



Promoting Social Considerations into Public Procurement Procedures for Social Economy Enterprises

Matrix explaining how social considerations have been embedded in the Polish law transposing Directive 24/2014/EU



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Article 18(2) of the Directive ► Article 29 para. 3a of the Public Procurement Law of 29 January 2004 (consolidated text Journal of Laws Dz. U. of 2018, item 1603 as amended) (the “PPL”)

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>The general principle according to which in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions has not been literally set out in Polish public procurement law.</p> <p>However, it has been implemented in the specific provisions of the PPL, including:</p> <ul style="list-style-type: none"> – <u>Article 29 para. 3a of the PPL</u> <i>3a. In the description of the subject of a service or construction works contract, the contracting authority shall define requirements concerning the employment by a contractor or subcontractor, on the basis of employment contracts, of persons carrying out activities related to the performance of the contract indicated by the contracting authority, where carrying out those activities consists in carrying out work in the manner described in Article 22 § 1 of the Labour Code Act of 26 June 1974 (...).</i> – Article 24 para. 1 of the PPL (mandatory exclusion grounds) * – Article 24 para. 2 of the PPL (voluntary exclusion grounds) * – Article 90 para. 1 subpara. 1, 3 and para. 3 of the PPL (abnormally low tenders) * <p>* Referred to in the following sections of the matrix (below).</p>	<p><u>Article 36 para. 2 subpara. 8a of the PPL</u> <i>2. Unless otherwise provided for by this Act, the terms of reference shall also contain the following: (...)</i></p> <p><i>8a) where the contracting authority provides for the requirements referred to in Article 29.3a, the specification of, in particular:</i></p> <p><i>a) the method of documentation of the employment of persons referred to in Article 29.3a,</i></p> <p><i>b) the powers of the contracting authority relating to the control of the fulfilment of the requirements referred to in Article 29.3a by the economic operator and to penalties for non-compliance with those requirements,</i></p> <p><i>c) the type of activities necessary to perform the contract which are covered by the requirements of the employment by the economic operator or a subcontractor, under an employment contract, of persons carrying out activities in the course of the performance of the contract;</i></p>	<p>Contracting authorities are obliged to ensure that contractors and subcontractors do not unlawfully apply civil-law contracts instead of employment contracts in relations with their employees engaged in the performance of the public procurement contracts.</p> <p>When preparing the description of the subject of the contract, every contracting authority should: (i) decide in advance if and which activities related to the performance of the contract will have the characteristics of the employment relationship and (ii) set out the obligation to employ all natural persons who will perform these activities on the basis of the employment contracts by the contractor or subcontractor.</p> <p>Subsequently, the contracting authority should stipulate within the terms of reference: (i) the manner in which the basis of the employment is to be proven by the contractor/ controlled by the contracting authority and (ii) sanctions for the contractor for non-compliance with the above mentioned obligation (e.g. contractual penalties).</p>	<p><u>Article 22 sections 1, 1² of the Labour Code Act of 26 June 1974 (consolidated text Journal of Laws Dz. U. of 2018, item 917 as amended) (the “PLC”)</u></p> <p><i>22. § 1. By establishing an employment relationship, an employee assumes the obligation to perform specific work for the employer and under the employer's direction at a place and time specified by the employer, and the employer assumes an obligation to employ the employee against payment of remuneration. (...)</i></p> <p><i>§ 1². A contract of employment cannot be replaced with a civil-law contract based on the conditions of work referred to in § 1.</i></p>
<p>Possible elements of legal uncertainty (better if already dealt with in national courts)</p>	<p><u>May the contracting authority require the exact number of natural persons to be employed by the contractor or subcontractor on the basis of the employment contracts?</u> According to the National Appeal Chamber's (Polish: <i>Krajowa Izba Odwoławcza</i>; the “NAC”) case law, Article 29 para. 3a of the PPL does not provide the contracting authority with the</p>		

	<p>right to stipulate how many employees should be employed to perform the subject of the contract (e.g. KIO 411/18).</p> <p><u>Taking into account Article 5 of the GDPR, is the contracting authority entitled to get access to the contractor's / subcontractor's employees' personal data?</u> The contracting authority may require the contractor to present the copies of the contracts of employment including the names and surnames of the employees engaged in the performance of the contract. Such a conclusion results from an opinion drafted jointly by the PPO and the Polish Inspector General for the Protection of Personal Data.</p> <p><u>Does Article 29 para. 3a of the PPL prevent the sole proprietors who act on their own (without any employees) from applying for the public contracts?</u> The NAC ruled in KIO 2101/16 that Article 29 section 3a of the PPL does not apply to the actions undertaken directly by the contractor. Thus, sole proprietors are free to apply for the public contracts for works or services even if they do not have any employees.</p>
<p>Example of application from the national level (where applicable)</p>	<p>Application of Article 29 para. 3a of the PPL is mandatory in every public procurement proceeding regarding a contract for works or services.</p> <p>The Polish Public Procurement Office (the “PPO”) has issued the model provisions to be used by contracting authorities in tender documentation: https://www.uzp.gov.pl/baza-wiedzy/wzorcowe-dokumenty/wzory-oswiadczen-i-dokumentow-z-zakresu-znowelizowanych-przepisow-ustawy-pzp.</p>

Article 20 of the Directive ► Article 22 para. 2 and 2a of the PPL

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>2. Contracting authorities may reserve in contract notices the exclusive right to tender for a contract to sheltered workshops and other economic operators which pursue activity or whose organisational units which are to perform a given contract pursue activity involving the social and professional integration of persons being members of socially marginalised groups, in particular:</p> <p>1) disabled persons within the meaning of the Act of 27 August 1997 on the Vocational Rehabilitation, Social Resettlement, and Employment of Disabled Persons (Journal of Laws Dz. U. of 2016, items 2046 and 1948 and of 2017, items 777 and 935);</p> <p>2) the unemployed within the meaning of the Act of 20 April 2004 on the Promotion of Employment and on Labour Market Institutions (Journal of Laws Dz. U. of 2017, items 1065, 1292 and 1321);</p> <p>3) persons deprived of liberty or persons released from prison, referred to in the Executive Criminal Code Act of 6 June 1997 - (Journal of Laws Dz. U. of 2017, items 665, 666 and 768), having difficulties in integration with the community;</p> <p>4) persons with mental disorders within the meaning of the Act of 19 August 1994 on the Protection of Mental Health (Journal of Laws Dz. U. of 2017, item 882);</p> <p>5) homeless persons within the meaning of the Social Assistance Act of 12 March 2004 (Journal of Laws Dz. U. of 2016, item 930, as amended);</p> <p>6) persons who have been granted refugee status or subsidiary protection in the Republic of Poland, as referred to in the Act of 13 June 2003 on the Protection of Foreigners in the Republic of Poland (Journal of Laws Dz. U. of 2016, items 1836 and 2003 and of 2017, item 60);</p> <p>7) persons under 30 and over 50 years of age, having</p>	<p><u>Section 11 of the Regulation of the Minister of Development of 26 July 2016 on the Types of Documents that the Contracting Authority May Require from the Contractor in the Procurement Procedure (Journal of Laws Dz. U. item 1126 as amended):</u></p> <p>§ 11. In the case referred to in art. 22 para. 2 of the Act, the contracting authority may request:</p> <p>1. the decision on granting the status of a sheltered or occupational activity establishment, referred to in the Act of 27 August 1997 on vocational and social rehabilitation and employment of disabled persons (Journal of Laws Dz. U. of 2011, item 721, as amended), or other documents confirming the status of the contractor as a sheltered work establishment or confirming that the contractor is running, or through its organisationally separated entity that will carry out the public contract, activities including the social and professional integration of people who are members of socially marginalized groups;</p> <p>2. documents confirming the employment rate of persons belonging to one or more categories referred to in art. 22 paragraph 2 of the Act, employed by sheltered workshops or a contractor or its organisationally separated entity that will execute the order.</p>	<p>Article 22 para. 2 and 2a of the PPL constitute an exceptional regulation, because they allow limiting the number of contractors regardless of the subject of the order.</p> <p>The contracting authority may stipulate in the documentation of the procedure that only contractors employing socially marginalised persons may apply for the award of the contract.</p> <p>The list of socially marginalised groups set out in this Article is only exemplary – the contracting authority may refer to other socially marginalised groups in the terms of reference.</p> <p>The contracting authority should specify the required percentage rate of employment of persons identified as belonging to socially marginalised groups, but it should not be lower than 30% of the total number of persons employed by the contractor or in the contractor's unit.</p> <p>This Article does not require socially marginalised persons employed by the contractor to perform the object of the awarded public contract.</p>	<ul style="list-style-type: none"> – Act of 27 August 1997 on the Vocational Rehabilitation, Social Resettlement, and Employment of Disabled Persons (Journal of Laws Dz. U. of 2016, items 2046 and 1948 and of 2017, items 777 and 935) – Act of 20 April 2004 on the Promotion of Employment and on Labour Market Institutions (Journal of Laws Dz. U. of 2017, items 1065, 1292 and 1321) – Executive Criminal Code Act of 6 June 1997 (Journal of Laws Dz. U. of 2017, items 665, 666 and 768) – Act of 19 August 1994 on the Protection of Mental Health (Journal of Laws Dz. U. of 2017, item 882) – Social Assistance Act of 12 March 2004 (Journal of Laws Dz. U. of 2016, item 930, as amended) – Act of 13 June 2003 on the Protection of Foreigners in the Republic of Poland (Journal of Laws of 2016, items 1836 and 2003 and of 2017, item 60) – Act of 6 January 2005 on National and Ethnic Minorities and Regional Languages (Journal of Laws Dz. U. of

