding a public contract.¹⁹ On the other hand, notices of contract modifications allow interested economic operators to learn about the fact and content of the modifications made, and to consider whether there has been an unlawful direct award of a contract, which constitutes grounds for seeking review to declare the modification ineffective. Contracting authorities that have made modifications to a public contract involving additional contracts and changes to the public contract due to unforeseen circumstances should publish the relevant notices in the EU Official Journal. It is not clear why the EU legislature decided to limit the disclosure requirements to only two cases of public contract modification. The lack of an obligation to provide information in the case of a modification made in accordance with a review clause in the contract makes it difficult for interested economic operators to check whether the modification complies with the provisions of the public contract, and ensure that the modification does not change its general nature. The EU legislator did not specify a deadline for publication of a public contract modification notice. In the absence of relevant domestic regulations, it seems that, in line with the transparency principle, publication should be made promptly.

¹⁴ Article 53 of Directive 2014/24/EU, Article 73 of Directive 2014/25/EU, Article 34 of Directive 2014/23/EU.

¹⁵ Article 55 of Directive 2014/24/EU, Article 75 of Directive 2014/25/EU, Article 35 of Directive 2009/81/EC, Article 40 of Directive 2014/23/EU.

¹⁶ Article 67(5) of Directive 2014/24/EU, Article 82(5) of Directive 2014/25/EU.

¹⁷ Article 72 of Directive 2014/24/EU, Article 89 of Directive 2014/25/EU, Article 43 of Directive 2014/23/EU.

¹⁸ Article 83(6) of Directive 2014/24/EU, Article 99(5) of Directive 2014/25/EU.

¹⁹ E. Plas, *Amendments to Public Contracts: In Search of a Sufficient Degree of Transparency*, "Public Procurement Law Review" 2021, no. 1, p. 16.

3. Concept and Development of E-Procurement

The widespread use of electronic means in the procedures for awarding public contracts results from the strategy introduced in the European Union to implement the concept of e-procurement - one of the elements of computerization of administration and public activity. The electronization of activities and procedures improves and speeds up the process of settling issues and providing public services, improves their quality, and at the same time reduces bureaucratic burdens, while ensuring universal access to information.²⁰

The computerization of public procurement, like practically all other areas of the economy and even life, has been progressing since the beginning of the Internet, and even without the intervention of the EU lawmakers it had to become a reality sooner or later. Widespread access to the Internet and the associated savings in transportation, correspondence and other technical costs of conducting proceedings create new opportunities for businesses, which can focus more on providing services, supplies and construction works being at the core of their business.

The electronization of public procurement has become an integral part of the ongoing program of computerization of the EU Member States. Among the benefits, the most commonly cited are increased and broader access to public procurement for economic operators, including small and medium-sized enterprises, increased competition in public procurement, easier communication, savings, increased efficiency of procedures, de-formalization of procurement, and increased transparency in spending public funds. Changes in legislation should therefore correspond to technological development and encourage member states to implement modern solutions.

Electronic public procurement (e-procurement) is the term used to describe public contracts where the activities of the contracting authority and economic operators are performed fully or mostly by electronic means, in part or in all phases of a public procurement procedure.

Two basic parts of electronic procurement process can be distinguished: the pre-awarding phase and the post-awarding phase. The pre-awarding phase includes:

- a) e-Sourcing, which means all activities conducted by the contracting authority or entity aimed at the preparation of a call;
- b) e-Noticing, which means that calls for tenders are published in electronic format in the relevant Official Journal and on contracting authorities' web-

²⁰ R. Szostak, *Zagadnienia ogólne* [in:] *Informatyzacja procedur udzielania zamówień publicznych*, R. Szostak (ed.), Warszawa 2018, p. 1.

sites; the access to tender documents and specifications should be provided electronically and in a non-discriminatory way;

- c) e-Tendering includes two sub-phases: e-Access and e-Submission - the former means electronic access to procurement documents and specifications and making them available for download, the latter is the submission of offers in electronic format to the contracting authority; tenders should be received, accepted and processed in accordance with the legal requirements.