<p><i>the status of a person seeking employment, unemployed;</i></p> <p><i>8) persons being members of disadvantaged minorities, in particular being members of national and ethnic minorities within the meaning of the Act of 6 January 2005 on National and Ethnic Minorities and Regional Languages (Journal of Laws Dz. U. of 2017, item 823).</i></p> <p><i>2a. Contracting authorities shall determine the minimum percentage of employment of persons falling within one or more of the categories referred to in paragraph 2, not less than 30%, of employees of sheltered workshops or economic operators or their units, referred to in section 2.</i></p>			2017, item 823]
<p>Possible elements of legal uncertainty (better if already dealt with in national courts)</p>	<p><u>Should the contractor have the specific legal status?</u> It is unclear if this regulation allows reserving a contract only for contractors who exercise the activity which consists of the social and professional integration of persons being members of socially marginalised groups according to their legal form or their constituting documents (e.g. articles of association). The NAC's case law is not consistent in this respect. However, in one of the recognized cases it has ruled that Article 22 para. 2 of the PPL does not require the contractor to have any specific legal status and that it is enough for the contractor to employ a given percentage of marginalised persons to apply for the reserved contract (see e.g. KIO 831/17).</p> <p><u>Taking into account Article 5 and Article 9 of the GDPR, is the contracting authority entitled to get access to the contractor's employees' sensitive personal data regarding e.g. state of health of these persons?</u></p> <p><u>The definition of the concept of "a person being a member of a socially marginalised group"</u> How long does such a status last (e.g. in the case of a person who was previously unemployed)?</p>		
<p>Example of application from the national level (where applicable)</p>	<p>Application of Article 22 para. 2 and 2a of the PPL is not mandatory and in fact, the contracting authorities do not apply this clause very often.</p> <p>Some examples of application of the above regulation are available in the PPO's publication <i>Good practices in the sustainable field public procurement</i> (Polish: <i>Dobre praktyki w zakresie zrównoważonych zamówień publicznych</i>, J. Pożarowska, M. Olejarz (editors), source: https://www.uzp.gov.pl/_data/assets/pdf_file/0031/35977/Dobre-praktyki-w-zakresie-zrownowazonych-zamowien-publicznych.pdf)</p>		

Article 40 of the Directive ► Articles 31a-31c of the PPL

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>31a. 1. Before launching a contract award procedure, contracting authorities may inform economic operators about plans and expectations concerning a contract, in particular they may conduct technical dialogue, seeking advice or information from experts, public authorities, or economic operators to the extent necessary to prepare the description of the subject of a contract or the terms of reference, or to determine the terms and conditions of a contract.</p> <p>2. Technical dialogue shall be conducted in such a manner as to ensure fair competition and equal treatment of potential economic operators and the solutions proposed by them.</p> <p>31b. The contracting entity shall publish information on the intended technical dialogue and its subject on website.</p> <p>31c. The contracting entity shall publish information on the application of technical dialogue in the contract notice.</p>	<p><u>Article 31d of the PPL</u></p> <p>31d. Where there is a possibility of an entity which has been involved in the preparation of a contract award procedure participating in that procedure, the contracting authority shall take appropriate measures to ensure that competition is not distorted by the participation of that entity in the procedure, in particular it shall communicate to the other economic operators information obtained and provided during the preparation of the procedure and fix an adequate time limit for the submission of tenders. The contracting authority shall indicate the measures aimed at preventing the distortion of competition in the procedure record.</p>	<p>The PPL does not limit the application of a technical dialogue. It is admissible to use this procedure in every case in which the contracting authority recognizes it as a convenient tool to obtain the necessary information.</p> <p>The contractors interested in applying for a future contract may participate in the dialogue. The contracting authority is therefore obliged to ensure fair competition and equal treatment of potential contractors and solutions offered by these contractors during the dialogue procedure.</p> <p>The contracting authority is obliged to publish information on the intended technical dialogue and its subject on a website. This obligation is aimed at enabling all interested contractors to enter into the dialogue.</p>	<p><u>Article 24 para 1 subpara. 19 and 20 of the PPL:</u></p> <p>24.1. The following economic operators are excluded from the contract award procedure: (...)</p> <p>19. an economic operator which was involved in the preparation of a given contract award procedure or whose employee, as well as a person working based on a mandatory contract, a contract to perform a specific task, a contract of agency or another service provision contract, was involved in the preparation of such a procedure, unless the distortion of competition thus caused can be remedied otherwise than by excluding that economic operator from participation in that procedure;</p> <p>20. an economic operator which has entered into an agreement with other economic operators aimed at distorting competition between economic operators in a contract award procedure, as the contracting authority is able to demonstrate using appropriate means of proof;</p> <p><u>Article 6 para. 1 of the Competition and Consumer Protection Act of 16 February 2007 (Consolidated text Journal of Laws Dz. U. of 2018, item 798 as amended)</u>, according to which any</p>

		<p>agreements which have as their object or effect the prevention, restriction or other distortion of competition within the relevant market is prohibited.</p>
<p>Possible elements of legal uncertainty (better if already dealt with in national courts)</p>	<p><u>Do the public procurement general principles other than principles of fair competition and equal treatment apply to a technical dialogue?</u> It is unclear if the principles of proportionality, transparency, impartiality and objectivity are also applicable. Additionally, the PPL does not directly determine whether the dialogue's procedure should be conducted publicly and/ or in writing.</p>	
<p>Example of application from the national level (where applicable)</p>	<p><u>Application of a technical dialogue is not mandatory.</u></p> <p>The PPL does not provide any specific procedural requirements except: (i) the general principles of fair competition and equal treatment of potential economic operators and the solutions proposed by them and (ii) the obligation to publish information on the intended technical dialogue and its subject on website. However, the PPO suggests that the contracting authority should adopt and publish the dedicated regulations for conducting a technical dialogue.</p> <p>The PPO has published: (i) the model notice of a technical dialogue and (ii) the model regulations for conducting a technical dialogue - which are both available on the PPO's website: https://www.uzp.gov.pl/baza-wiedzy/wzorcowe-dokumenty/wzorcowe-dokumenty-dotyczace-dialogu-technicznego.</p>	

Art 42(1) (fourth and fifth subparagraph) of the Directive ► Article 29 para. 5 and 6 of the PPL

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>29. (...) 5. <i>In the case of contracts intended for use by natural persons, including the staff of a given contracting authority, the description of the subject of the contract shall be drawn up taking into account requirements concerning accessibility for people with disabilities or design intended for all users.</i></p> <p>6. <i>Where the requirements referred to in paragraph 5 arise from a legal act of the European Union, the subject of the contract shall, as far as design intended for all users is concerned, be described by reference to that act.</i></p>	N/A	<p>This obligation applies to all public contracts which subject is intended for use by natural persons.</p> <p>The contracting authority should take into account the widest possible access of disabled persons and various types of disability.</p> <p>If any legal act of the European Union provides for mandatory accessibility requirements, technical specifications must refer to these requirements.</p>	N/A
Possible elements of legal uncertainty (better if already dealt with in national courts)	<p>The definition of “<u>a person with a disability</u>”.</p> <p>What is the difference between “<u>an accessibility for people with disabilities</u>” and “<u>a design intended for all users</u>” within the meaning of Article 29 para. 5 of the PPL?</p>		
Example of application from the national level (where applicable)	<p>Application of Article 29 para. 5 and 6 of the PPL is mandatory in relation to every contract which is intended for use by <u>natural persons</u> e.g. the contract for the construction or furnishing of a public utility building or for the delivery of means of communication.</p>		

Article 43 of the Directive ► Article 30a of the PPL

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p><i>30a. 1. In the case of contracts with specific characteristics, a contracting authority may, in the description of the subject of a contract, in the tender assessment criteria, or in the contract performance conditions, determine specific labelling, where all of the following conditions are fulfilled:</i></p> <p><i>1) the label requirements only concern criteria which are linked to the subject of the contract and are appropriate to define characteristics of the works, supplies, or services that are the subject of the contract;</i></p> <p><i>2) the label requirements are based on objectively verifiable and non-discriminatory criteria;</i></p> <p><i>3) the conditions for awarding the labels are established in an open and transparent procedure in which all relevant stakeholders, including public administration entities, consumers, social partners, manufacturers, distributors, and non-governmental organisations, may participate;</i></p> <p><i>4) the labels are accessible to all interested parties;</i></p> <p><i>5) the label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence.</i></p> <p><i>2. Where contracting authorities do not require the works, supplies, or services to meet all of the label requirements, they shall indicate particular label requirements.</i></p> <p><i>3. Where a specific label is required, contracting authorities shall accept all labels that confirm that the given works, supplies, or services meet equivalent requirements.</i></p> <p><i>4. Where an economic operator, for reasons that are not attributable to it, is unable to obtain a specific label indicated by the contracting authority or a label confirming that the given works, supplies, or services meet equivalent requirements, the contracting authority shall, within a time limit specified by it, accept other appropriate means of proof, in particular a technical dossier from the manufacturer, provided that the economic operator concerned proves that the works, supplies, or services to</i></p>	<p><u>Article 2 subpara. 16 of the PPL:</u></p> <p><i>2. For the purposes of this Act: (...) 16) labelling - shall mean any certificate, attestation or any other document confirming that a given work, product, service, process or procedure meets certain requirements;</i></p>	<p>When defining the description of the subject of the contract, the contracting authority may refer to a specific labelling provided that all of the conditions listed in Article 30a para. 1 of the PPL are met.</p> <p>The contracting authority may also refer to only particular label requirements.</p> <p>The contracting authority cannot:</p> <ul style="list-style-type: none"> – determine that it will accept only a specific labelling – it should accept every labelling that confirms that the offered works, supplies, or services meet the given requirements; – rely only on the labelling – it should accept also other appropriate means of proof; – require these of the characteristics covered by the labelling which are not related to the subject of the contract. 	<p>N/A</p>

<p><i>be provided by it fulfil the requirements of the specific label or the specific requirements indicated by the contracting authority.</i></p> <p><i>5. Where a label which fulfils the conditions set out in paragraph 1 (2) to (5) but also sets out requirements not linked to the subject of the contract, the contracting authority shall not require that label. In such a case, contracting authorities may describe the subject of a contract by reference to those label requirements, or, where necessary, to those parts of the label which are linked to the subject of the contract and are appropriate to define characteristics of the works, supplies, or services to be provided.</i></p>			
<p>Possible elements of legal uncertainty (better if already dealt with in national courts)</p>	<p>There is no recent case law of the NAC as regards the interpretation of Article 30a of the PPL.</p>		
<p>Example of application from the national level (where applicable)</p>	<p>Practical aspects related to the use of labels in public procurement have been presented in the publication of the PPO Sustainable <i>public procurement. Social and environmental aspects in the procedure of awarding the contract in the light of the amendment to the Public Procurement Law</i> (Polish: <i>Zrównoważone zamówienia publiczne. Aspekty społeczne i środowiskowe w procedurze udzielania zamówienia w świetle nowelizacji ustawy Prawo zamówień publicznych</i>, K. Ołdak-Buianowska, M. Skowron, A. Węclawska (authors), M. Stręciwilk, M. Olejarz (editors), source: https://www.uzp.gov.pl/_data/assets/pdf_file/0029/35993/Zrownowazone-zamowienia-publiczne.pdf).</p> <p>The PPO has also recently published the studies on ecological and social labels (source: https://www.uzp.gov.pl/aktualnosci/opracowania-w-zakresie-oznakowan-ekologicznych-i-spoecznych).</p>		

Article 46 of the Directive ► Article 36aa of the PPL

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p><i>36aa. 1. Contracting authorities may divide contracts into lots, determining the scope and subject of such lots.</i></p> <p><i>2. In the case referred to in paragraph 1, contracting authorities shall indicate in the contract notice, in the terms of reference, in the invitation to confirm interest, or in the notice on the establishment of an economic operator selection system, as well as in the invitation to tender or in the invitation to negotiate, whether tenders may be submitted for one, for several or for all of the lots.</i></p> <p><i>3. Contracting authorities may indicate in the contract notice, in the terms of reference, in the invitation to confirm interest, or in the notice on the establishment of an economic operator selection system, as well as in the invitation to tender or in the invitation to negotiate, the maximum number of lots that may be awarded to one tenderer.</i></p> <p><i>4. Contracting authorities may limit the number of lots that may be awarded to one tenderer provided that the maximum number of lots that may be awarded to one tenderer is indicated in accordance with paragraph 3.</i></p> <p><i>5. In the case referred to in paragraph 3, contracting authorities shall determine in the terms of reference objective and non-discriminatory criteria or rules that they intend to apply for determining which lots will be awarded to an economic operator where the conduct of a contract award procedure would result in one tenderer being awarded more lots than the maximum number of lots that it may be awarded.</i></p>	<p><u>Article 2 subpara.6 of the PPL</u></p> <p><i>2. For the purposes of this Act: (...)</i></p> <p><i>6) partial tender - shall mean a prospective tender for a portion of a public contract, in accordance with the essential terms of reference of the contract;</i></p> <p><u>Article 22c para 4 of the PPL</u> according to which where a contract is divided into lots: (i) the PPL's provisions regarding the maximum level of conditions of participation in a procedure concerning the financial or economic standing should apply to each individual lot and (ii) contracting authorities may set the minimum yearly turnover also by reference to more than one lot of a contract in the event that the economic operator whose tender is selected as the most advantageous one is awarded several lots of the contract to be executed at the same time.</p> <p><u>Article 36 para. 2 subpara. 1 and 15 of the PPL</u></p> <p><i>36. (...) 2. Unless otherwise provided for by this Act, the terms of reference shall also contain the following: (...)</i></p> <p><i>1) a description of the lots into which a contract is subdivided if the contracting entity accepts tenders for lots; (...)</i></p> <p><i>15) the number of lots of the contract for which economic operators may submit a tender or the maximum number of lots that may be awarded to one economic operator and the criteria or rules that are to apply to the determination which lots will be awarded to one economic operator if its tender is selected for more than the maximum number of lots.</i></p>	<p>If the subject of the public contract is divisible, the contracting authority may divide it into lots.</p> <p>The contracting authority may indicate:</p> <ul style="list-style-type: none"> – whether tenders can be submitted for one, for several or for all of the lots and/ or – the maximum number of lots that may be awarded to one tenderer. <p>When the contracting authority stipulates the maximum number of lots that may be awarded to one tenderer it should also provide for objective and non-discriminatory criteria or rules for determining which lots will be awarded to the tenderer who submitted the most favourable tenders for more than the maximum number of lots.</p>	<p><u>Article 5b supari. 2 of the PPL</u></p> <p><i>5b. The following actions shall not be taken by the contracting authority for the purpose of circumventing the provisions of the Act: (...)</i></p> <p><i>2) dividing a contract into separate contracts in order to avoid the joint estimation of their value.</i></p> <p><u>Article 32 para. 4 of the PPL</u></p> <p><i>4. If the contracting entity accepts tenders for lots or subdivides a contract into lots, each of which is the subject-matter of a separate procedure, the value of the contract is the aggregate value of its respective lots.</i></p> <p><u>Article 6a of the PPL</u></p> <p><i>In case of contracts awarded in lots, the contracting entity may apply provisions relevant to the value of a lot to the award of that lot if the value is less than the equivalent of 80 000 EUR in PLN for supplies or services, or 1 000 000 EUR for works, provided the total value of the lot does not exceed 20% of the value of the contract.</i></p>

	<p>Article 96 para. 1 subpara. 11 of the PPL</p> <p><i>1. During the conduct of a contract award procedure, the contracting authority shall draw up a procedure record including at least: (...)</i></p> <p><i>11) the reasons for which the contract has not been divided into lots;</i></p>		
<p>Possible elements of legal uncertainty (better if already dealt with in national courts)</p>	<p>Is the contracting authority obliged to divide every contract into lots? If so, how far should the division of the contract go?</p> <p><u>What kind of rules referred to in Article 36aa para. 5 of the PPL would not be against the principles of fair competition and equal treatment of tenderers?</u></p>		
<p>Example of application from the national level (where applicable)</p>	<p>The PPO has published clarifications regarding Article 36aa para. 5 and Article 96 para 1 subpara. 11 of the PPL which address the following questions: (i) How to justify the resignation from the division of the contract into lots? If it is more convenient for the contracting authority to have one contract than three for individual lots, is it a sufficient justification? (ii) Does the contracting authority, which splits the public contract into fewer lots than is possible, violate the provisions of the PPL? (source: https://www.uzp.gov.pl/baza-wiedzy/interpretacja-przepisow/pytania-i-odpowiedzi-dotyczace-nowelizacji-ustawy-prawo-zamowien-publicznych/podzial-zamowienia-na-czesci)</p>		

Article 56 of the Directive ► Article 7 para. 3, Article 22 para. 1, Article 89 para. 1 subpara. 1, Article 24aa, Article 26 para. 3 and 3a of the PPL