Post-awarding phase includes:

- a) e-Awarding and e-Evaluation – the electronic tenders received by the contracting authority are opened and evaluated in accordance with legal regulations;
- b) e-Contract – the contracting authority and the winning tenderer use electronic means for conclusion, enactment and monitoring of a contract;
- c) e-Order – the contracting authority prepares an electronic order that is issued and accepted by the contractor;
- d) e-Invoicing – invoices in electronic format are prepared by the contractor and delivered to the contracting authority;
- e) e-Payment – contracting authorities pay for the ordered goods, services or works using electronic methods.²¹

The full computerization of public procurement procedures is the result of previous preparatory acts. Already in the 1990s, the European Commission called on Member States to help realise the potential of e-procurement and took steps to promote electronic tools in public procurement by preparing the SIMAP project.²² Further initiatives followed the revision of public procurement law in the European Union and coincided with the adoption of new directives in 2004 - the EU legislator for the first time explicitly addressed the permissibility of using electronic means in the process of awarding public contracts and communicating with economic operators. The contracting authority gained the right to choose the means of communication, about which it was obliged to notify the economic operators in the contract documents. Over time, the intention to use electronic means for public procurement was reaffirmed in

²¹ E. Prałat, *Public E-Procurement Tools in European Union* [in:] “Nierówności Społeczne a Wzrost Gospodarczy”, no. 2, Rzeszów 2019, pp. 190-191, https://www.ur.edu.pl/storage/file/core_files/2019/7/29/4183687e71c80b9b5efdf96d7867d720/tekst%2014%20Ewa%20Pra%C5%82at.pdf (31.01.2022).

²² S. Arrowsmith, *The Law of Public and Utilities Procurement*, London 2018, pp. 604-605, Communication from the European Commission, Public Procurement in the European Union, 11.3.1998, COM (98) 143.

the strategy contained in the European Commission communication “Europe 2020 - A strategy for smart, sustainable and inclusive growth.”²³

Important documents that determined the current shape of the EU regulations in the field of public procurement were the European Parliament resolution of 25 October 2011 on the modernization of public procurement²⁴ and the European Commission Communication of 20 April 2012, “A strategy for e-procurement.”²⁵ Implementation of actions planned in the latter document was summarised in the European Commission Communication of 26 June 2013, “Comprehensive e-procurement as a means of modernising public administration.”²⁶ In the European Commission’s view, the move to complex e-procurement could generate significant savings and provide a boost to the economy by opening up the internal market and fostering innovation. The main objective of these Communications was therefore to drive the full transformation to e-procurement in the European Union. The 2014 Procurement Directives represent an important step towards full computerization of public procurement, introducing as a principle the use of electronic means of communication with economic operators.²⁷

4. E-Procurement for Transparency under Directive 2014/24/EU

The process of computerization of public procurement included in Directive 2014/24/EU promotes the dissemination of information about tenders organized by contracting authorities, which is intended to translate into increased interest among economic operators and to foster competition. The EU legislator pointed out in recital 52 of the preamble to Directive 2014/24/EU that the use of electronic means of communication and information can improve the efficiency and transparency of the public procure-

²³ COM (2010) 2020.

²⁴ 2011/2048(INI).

²⁵ COM (2012) 179.

²⁶ COM (2013) 453.

²⁷ The deadline for the implementation of the 2014 Procurement Directives was 18 April 2016, but due to the extent of the changes necessary in each Member State, the different level of experience and technological advancement, as well as the need for contracting authorities to prepare mentally for the technological change, the possibility was provided to postpone the basic deadline for central purchasing bodies until 18 April 2017 at the latest, and for all other contracting authorities until 18 October 2018. During the 2014 legislative process, however, the provisions of Directive 2009/81/EC were not modernized.

ment process by significantly increasing the opportunities for economic operators to participate in procurement procedures across the internal market.²⁸

In light of the provisions of Directive 2014/24/EU, the use of electronic means has become a necessity, and communication by electronic tools is an obligation for contracting authorities and applies to all stages of the procurement procedure. Having regard to recital 52 of the preamble to Directive 2014/24/EU, it can be concluded that only activities undertaken by contracting authorities after the award of the public contract and within the framework of internal communication inside the contracting authority are not covered by the obligation to use electronic tools. Directive 2014/24/EU also does not oblige contracting authorities to process tenders electronically or make electronic evaluation or automated processing mandatory.²⁹

The process of computerization of public procurement should take place in accordance with the basic principles: equal treatment of economic operators, transparency, fair competition and proportionality. The EU legislator in Article 22(1) and recital 53 of preamble to Directive 2014/24/EU emphasized that contracting authorities should use electronic means of communication that are non-discriminatory, generally available and interoperable with widely used ICT products and that do not restrict economic operators' access to the public contract award procedure. Such means should also take due account of accessibility for persons with disabilities. In the background of the principle of equal treatment of economic operators in the context of the use of electronic means, the question sometimes arises whether Directive 2014/24/EU has introduced higher non-discrimination standards than those provided for in the Treaty on the Functioning of the EU.³⁰

The EU legislator has also pointed out that electronic means of communication are particularly suitable to support centralized purchasing practices and tools because of the possibilities they offer for re-use and automatic processing of data and for minimizing information and transaction costs. Therefore, the use of such electronic means of communication by central purchasing bodies should be made mandatory as a matter of priority, while facilitating the convergence of practices across the Union.³¹

The term "electronic means" is defined in Article 2 (1) (19) of Directive 2014/24/EU and refers to electronic equipment for the processing (including digital compres-

²⁸ R. Bickerstaff, *E-Procurement Under the New EU Procurement Directives*, "Public Procurement Law Review" 2014, no. 3, pp. 134-147.

²⁹ A. Sołtysińska, *Informatyzacja zamówień publicznych w świetle regulacji unijnych*, „Prawo Zamówień Publicznych” 2019, no. 4, pp. 3-18.

³⁰ S. Arrowsmith, *The Law of Public...*, pp. 619-620.

³¹ Recital 72 of preamble to Directive 2014/24/EU.

sion) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical or other electromagnetic means. Any information transmitted by electronic means is at the same time transmitted in writing - in light of the definition of the terms “written” and “in writing” included in Article 2 (1) (18) of Directive 2014/24/EU. The EU legislature has assumed that any expression consisting of words or figures that can be read, reproduced and then passed on, including information sent and stored by electronic means, constitutes a “written” form within the meaning of Directive 2014/24/EU.

According to Article 22 (1) of Directive 2014/24/EU, Member States shall ensure that the tools and devices to be used for communicating by electronic means, as well as their technical characteristics, shall be non-discriminatory, generally available and interoperable with the ICT products in general use and shall not restrict economic operators’ access to the procurement procedure. In Annex IV to Directive 2014/24/EU, the EU legislator has set out requirements for standards relating to tools and devices for the electronic receipt of tenders, requests to participate, plans and projects in competitions. The tools and devices in question should guarantee that:

- a) the exact time and dates for receipt of documents sent by contractors can be precisely determined;
- b) it may be reasonably ensured that, before the time limits laid down, no-one can gain access to data transmitted under these requirements;
- c) only authorised persons may set or change the dates for opening data transmitted;
- d) during the various stages of the procurement procedure or of the contest, access to all or part of the data submitted must be possible for authorised persons only;
- e) only authorised persons may provide access to the data submitted and only after the date specified;
- f) data received and opened in accordance with these requirements must remain accessible only to persons authorized to examine them;
- g) if the access prohibitions or conditions referred to above are violated or their violation is attempted, it is practicable to ensure that such violations or attempts are clearly detectable.

Additionally, economic operators should have access to information on the specifications for electronic submission of tenders and requests for tenders, including encryption and time-stamping.