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p><u>Article 7 para. 3 of the PPL</u> 3. <i>Contracts shall be awarded solely to economic operators selected in accordance with the provisions of this Act.</i></p> <p><u>Article 22 para. 1 of the PPL</u> 1. <i>Economic operators tendering for a contract shall:</i> 1) <i>not be subject to exclusion;</i> 2) <i>meet the requirements for participation in a given procedure, as long as such requirements have been set out by the contracting authority in the contract notice or in the invitation to confirm interest.</i></p> <p><u>Article 89 para. 1 subpara. 1 of the PPL</u> 1. <i>The contracting entity rejects tenders that: (...)</i> 2) <i>are not relevant to the terms of reference, subject to Article 87 (2) (3);</i></p> <p><u>Article 24aa of the PPL</u> 1. <i>In an open procedure, a contracting authority may first evaluate tenders and then investigate whether the economic operator whose tender has been evaluated as the most advantageous one is not subject to exclusion and fulfils the conditions of participation in the procedure, as long as the terms of reference or the contract notice provides for such a possibility.</i> 2. <i>Where the economic operator referred to in paragraph 1 evades entering into a contract or does not lodge a security for the proper performance of the contract, the contracting authority may investigate whether the economic operator which submitted the tender which has been given the top rating is not subject to exclusion and whether it fulfils the conditions of participation in the procedure.</i></p> <p><u>Article 26 para. 3 and 3a of the PPL</u> 3. <i>Where an economic operator has not submitted the declaration referred to in Article 25a.1, declarations or</i></p>	<p><u>Article 25 para. 1 of the PPL</u> 1. <i>In a contract award procedure, a contracting authority may only require economic operators to submit declarations and documents necessary for the conduct of the procedure. Declarations or documents confirming:</i> 1) <i>the fulfilment of the conditions of participation in the procedure or the selection criteria,</i> 2) <i>the fulfilment of the requirements set out by the contracting authority by the supplies, services, or construction works offered,</i> 3) <i>the absence of grounds for exclusion - shall be indicated by the contracting authority in the contract notice, the terms of reference, or the invitation to tender.</i></p> <p><u>Article 36 para. 1 of the PPL</u> 36. 1. <i>The terms of reference shall at least contain (...)</i> 5) <i>the conditions for participation;</i> 5a) <i>the grounds for exclusion referred to in Article 24.5;</i> 6) <i>a list of declarations or documents confirming the fulfilment of the conditions of participation in a procedure and the absence of grounds for exclusion;</i></p> <p><u>Regulation of the Minister of Development of 26 July 2016 on the Types of Documents that the Contracting Authority May Require from the Contractor in the Procurement Procedure (Journal of Laws Dz. U. item 1126 as</u></p>	<p>The contracting authority may assess only these requirements for participation in a procedure which have been set out in the contract notice or in the invitation to confirm interest.</p> <p>The contracting authority should always determine whether a tenderer is not subject to the mandatory exclusion.</p> <p>The inverted order of verification, meaning first evaluating tenders and then investigating whether the tenderer whose tender has been evaluated as the most advantageous one is not subject to exclusion and fulfils the conditions of participation in the procedure is applicable only in the open tender procedure (Polish: <i>przetarg nieograniczony</i>).</p> <p>The missing or defective declarations and documents confirming: (i) the fulfilment of the conditions of participation in the procedure or the selection criteria, (ii) the fulfilment of the requirements set out by the contracting authority by the supplies, services, or construction works offered and (iii) the absence of grounds for exclusion as well as required powers of attorney may be supplemented by the tenderer.</p> <p>The contracting authority should request that such missing or defective declarations, documents and powers of attorney be supplemented. This obligation is not applicable only if the</p>	<p><u>Article 22 para. 1a and 1b of the PPL</u> 22. (...) 1a. <i>Contracting authorities shall indicate the conditions of participation in a procedure and the means of proof required of economic operators, proportionate to the subject-matter of the contract and enabling the evaluation of economic operators' capacity to perform a contract properly, in particular expressed as minimum levels of ability.</i> 1b. <i>The conditions of participation in a procedure may relate to:</i> 1) <i>competences or licenses required to pursue the professional activity in question, as long as this is provided for in separate provisions;</i> 2) <i>economic or financial standing;</i> 3) <i>technical and professional ability.</i></p> <p><u>Article 22a of the PPL</u> (possibility to rely on the technical or professional ability or the economic or financial standing of other entities)</p> <p><u>Article 22b of the PPL</u> (conditions of participation in a procedure concerning the competences or licenses required to pursue the professional activity)</p> <p><u>Article 22c of the PPL</u> (conditions</p>

<p><i>documents confirming the circumstances referred to in Article 25.1, or other documents necessary for the conduct of the procedure, the declarations or documents are incomplete, contain errors, or raise doubts indicated by the contracting authority, the contracting authority shall request that such declarations or documents be submitted, completed, or corrected or that explanations be provided within a time limit indicated by the contracting authority, unless the tender of that economic operator is to be rejected or it would be necessary to cancel the procedure despite the submission, completion, or correction of such declarations or documents, or the provision of explanations.</i></p> <p><i>3a. Where an economic operator has not submitted the required powers of attorney or has submitted defective powers of attorney, the contracting authority shall request that the powers of attorney be submitted within a time limit indicated, unless the tender of that economic operator is to be rejected or it would be necessary to cancel the procedure despite the submission of such powers of attorney.</i></p>	<p><u>amended)</u></p>	<p>tender would be subject to rejection despite the supplementation of the documents/ declarations or there are indications that the proceedings will be annulled.</p>	<p>of participation in a procedure concerning the financial or economic standing) <u>Article 22d of the PPL</u> (conditions of participation in a procedure concerning the technical or professional ability) <u>Article 24 of the PPL</u> (the grounds for exclusion) <u>Article 36 of the PPL</u> (contents of the terms of reference)</p>
<p>Possible elements of legal uncertainty (better if already dealt with in national courts)</p>	<p><u>Is it possible to supplement the missing or defective declarations, documents or powers of attorney if the tenderer has already failed to supplement them on time at the contracting authorities' first request?</u></p> <p>The NAC's case law indicates that a request to supplement under Article 26 para. 3 of the PPL may be issued only once in relation to the same document/ declaration/ power of attorney. It is allowed to repeat the request only if the first one was incorrect or incomplete (see e.g. KIO 493/18)</p> <p><u>Should the supplemented document be valid as of the date of opening of tenders?</u></p> <p>According to the NAC's case law, the supplemented documents should confirm the given circumstances as of the date of their submission (see e.g. KIO 1946/18).</p>		
<p>Example of application from the national level (where applicable)</p>	<p>Application of Article 7 para. 3, Article 22 para. 1, Article 89 para. 1 subpara. 1, Article 26 para. 3 and 3a of the PPL is mandatory in every tender procedure.</p> <p>The inverted procedure stipulated in Article 24aa of the PPL is voluntary. Explanations regarding this procedure has been published by the PPO on its website: https://www.uzp.gov.pl/baza-wiedzy/interpretacja-przepisow/pytania-i-odpowiedzi-dotyczace-nowelizacji-ustawy-prawo-zamowien-publicznych/procedura-uregulowana-w-art.-24aa-ustawy-pzp,-tzw.-procedura-odwrocona)</p>		

Article 57 of the Directive ► Article 24 of the PPL

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>24. 1. <i>The following economic operators are excluded from the contract award procedure:</i></p> <p>1) – 11) <i>(repealed);</i></p> <p>12) <i>an economic operator which has not proved the fulfilment of the conditions of participation in a procedure or has not been invited to negotiate or to submit initial tenders or tenders, or has not proved the absence of grounds for exclusion;</i></p> <p>13) <i>an economic operator being a natural person who has been the subject of a conviction by final judgment for:</i></p> <p>a) <i>a criminal offence referred to in Article 165a, Articles 181 to 188, 189a, Articles 218 to 221, Articles 228 to 230a, Article 250a, Article 258, or Articles 270 to 309 of the Criminal Code Act of 6 June 1997 (Journal of Laws of 2016, item 1137, as amended) or Article 46 or Article 48 of the Sports Act of 25 June 2010 (Journal of Laws of 2016, items 176, 1170 and 1171 and of 2017, items 60 and 1051),</i></p> <p>b) <i>a criminal offence having a terrorist nature, referred to in Article 115 § 20 of the Criminal Code Act of 6 June 1997,</i></p> <p>c) <i>a fiscal offence,</i></p> <p>d) <i>a criminal offence referred to in Article 9 or Article 10 of the Act of 15 June 2012 on the Effects of Entrusting Work to Foreigners Staying Illegally in the Territory of the Republic of Poland (Journal of Laws of 2012, item 769);</i></p> <p>14) <i>an economic operator where an active member of its management or supervisory body, a partner in a registered partnership or a professional partnership or a general partner in a limited partnership or a limited joint-stock partnership, or a proxy has been convicted by a final judgment for a criminal offence referred to in subparagraph (13);</i></p> <p>15) <i>an economic operator subject to a final court judgment or administrative decision on the breach of its obligations relating to the payment of taxes or social security or health insurance contributions, unless the economic operator has paid the taxes or social security or health insurance contributions due along with the</i></p>	<p><u>Regulation of the Minister of Development of 26 July 2016 on the Types of Documents that the Contracting Authority May Require from the Contractor in the Procurement Procedure (Journal of Laws Dz. U. item 1126 as amended)</u></p>	<p>The contracting authority is obliged to exclude the tenderer on the grounds stipulated in Article 24 para. 1 of the PPL (obligatory exclusions) and in Article 24 para. 5 of the PPL (discretionary exclusions) provided that the grounds for exclusion listed in Article 24 para. 5 of the PPL have been stipulated in the tender documentation (i.e. in the contract notice, in the terms of reference, or in the invitation to negotiate).</p> <p>Article 24 para. 8 of the PPL makes explicit provision for a “self-cleaning” procedure for the tenderer in the case of certain mandatory and discretionary exclusions.</p>	<ul style="list-style-type: none"> – <u>Article 165a, Articles 181 to 188, 189a, Articles 218 to 221, Articles 228 to 230a, Article 250a, Article 258, or Articles 270 to 309 of the Criminal Code Act of 6 June 1997 (Journal of Laws Dz. U. of 2016, item 1137, as amended) (the “Criminal Code Act”)</u> – <u>Article 46 and Article 48 of the Sports Act of 25 June 2010 (Journal of Laws Dz. U. of 2016, items 176, 1170 and 1171 and of 2017, items 60 and 1051),</u> – <u>Article 115 § 20 of the Criminal Code Act of 6 June 1997</u> – <u>Article 9 and Article 10 of the Act of 15 June 2012 on the Effects of Entrusting Work to Foreigners Staying Illegally in the Territory of the Republic of Poland (Journal of Laws Dz. U. of 2012, item 769);</u> – <u>Act of 28 October 2002 on the Liability of Collective Entities for Acts Prohibited under Penalty (Journal of Laws Dz. U. of 2016, item 1541 and of 2017, items 724 and 933);</u> – <u>Any regulation regarding the payment of taxes or social</u>

interest or fines or has entered into a binding agreement concerning the payment of those amounts due;

16) an economic operator which, either intentionally or owing to gross negligence, misinformed a contracting authority as to the absence of grounds for exclusion, the fulfilment of the conditions of participation in a given procedure or objective and non-discriminatory criteria, hereinafter referred to as "selection criteria", or which has withheld such information or is not able to submit the documents required;

17) an economic operator which, owing to recklessness or gross negligence, has provided a contracting authority with misleading information that may have material influence on decisions taken by that contracting authority in a contract award procedure;

18) where an economic operator has unduly influenced or tried to influence the activities of a contracting authority or to obtain confidential information that may confer upon it advantages in a contract award procedure;

19) an economic operator which was involved in the preparation of a given contract award procedure or whose employee, as well as a person working based on a mandatory contract, a contract to perform a specific task, a contract of agency or another service provision contract, was involved in the preparation of such a procedure, unless the distortion of competition thus caused can be remedied otherwise than by excluding that economic operator from participation in that procedure;

20) an economic operator which has entered into an agreement with other economic operators aimed at distorting competition between economic operators in a contract award procedure, as the contracting authority is able to demonstrate using appropriate means of proof;

21) an economic operator being a collective entity which has been prohibited by the court from tendering for public contracts pursuant to the Act of 28 October 2002 on the Liability of Collective Entities for Acts Prohibited under Penalty (Journal of Laws of 2016, item 1541 and of 2017, items 724 and 933);

22) an economic operator which has been prohibited from tendering for public contracts as a precautionary measure;

23) economic operators which, being part of the same capital group within the meaning of the Act of 16 February 2007 on Competition and Consumer Protection (Journal of Laws of 2017, items 229,

security or health insurance contributions;

- Act of 16 February 2007 on Competition and Consumer Protection (Journal of Laws of 2017, items 229, 1089 and 1132);
- Restructuring Law Act of 15 May 2015 (Journal of Laws of 2016, items 1574, 1579, 1948 and 2260);
- Bankruptcy Law Act of 28 February 2003 (Journal of Laws of 2016, items 2171, 2260 and 2261 and of 2017, item 791);
- Provisions of (i) labour law, (ii) environmental protection law or (iii) social security law whose violation may result in imposing a financial penalty on the tenderer.

1089 and 1132), have submitted separate tenders, partial tenders, or requests to participate in a procedure, unless they demonstrate that the links between them do not lead to a distortion of competition in the given contract award procedure.

2. – 3. (repealed).

4. The tender of an excluded economic operator is considered to be rejected.

5. A contracting authority may exclude from a contract award procedure an economic operator:

1) in respect of which a liquidation process has been initiated, an arrangement in restructuring proceedings approved by the court provides for the satisfaction of creditors through the liquidation of its property or the court has ordered the liquidation of its assets under Article 332.1 of the Restructuring Law Act of 15 May 2015 (Journal of Laws of 2016, items 1574, 1579, 1948 and 2260), or which has been declared bankrupt, except for an economic operator which, following the declaration of bankruptcy, has concluded an arrangement approved by a final and binding court decision, where the arrangement does not provide for the satisfaction of creditors through the liquidation of the bankrupt's assets, unless the court has ordered the liquidation of its assets under Article 366.1 of the Bankruptcy Law Act of 28 February 2003 (Journal of Laws of 2016, items 2171, 2260 and 2261 and of 2017, item 791);

2) which has culpably committed grave professional misconduct, which renders its integrity questionable, in particular where the economic operator, intentionally or owing to gross negligence, has failed to perform a contract or has performed it improperly, as the contracting authority is able to demonstrate using appropriate means of proof;

3) where the types of relationship specified in Article 17.1 (2) to (4) exist between the economic operator or the persons referred to in paragraph 1 (14), authorised to represent the economic operator, and:

a) the contracting authority,

b) persons authorised to represent the contracting authority,

c) members of the tender committee,

d) persons who have submitted the declaration referred to in Article 17.2a

- unless it is possible to ensure the impartiality of the contracting

authority otherwise than by excluding the economic operator from participation in the procedure;

4) which, for reasons attributable to it, has failed to perform or has performed to a considerable degree improperly an earlier public procurement contract or a concession contract concluded with a contracting authority referred to in Article 3.1 (1) to (4), which resulted in the termination of the contract or in granting damages;

5) being a natural person who has been convicted by final judgment for a delinquency against the rights of employees or a delinquency against the environment, where that delinquency was punished by custody, restriction of personal liberty, or a fine of not less than PLN 3,000;

6) where an active member of its management or supervisory body, a partner in a registered partnership or a professional partnership or a general partner in a limited partnership or a limited joint-stock partnership, or a proxy has been convicted by final judgment for a delinquency referred to in subparagraph (5);

7) subject to a final administrative decision on the breach of obligations arising from labour law, environmental protection law or social security legislation, where that decision imposed a financial penalty of not less than PLN 3,000;

8) which is in breach of obligations relating to the payment of taxes or social security or health insurance contributions, as the contracting authority is able to demonstrate using appropriate means of proof, except for the case referred to in paragraph 1 (15), unless the economic operator has paid the taxes or social security or health insurance contributions due along with the interest or fines or has entered into a binding agreement concerning the payment of those amounts due.

6. Where a contracting authority intends to exclude an economic operator pursuant to paragraph 5, it shall indicate the grounds for exclusion in the contract notice, in the terms of reference, or in the invitation to negotiate.

7. An economic operator shall be excluded:

1) in the cases referred to in paragraph 1 (13) (a) to (c) and paragraph 1 (14), where a person referred to in those provisions has been convicted of a criminal offence listed in paragraph 1 (13) (a) to (c) where less than 5 years has passed from the date on which a judgment confirming the existence of one of the grounds for exclusion became final, unless another period of exclusion was