In recital 57 of the preamble to Directive 2014/24/EU, the EU legislator pointed out the proportionality of the standards: before determining the level of security required for electronic means of communication to be used in the various stages of a public procurement procedure, Member States and contracting authorities should

assess the proportionality between the requirements to ensure the reliable and correct identification of the senders of a given message and the integrity of its content and the risk of problems arising, such as in situations where messages are sent by a different sender than previously indicated. For example, a different level of security is required for an email requesting confirmation of the exact address of a briefing, and a different level of security is required for the bid itself, which is binding on the contractor.³²

According to the wording of Article 53 of Directive 2014/24/EU, contracting authorities shall provide unrestricted, full, direct and free access to procurement documents by electronic means. The obligation to make the documents available shall be updated from the date of publication of the contract notice in the EU Official Journal or from the date on which the invitation to confirm interest is sent. The address of the website on which the contract documents are available shall be provided by the contracting authority when publishing the notice or sending the invitation to participate in the tender.

The term “procurement documents” is defined very broadly in Article 2(1)(13) of Directive 2014/24/EU and includes all documents that the contracting authority has produced in the course of the procurement procedure and documents to which the contracting authority refers when describing particular elements of the tender procedure. The cited provision contains an open catalogue of such exemplary contract documents, which include, among others, the contract notice, technical specifications, descriptive document, proposed terms and conditions of a public contract, formats for the presentation of documents by economic operators, and information on applicable obligations. Procurement documents under this definition will not be documents originating directly from the economic operator. In recital 58 of the preamble to Directive 2014/24/EU, the EU legislature clearly distinguishes procurement documents from requests to participate and tenders, which are drawn up by economic operators.

Taking into account the scope of documents covered by the above definition, it should be concluded that the contracting authority is obliged to make available in electronic form all documents related to the contract being conducted, including, in addition to those listed in the definition, also other supporting documents produced by the contracting authority (market research, estimation of the contract value) or documents that were produced at its request (such as expert reports and opinions) if they served to describe or specify the elements of the contract, as well as those to which it refers. Documents should be made available in electronic form, but this does not

³² A. Sołtysińska, *Informatyzacja zamówień publicznych...*, pp. 3-18.

oblige contracting authorities to produce all documents in this form. Those created in written (paper) form should be made available in scanned form.³³

The analysed provision of Article 53 of Directive 2014/24/EU reinforces the application of the principle of equal treatment by ensuring that economic operators have equal access to the procurement documents - at the same time and in the same way. The use of electronic means of communication guarantees equal treatment of economic operators regardless of the Member State in which they are established. This means that the contracting authority is required to provide unrestricted access to all procurement documents, both during awarding and after the performance of a public contract. It is therefore unacceptable for the contracting authority to impose any restrictions in this regard.

The contracting authority must provide IT tools appropriate to the requirements, including hardware, software, and Internet bandwidth, in both directions, that is, from the contracting authority and to the contracting authority. It will be advisable to provide standardized tools to support this process, as well as to tailor them appropriately to the scope and type of orders executed by the ordering party. If a contracting authority carries out or can carry out large construction contracts, which as a rule require access to documents of significant size, it should take into account the fact that making them available via a standard website may prove to be insufficient, if only because of data transmission limitations for an Internet connection. For certain types of procurement, contracting authorities must also take into account the need to provide simultaneous access to a greater number of documents to a very large number of interested parties. Failure to provide such functionalities at the technical layer may lead to a situation where access to the specification is restricted to a part of potential interested parties. Such a situation may therefore be interpreted as a violation of the principles set out in Article 53 of Directive 2014/24/EU, including in particular the principle of both unrestricted and full access to procurement documents.

Taking into account the possibility of supplementing the contract documents, the deadline for making them available may in practice be later than that indicated in Article 53 of Directive 2014/24/EU. The contracting authority is obliged to make available all procurement documents which have been drawn up and exist on the date of the contract notice or the invitation to participate in the tender.