<p>determined in that judgment;</p> <p>2) in the cases referred to in:</p> <p>a) paragraph 1 (13) (d) and paragraph 1 (14), where a person referred to in those provisions has been convicted of a criminal offence listed in paragraph 1 (13) (d),</p> <p>b) paragraph 1 (15),</p> <p>c) paragraph 5 (5) to (7)</p> <p>- where less than 3 years has passed from, as appropriate, the date on which a judgment confirming the existence of one of the grounds for exclusion became final, unless another period of exclusion was determined in that judgment, or the date on which a decision confirming the existence of one of the grounds for exclusion became final;</p> <p>3) in the cases referred to in paragraph 1 (18) and (20) or paragraph 5 (2) and (4), where less than 3 years has passed from the date of the occurrence of the event being the ground for exclusion;</p> <p>4) in the case referred to in paragraph 1 (21), where the period of the prohibition on tendering for public contracts set by a final judgment has not elapsed;</p> <p>5) in the case referred to in paragraph 1 (22), where the period of the prohibition on tendering for public contracts has not elapsed.</p> <p>8. An economic operator subject to exclusion pursuant to paragraph 1 (13) and (14) and (16) to (20) or paragraph 5 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability, in particular prove that it has remedied damage caused by the criminal offence or fiscal offence, paid financial compensation for the damage suffered or remedied the damage, clarified the facts and circumstances in a comprehensive manner, and actively collaborated with the law enforcement authorities, and taken concrete technical, organisational, and personnel measures that are appropriate to prevent further criminal offences or fiscal offences or misconduct on the part of the economic operator. The provision of the first sentence shall not be applied where a prohibition on tendering for public contracts has been imposed by a final judgement in respect of an economic operator being a collective entity and the period of that prohibition determined in that judgment has not elapsed.</p>			
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<p>9. An economic operator shall not be subject to exclusion where the contracting authority, taking into account the gravity and the specific circumstances of the act of that economic operator, considers evidence provided under paragraph 8 as sufficient.</p> <p>10. In the cases referred to in paragraph 1 (19), before excluding an economic operator the contracting authority shall give that economic operator the opportunity to prove that its involvement in preparing the contract award procedure is not capable of distorting competition. The contracting authority shall indicate the measures taken to ensure competition in the procedure record.</p> <p>11. An economic operator, within 3 days from the date of the provision of the information referred to in Article 51.1a, Article 57.1, or Article 60d.1 or from the publication of the information referred to in Article 86.5 on the website, shall submit to the contracting authority a declaration on the membership or non-membership of the same capital group, referred to in paragraph 1 (23). Along with the submission of a declaration, an economic operator may provide evidence that its links with another economic operator do not lead to a distortion of competition in a given contract award procedure.</p> <p>12. A contracting authority may exclude an economic operator at each stage of a contract award procedure.</p>			
<p>Possible elements of legal uncertainty (better if already dealt with in national courts)</p>	<p><u>The relation between the grounds for exclusion stipulated in Article 24 para. 1 subpara. 16 and subpara. 17 of the PPL</u></p> <p>According to the case law of the NAC, Article 24 para. 1 subpara. 16 of the PPL constitutes a qualified form of misleading the contracting authority and consequently is wider than Article 24 para. 1 subpara. 17 of the PPL (see e.g. KIO 2010/18)</p> <p><u>Is the contracting authority obliged to issue a request to the tenderer to provide means necessary to conduct a self-cleaning procedure?</u></p> <p><u>How to assess the technical, organisational, and personnel measures applied by the tenderer and determine if these measures are appropriate to prevent further criminal offences or fiscal offences or misconduct on the part of the tenderer?</u></p>		
<p>Example of application from the national level (where applicable)</p>	<p>Application of Article 24 para. 1 and 7-12 of the PPL is obligatory in every tender procedure.</p> <p>The contracting authority may apply certain or all the grounds for exclusion listed in Article 24 para. 5 of the PPL provided that it has stipulated this grounds in the tender documentation in accordance with Article 24 para. 6 of the PPL.</p>		

Article 67 of the Directive ► Article 91 of the PPL

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>91. 1. <i>The contracting entity selects the most advantageous tender on the basis of the evaluation criteria determined in the terms of reference.</i></p> <p>2. <i>The tender assessment criteria shall be the price or cost or the price or cost and other criteria linked to the subject of the contract, in particular:</i></p> <p>1) <i>quality, including technical parameters, aesthetic and functional characteristics;</i></p> <p>2) <i>social aspects, including the professional and social integration of the persons referred to in Article 22.2, accessibility for persons with disabilities or addressing the needs of users;</i></p> <p>3) <i>environmental aspects, including energy efficiency of the subject of the contract;</i></p> <p>4) <i>innovation aspects;</i></p> <p>5) <i>organisation, professional qualifications and experience of persons assigned to performing the contract, where they can have a significant impact on the quality of performance of the contract;</i></p> <p>6) <i>after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.</i></p> <p>2a. <i>The contracting authorities referred to in Article 3.1 (1) and (2) and their associations may apply the price criterion as the only tender assessment criterion or a criterion with a weighting greater than 60% provided that they specify in the description of the subject of the contract quality standards relating to all essential characteristics of the subject of the contract and evidence in an annex to the procedure record how the costs over the life cycle are accounted for in the description of the subject of the contract, with the exception of Article 72.2 and Article 80.3.</i></p>	<p><u>Article 2 subpara. 1, 1a and 5 of the PPL</u></p> <p>2. <i>For the purposes of this Act: (...)</i></p> <p>1) <i>price - shall mean price within the meaning of Article 3.1 (1) and Article 3.2 of the Act of 9 May 2014 on Information on Prices of Goods and Services (Journal of Laws item 915 and of 2016, item 1823);</i></p> <p>1a) <i>life cycle - shall mean all consecutive or interlinked stages of the existence of the supplied item, service, or construction work, in particular research and development, industrial design, testing, production, transport, use, repair, modernisation, modification, maintenance throughout the period of existence, logistics, training, wear and tear, demolition, withdrawal, and disposal;</i></p> <p>5) <i>the most advantageous tender - this shall mean a tender:</i></p> <p>a) <i>offering the most advantageous ratio of the price or cost to other criteria related to the subject of a given public contract, in particular in the case of contracts concerning creative or research activity where the subject of the contract cannot be defined in an unambiguous and exhaustive way in advance, or a tender which best meets the criteria other than price or cost where the price or cost is fixed, or</i></p> <p>b) <i>offering the lowest price or cost where the price or cost is the only criterion;</i></p> <p><u>Article 36 para. 1 subpara. 13 of the PPL</u></p> <p>36. 1. <i>The terms of reference shall at least contain: (...)</i></p> <p>13) <i>a description of the criteria that the</i></p>	<p>The list of potential criteria is open. The contracting authority may set other criteria with the observance of the principle that they relate to the subject of the contract.</p> <p>The price or cost must always be the criterion for the evaluation of tenders, although not necessarily the criterion of the highest weight. The use of the price criterion is limited for the contracting authorities which are the units of the public finance sector and their associations.</p> <p>The criteria for the evaluation of tenders may not concern the contractor's characteristics in particular, its economic, technical or financial reliability.</p>	<p><u>Act of 9 May 2014 on Informing about Prices of Goods and Services (Consolidated text Journal of Laws Dz. U. of 2017, item 1830 as amended)</u></p>

<p>2b. Contracting authorities may set out a fixed price or cost where a fixed price or cost has been established by generally applicable regulations or by a competent authority. In such cases, tenders shall be selected based on assessment criteria other than the price.</p> <p>2c. Tender assessment criteria shall be linked to the subject of the contract where they are linked to the construction works, supplies, or services to be provided under that contract in all aspects and in relation to particular stages of their life cycle, including the process of production, delivery and marketing, even where they are not essential characteristics of the subject of the contract.</p> <p>2d. Contracting authorities shall establish tender assessment criteria in an unambiguous and clear manner enabling the verification of information provided by economic operators.</p> <p>3. Tender evaluation criteria may not concern the economic operator's properties, in particular his economic, technical or financial credibility.</p> <p>(...)</p>	<p>contracting authority is to consider in the tender selection process, including the specification of the weighting given to those criteria and the method for tender assessment, and where weighting is not possible for objective reasons, the contracting authority shall indicate the tender assessment criteria in descending order of importance;</p> <p><u>Article 91 para 4-6 of the PPL</u></p> <p>4. Where it is impossible to select the most advantageous tender due to the fact that two or more tenders offer the same ratio of the price or cost to other tender assessment criteria, the contracting authority shall select from among those tenders the tender with the lowest price or the lowest cost, and where tenders with the same price or cost have been submitted, the contracting authority shall request the economic operators which submitted those tenders to submit additional tenders within a time limit stipulated by the contracting authority.</p> <p>5. Where in a contract award procedure in which one of the tender assessment criteria is the price or cost it is impossible to select the most advantageous tender due to the fact that tenders with the same price or cost have been submitted, the contracting authority shall request the economic operators which submitted those tenders to submit additional tenders within a time limit stipulated by the contracting authority.</p> <p>5a. Where in a contract award procedure in which one of the tender assessment criteria is the cost, understood as the sum of the acquisition cost and other life cycle costs, it is impossible to select the most advantageous tender due to the fact that tenders with the same price or cost have been submitted, the contracting authority shall select the tender:</p>		
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	<p>1) with a lower acquisition cost or 2) with lower other life cycle costs - where it provided for such a possibility in the terms of reference.</p> <p>6. Submitting additional tenders, economic operators shall not offer prices or costs higher than those offered in the tenders submitted. (...)</p> <p>8. The minister responsible for the economy shall determine, by regulation, tender evaluation criteria other than the price criterion relating to certain types of public contracts, in order to implement relevant legal provisions of the European Union and taking into account the specific nature or objective of a public contract.</p> <p><u>Regulation of the President of The Council of Ministers of 10 May 2011 on Other Than the Price Mandatory Criteria for the Evaluation of Tenders for Certain Types of Public Procurement (Journal of Laws Dz. U. No. 96, item 559)</u> which stipulates the mandatory criteria for the evaluation of offers in relation to public procurement for the purchase of motor vehicles of categories "M" and "N".</p>		
<p>Possible elements of legal uncertainty (better if already dealt with in national courts)</p>	<p><u>The linkage with the subject-matter of the contract</u> <u>The admissibility of quality criteria which may be evaluated differently by particular members of the tendering committee (e.g. the criterion of taste)</u></p>		
<p>Example of application from the national level (where applicable)</p>	<p>The PPO has published the study <i>Examples of social and environmental criteria for the evaluation of offers in public procurement</i> (Polish: <i>Przykładowe społeczne i środowiskowe kryteria oceny ofert w zamówieniach publicznych</i>, B. Brańko, M. Skowron, K. Ołdak- Bułanowska (authors), M. Olejarz (editor), source: https://www.uzp.gov.pl/data/assets/pdf_file/0016/38311/Przykladowe-spoeczne-i-srodowiskowe-kryteria-oceny.pdf)</p>		