The provisions of Directive 2014/24/EU provide for certain derogations from the obligation to use electronic means for submitting tenders and making contract documents available, provided that this is justified by the specific nature of the subject

³³ *Ibidem.*

matter of the public contract, copyright, technical requirements or those relating to data confidentiality. In that case, communication shall be by post or a combination of postal or other appropriate means and electronic means. In accordance with the wording of the second subparagraph of Article 22(1) and the second subparagraph of Article 53(1) of Directive 2014/24/EU, contracting authorities are not obliged to require electronic means of communication for the submission of tenders or to provide unrestricted, full, direct and free access by electronic means to certain contract documents in the following cases:

- a) where, due to the specialised nature of the contract, the use of electronic means of communication would require particular tools, devices or file formats that are not generally available or supported by generally available applications;
- b) when applications for handling file formats that are suitable for describing tenders use file formats that cannot be handled by other generally available applications or are covered by a proprietary licensing system and cannot be made available for downloading or remote use by the contracting authority;
- c) where the use of electronic means of communication would require specialized office equipment that is not generally available to contracting authorities;
- d) where the procurement documents require the submission of a physical or scale model which cannot be communicated by electronic means;
- e) where, for reasons of extreme sensitivity, the information requires such a high level of protection that it cannot be adequately ensured by using electronic tools generally available to economic operators or provided by the contracting authorities.

In the cases described, contracting authorities may indicate in the contract notice or invitation to tender that the procurement documents concerned will be transmitted by means other than electronic. In such a case, the deadline for submission of tenders shall be extended by five days. An extension of the time limit for receipt of tenders shall not apply in cases of duly justified urgency referred to in:

- a) the open procedure under Article 27 (3) of Directive 2014/24/EU,
- b) the restricted procedure under Article 28 (6) of Directive 2014/24/EU,
- c) competitive procedure with negotiation under Article 29 (1) of Directive 2014/24/EU.

On a similar basis, the time limit for the submission of tenders shall be extended if contracting authorities decide to impose requirements on economic operators aimed at protecting the confidential nature of the information which the tender organiser makes available during the procurement procedure. If unrestricted, full, direct and free

access by electronic means to certain procurement documents cannot be ensured, when the need arises to protect the confidential nature of the information made available, the contracting authorities shall indicate in the notice or in the invitation to tender which measures to protect the confidential nature of the information they require and how to access those documents.

It is accepted in the literature that the restriction in Article 53 of Directive 2014/24/EU applies only to the media used - instead of electronic means enabling documents to be downloaded from a website, the contracting authority makes the procurement documents available by other means. However, the contracting authority should provide unrestricted, full, direct and free access to the contract documents. Direct access does not preclude requirements for simple registration or log-in.³⁴

The Commission is empowered, by adopting a delegated act, to amend the list set out in points (a) to (d) of Article 22 (1) of Directive 2014/24/EU where technological developments make further exceptions to the use of electronic means of communication inappropriate or, in exceptional situations, where new exemptions are necessary due to technological developments.

One of the important elements of the process of computerization of public procurement is the creation of publicly available databases and the promotion of the use of existing databases.³⁵ Contracting authorities and economic operators can use the information gathered in the online repository of certificates e-Certis. The e-Certis database is a free guide to the different types of documents and certificates that are required from economic operators when tendering for public contracts in all EU countries. It has been developed and made available by the European Commission as a tool to assist both economic operators and contracting authorities in identifying which information is required or submitted during a procurement procedure. The information contained in the e-Certis platform is not legally binding. Article 61 of Directive 2014/24/EU requires Member States to keep the information on certificates and other types of documentary evidence entered into e-Certis up to date. Contracting authorities have been obliged to require in the first place the types of attestations or documentary evidence that are covered by e-Certis. On the other hand, the European Commission's task is to make available all language versions of the Single European Procurement Document.

Due to the fact that the information contained in the e-Certis platform is only of informational nature, system failures and inability to verify documents are not excluded

³⁴ S. Arrowsmith, *The Law of Public...*, p. 615.

³⁵ A. Sołtysińska, *Informatyzacja zamówień publicznych...*, pp. 3-18.

- the role that e-Certis actually plays in the public procurement system is not as big as its potential might suggest. Despite the obligation to update the data, arising from the content of Article 61 of Directive 2014/24/EU, the transmitted model certificates are only a source of information about the law and practice of Member State.³⁶

One of the manifestations of reducing bureaucratization in public procurement is the obligation of contracting authorities to directly use databases containing the information necessary to determine the personal situation of economic operators. According to the wording of Article 59 (5) of Directive 2014/24/EU, economic operators are not obliged to provide documents if the contracting authority is able to obtain certificates or relevant information directly through a free national database in any Member State (i.e. a national procurement register, a business register or a prequalification system).

In order to make effective use of existing databases, Member States were required to:

- a) make the databases available under the same conditions to contracting authorities from other Member States;
- b) make available and update in e-Certis a comprehensive list of databases containing the relevant information on economic operators which can be accessed by contracting authorities from other Member States.

5. Conclusion remarks

The development of e-procurement is not without difficulties due to technical problems or issues that could not initially be foreseen. Problems of technical nature arise from the need to provide standards for access, storage and transmission of documents. Issues that were initially overlooked relate to the difficulty of proving that an action has been carried out in an IT system, especially when, for technical reasons, the e-procurement platform crashes or does not function properly. For example, it may be difficult for a contractor to prove that it submitted a bid by the required deadline if its transmission is delayed for technical reasons.

However, irrespective of the difficulties accompanying the development of e-procurement, it has to be concluded that electronic means of communication support the effective functioning of the principle of transparency. From the perspective of contractors, the use of procurement platforms allows for a better tracking of the course of the tender and for easy access to all documents prepared by the contracting authority and

³⁶ B. Nuzzo, *Urzędowe ogłoszenia, repozytoria i sprawozdania* [in:] *Informatyzacja procedur udzielania zamówień publicznych*, R. Szostak (ed.), Warszawa 2018, pp. 151-155.

submitted by competitors. Access to documents is free of charge and takes place on equal terms. The obligation to post procurement documents on contracting authorities' websites allows economic operators to continuously check tender proposals of interest to them and plan their business activities. From the perspective of citizens, open access to information, which is not tied to the need to individually apply for particular documents, makes it easier to follow the process of spending money from the budget and implement public tasks. In this context, the proposal to impose an obligation on Member States to create and maintain a list of concluded public contracts and their modifications remains relevant. From a single market perspective, e-procurement promotes transparency and thus encourages economic operators to participate in tenders in other Member States. The open and transparent access to information that electronic means generate also allows easier obtaining of data for research, statistics and development plans. Publication of decisions of national review bodies on their websites makes it possible to follow trends in case law, to develop sound practices for contracting authorities and economic operators, and to harmonise interpretation. Access to official repositories makes it easier for contracting authorities and national review bodies to verify documents submitted by economic operators.

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Zebrane w monografii artykuły naukowe dotyczą szerokiego spektrum zagadnień związanych z cyfrową transformacją administracji publicznej w Europie. Pierwsza część książki została poświęcona analizie e-administracji z perspektywy prawa europejskiego. Następnie cyfryzację administracji przedstawiono jako katalizator transformacji administracji otwartej, odpowiedzialnej i świadczącej e-usługi dla obywateli. Książka ukazuje również wpływ digitalizacji na funkcjonowanie polskiej administracji publicznej. Ostatnia część opracowania dotyczy e-administracji jako czynnika zwiększającego potencjał administracji w państwach członkowskich UE i państwach stowarzyszonych oraz na szczeblu międzynarodowym.

Monografia adresowana jest do badaczy zajmujących się administracją, prawem administracyjnym i europejskim, praktyków: sędziów, prokuratorów, urzędników państwowych, adwokatów i radców prawnych oraz studentów i doktorantów prawa, administracji i ekonomii. Mamy nadzieję, że publikacja poszerzy wiedzę na temat cyfryzacji administracji w Polsce i Europie oraz zachęci do dalszych studiów w tej dziedzinie.



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