Article 69 of the Directive ► Article 90 of the PPL

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>90. 1. Where the price or cost offered or its significant parts seem to be abnormally low in relation to the subject of the contract and raise doubts of the contracting authority as to the possibility of performing the subject of the contract in accordance with the requirements defined by the contracting authority or arising from separate regulations, the contracting authority shall request explanations, including the provision of evidence relating to the calculation of the price or cost, in particular within the scope:</p> <p>1) the cost effectiveness of the method of performing the contract, selected technical solutions, exceptionally favourable conditions of performing the contract available to the economic operator, originality of the project of the economic operator, labour costs whose value assumed for the purpose of setting the price shall not be lower than the minimum wage determined pursuant to the provisions of the Act of 10 October 2002 on the Minimum Wage (Journal of Laws of 2017, item 847);</p> <p>2) public aid granted pursuant to separate regulations;</p> <p>3) arising from the provisions of labour law and social security legislation being in force in the place where the contract is to be performed;</p> <p>4) arising from the provisions of environmental protection law;</p> <p>5) entrusting the performance of part of the contract to a subcontractor.</p> <p>1a. Where the total price of a tender is at least 30% lower than:</p> <p>1) the value of the contract, established prior to the initiation of the procedure in accordance with Articles 35.1 and 35.2, plus the tax on goods and services due, or the arithmetical mean of the prices of all tenders submitted, the contracting authority shall request the explanations referred to in paragraph 1, unless that discrepancy stems from obvious circumstances which do not require explanation;</p> <p>2) the value of the contract plus the tax on goods and services due, updated taking into account the circumstances which occurred after the initiation of the procedure, in particular</p>	<p>Article 89 para. 1 subpara. 4 of the PPL</p> <p>1. The contracting entity rejects tenders that: (...)</p> <p>4) contain an abnormally low price or cost in relation to the subject of the contract;</p>	<p>Article 90 para 1 of the PPL: (i) obliges the contracting authority to ask for explanations when the price or cost appears abnormally low and raise doubts as to the feasibility of the contract, and (ii) entitles the contracting authority to request clarification when it develops concerns regarding the reliability of the price or cost calculation.</p> <p>The ordering party must question these doubts (except for the special circumstances indicated in para. 1a), when the tender price is 30% lower than the estimated contract value plus VAT or the arithmetic mean of all submitted tenders.</p> <p>The assessment should also regard the tender the important component of which has been valued in a way that raises doubts.</p> <p>Pursuant to Article 90 para. 2 of the PPL the burden of proof that the tender does not contain an abnormally low price or cost lies with the tenderer.</p> <p>Article 90 para 3 of the PPL obliges contracting authorities to reject abnormally low tenders or tenders submitted by tenderers which do not provide a sufficient explanation at the contracting authority's request.</p>	<ul style="list-style-type: none"> - <u>Act of 10 October 2002 on the Minimum Wage (Consolidated text Journal of Laws Dz. U. of 2017, item 847):</u> - <u>Act on 30 April 2004 on Proceedings in Matters Concerning State Aid (Consolidated text Journal of Laws Dz. U. of 2018, item 362).</u>

<p><i>material changes in market prices, the contracting authority may request the explanations referred to in paragraph 1.</i></p> <p><i>2. The obligation to demonstrate that a tender does not contain an abnormally low price or cost is incumbent upon the economic operator.</i></p> <p><i>3. A contracting authority shall reject the tender of an economic operator which has not provided explanations or where the assessment of the explanations and the evidence provided confirms that the tender contains an abnormally low price or cost in relation to the subject of the contract.</i></p> <p><i>4. Where the value of a contract is equal to or greater than the amounts specified in regulations issued pursuant to Article 11.8, the contracting authority shall notify the President of the Office and the European Commission of the rejection of tenders which, in the opinion of the contracting authority, contain an abnormally low price or cost due to public aid granted, and the economic operator has not proved, within the time limit stipulated by the contracting authority, that that aid is lawful within the meaning of regulations on the procedural issues concerning public aid.</i></p>			
<p>Possible elements of legal uncertainty (better if already dealt with in national courts)</p>	<p><u>Definition of “an abnormally low tender”</u></p> <p><u>Definition of “obvious circumstances which do not require explanation”</u></p> <p>The NAC has recently ruled that such circumstances appear for example when the value of the contract determined by the contracting authority prior to the tender proceeding was set at a significantly higher level (overestimated) than it would result from market realities, and the tenders submitted in the tender confirm this situation (see KIO 1968/18).</p> <p><u>Is it admissible to request additional clarifications from the tenderer</u></p> <p>The NAC explains that the contracting authority may call for supplementary explanations only exceptionally. It cannot ask for explanations again from the contractor, who only gave the ordering authority a response, but whose original explanations, due to their vagueness, do not explain where the price of the offer comes from (see KIO 1827/18). Additionally, according to the NAC’s case law, re-explanations cannot modify the explanations originally provided as this would change the declaration of intent originally made by the contractor. Such an action could lead to a breach of the principle of equal treatment of contractors and fair competition (see e.g. KIO 1825/18).</p>		
<p>Example of application from the national level (where applicable)</p>	<p>Application of Article 90 of the PPL is mandatory.</p>		

Article 70 of the Directive ► Article 29 para. 4 of the PPL

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>29. (...) 4. <i>In the description of the subject of a contract, the contracting authority may set out requirements related to the performance of the contract, which may include economic, environmental, social, innovation, or employment aspects, in particular concerning the employment of:</i></p> <p>1) <i>the unemployed within the meaning of the Act of 20 April 2004 on the Promotion of Employment and on Labour Market Institutions;</i></p> <p>2) <i>adolescent persons referred to in the provisions of labour law, for the purpose of professional training;</i></p> <p>3) <i>disabled persons within the meaning of the Act of 27 August 1997 on the Vocational Rehabilitation, Social Resettlement, and Employment of Disabled Persons;</i></p> <p>4) <i>persons other than those specified in subparagraphs 1, 2, or 3, referred to in the Social Employment Act of 13 June 2003 (Journal of Laws of 2016, item 1828) or in the relevant regulations of the Member States of the European Union or of the European Economic Area.</i></p>	<p><u>Article 36 para 2 subpara. 9 of the PPL:</u></p> <p>36. (...) 2. <i>Unless otherwise provided for by this Act, the terms of reference shall also contain the following: (...)</i></p> <p>9) <i>where the contracting authority provides for the requirements referred to in Article 29.4, the specification of, in particular:</i></p> <p>a) <i>the number and the period of the required employment of persons whom those requirements concern,</i></p> <p>b) <i>the powers of the contracting authority relating to the control of the fulfilment of the requirements referred to in Article 29.4 by the economic operator and to penalties for non-compliance with those requirements;</i></p>	<p>Contracting authorities are allowed to set additional conditions for performance of contracts linked to their subject matter.</p> <p>The additional requirements may include economic, environmental, social, innovation, or employment aspects.</p> <p>The employment conditions for performance of the contract may (among others) concern employment of members of the groups listed in article 29 para. 4 of the PPL. The list is open and the contracting authority may refer to other marginalised groups.</p>	<ul style="list-style-type: none"> – <u>Act of 20 April 2004 on the Promotion of Employment and on Labour Market Institutions (Consolidated text Journal of Laws of 2018, item 1265 as amended)</u> – <u>Act of 27 August 1997 on the Vocational Rehabilitation, Social Resettlement, and Employment of Disabled Persons (Consolidated text Journal of Laws of 2018, item 511 as amended)</u> – <u>Social Employment Act of 13 June 2003 (Consolidated text Journal of Laws of 2016, item 1828 as amended)</u>
<p>Possible elements of legal uncertainty (better if already dealt with in national courts)</p>	<p><u>What kind of “social aspects” other than obligation to employ members of particular marginalised group may be recognized as related to the performance of the contract?</u></p>		
<p>Example of application from the national level (where applicable)</p>	<p>Application of Article 29 para. 4 of the PPL is voluntary.</p> <p>Examples of good practices are available in the PPO’s publication <i>Good practices in the sustainable public procurement</i> (Polish: <i>Dobre praktyki w zakresie zrównoważonych zamówień publicznych</i>, J. Pożarowska, M. Olejarsz (editors), source: https://www.uzp.gov.pl/_data/assets/pdf_file/0031/35977/Dobre-praktyki-w-zakresie-zrownowazonych-zamowien-publicznych.pdf)</p>		

Article 71 of the Directive ► Article 36b, Article 36ba, Article 29 para. 3a and Article 143c of the PPL

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p><u>Article 36b of the PPL</u> <i>36b. 1. Contracting authorities shall require that economic operators indicate the lots whose performance they intend to entrust with subcontractors and provide the business names of the subcontractors.</i></p> <p><i>1a. In the case of construction works or service contracts which are to be performed at a site under the direct oversight of the contracting authority, the contracting authority shall require that prior to the commencement of the performance of the contract, the economic operator provide, in so far as known at that point in time, the business names or the names and surnames and the contact details of subcontractors and contact persons involved in such construction works or services. The economic operator shall notify the contracting authority of any changes to the details referred to in the first sentence during the course of the contract and provide information of any new contractors to which it intends to entrust the provision of construction works or services at a later time.</i></p> <p><i>1b. A contracting authority may request the information referred to in paragraph 1a in the case of supply contracts, service contracts other than those concerning services to be provided at a site under the direct oversight of the contracting authority or to contracts with suppliers involved in the performance of construction works or service contracts.</i></p> <p><i>2. Where an economic operator replaces or stops using the services of a subcontractor which is an entity whose resources were claimed by the economic operator in accordance with Article 22a.1, in order to demonstrate the fulfilment of the conditions of participation in a procedure, the economic operator shall be obliged to prove to the contracting authority that another subcontractor proposed or the economic operator itself fulfils them to a degree not smaller than the subcontractor whose resources were claimed by the economic operator during the contract</i></p>	<p><u>Article 2 subpara. 9b of the PPL</u> <i>2. For the purposes of this Act: (...)</i> <i>9b) a subcontract - which shall be understood to mean a paid contract in the written form the object of which are services, supplies or works comprising a part of a public contract, executed between an economic operator selected by the contracting entity and another undertaking (subcontractor) or, in the case of works, also between a subcontractor and subsequent subcontractor or subcontractors;</i></p> <p><u>Article 25a para. 5 of the PPL</u> <i>25a. (...) 5. At the request of the contracting authority, an economic operator which intends to entrust the performance of part of a contract to subcontractors, in order to demonstrate the absence of grounds for the exclusion of those subcontractors from participation in a given procedure, shall:</i></p> <p><i>1) submit single documents concerning the subcontractors - where the value of the contract is equal to or greater than the amounts specified in regulations issued pursuant to Article 11.8;</i> <i>2) include information about the subcontractors in the declaration referred to in paragraph 1 - where the value of the contract is lower than the amounts specified in regulations issued pursuant to Article 11.8.</i></p> <p><u>Section 9 para. 3 of the Regulation of the President of the Council of Ministers of 10 May 2011 on Other Than the Price Mandatory Criteria for the Evaluation of Tenders for Certain Types of Public Procurement (Journal of Laws Dz. U. No. 96, item 559)</u> which refers to the documents regarding the grounds for exclusion:</p>	<p>Contracting authorities ask tenderers to specify which lots of the future contract do they intend to entrust with subcontractors and to provide the business names of these subcontractors.</p> <p>However, it is not obligatory to require and assess declarations and documents regarding the exclusion grounds in relation to subcontractors whose resources were not claimed by the tenderer in accordance with Article 22a para. 1 of the PPL.</p> <p>Article 29 para. 3a of the PPL (see above) applies also to subcontractors' employees.</p> <p>The mechanism of direct payments covers only public contracts for works.</p>	<p><u>Article 36a of the PPL</u> <i>36a. 1. The economic operator may subcontract a part of the contract.</i> <i>2. The contracting entity may stipulate the economic operator's obligation himself to perform:</i></p> <p><i>1) the key part of a contract for works or services;</i> <i>2) works associated with arrangement and installation associated with a contract for supplies.</i></p> <p><i>2a. An economic operator who has been awarded a contract under Article 67.1 (12) to (14) whose subject is the provision of public services or construction works shall be obliged to perform personally the key elements of those services or construction works.</i></p> <p><u>Article 647¹ of the Civil Code Act of 23 April 1964 (Consolidated text Journal of Laws Dz. U. of 2018, item 1025 as amended)</u> which stipulates the joint and several liability of an investor and a contractor (general contractor) for the payment of remuneration due to subcontractor for the construction works performed by the latter, that have been previously notified to the investor.</p>

award procedure.

Article 36ba of the PPL

36ba. 1. Where a subcontractor is entrusted with the performance of part of a construction works or service contract during the implementation of that contract, the economic operator shall, at the request of the contracting authority, present the declaration referred to in Article 25a.1 or declarations or documents confirming the absence of grounds for exclusion in respect of that subcontractor.

2. Where the contracting authority determines that there are grounds for the exclusion of a given subcontractor, the economic operator shall be obliged to replace that subcontractor or not to entrust that subcontractor with the performance of part of the contract.

3. The provisions of paragraphs 1 and 2 shall apply to next-level subcontractors where this has been provided for by the contracting authority in the terms of reference.

4. Entrusting the performance of part of a contract to subcontractors shall not release the economic operator from its responsibility for the proper performance of that contract.

Article 29 para. 3a of the PPL

3a. In the description of the subject of a service or construction works contract, the contracting authority shall define requirements concerning the employment by a contractor or subcontractor, on the basis of employment contracts, of persons carrying out activities related to the performance of the contract indicated by the contracting authority, where carrying out those activities consists in carrying out work in the manner described in Article 22 § 1 of the Labour Code Act of 26 June 1974 (...).

Article 143c of the PPL

1. The contracting entity makes a direct payment of the remuneration due to a subcontractor or subsequent subcontractor who entered into a subcontract for works approved by the contracting entity or who entered into a subcontract for supplies or services a copy of which was delivered to the contracting entity, if the economic

§ 9 (...) 3. The contracting authority may require the contractor to submit the documents mentioned in § 5 para. 1-9 concerning the subcontractor, which it intends to entrust the performance of a part of the contract, which is not an entity whose capacity or situation the contractor relies on the principles set out in Article. 22a of the Act.

Article 143b of the PPL, especially para. 1- 2 and para. 5-8

143b 1. The economic operator, subcontractor or subsequent subcontractor of a contract for works intending to enter into a subcontract for works shall, during the period of implementation of a public contract for works, deliver to the contracting entity a draft copy of this contract, and the subcontractor or subsequent subcontractor shall deliver the economic operator's approval of a subcontract whose content is consistent with the draft contract.

2. The payment date of remuneration due to a subcontractor or subsequent subcontractor set forth in a subcontract shall not exceed 30 days from the delivery to the economic operator, a subcontractor or subsequent subcontractor of an invoice or bill confirming performance of a subcontracted supply, service or work. (...)

5. The economic operator, subcontractor or subsequent subcontractor of a contract for works delivers to the contracting entity a copy of a subcontract for works, confirmed for compliance with the original, within 7 days of the date of execution.

6. The contracting entity, within the time limit determined in accordance with Article 143d.1 (2), delivers in written form objections to a draft subcontract for works.

7. If no objections are delivered in written form to a draft subcontract for works within the period determined in accordance with Article 143d.1

<p>operator, subcontractor or subsequent subcontractor of a contract for works, respectively, avoids the obligation to pay the remuneration.</p> <p>2. The remuneration referred to in paragraph 1 concerns only liabilities incurred after the contracting entity's approval of a subcontract for works or after delivery to the contracting entity of a copy of a subcontract for supplies or services, certified for compliance with the original.</p> <p>3. Direct payment applies only to the remuneration due, less any interest payable to the subcontractor or subsequent subcontractor.</p> <p>4. Before making a direct payment, the contracting entity shall enable the subcontractor to submit in written form comments as to whether the direct payment is due to the subcontractor or subsequent subcontractor referred to in paragraph 1. The contracting entity notifies of the time limit to submit comments, no shorter than 7 days from the day of delivery of this information.</p> <p>5. If comments as referred to in paragraph 4 are submitted within the time limit determined by the contracting entity, the contracting entity may:</p> <p>1) abstain from paying remuneration directly to the subcontractor or subsequent subcontractor, if the economic operator proves that such payment is not due, or</p> <p>2) pay to the court deposit the amount required to pay the subcontractor's or subsequent subcontractor's remuneration in the case the contracting entity has serious doubts as to the amount payable or the undertaking to which the payment is due, or</p> <p>3) pay the remuneration directly to the subcontractor or subsequent subcontractor, if the subcontractor or subsequent subcontractor proves that such payment is due.</p> <p>6. In the case of a direct payment to the subcontractor or subsequent subcontractor referred to in paragraph 1, the contracting entity deducts the amount of the remuneration paid from the remuneration due to the economic operator.</p> <p>7. The need to make several direct payments to the</p>	<p>(2), this shall be understood to mean the contracting entity's acceptance of the draft subcontract.</p> <p>8. The economic operator, subcontractor or subsequent subcontractor of a contract for works delivers to the contracting entity a copy of a subcontract for supplies or services, confirmed for compliance with the original, within 7 days of the date of execution, except in the case of subcontracts whose value is less than 0.5% of the value of the public contract and subcontracts the object of which the contracting entity excluded from this obligation in the terms of reference. The exclusion referred to in the first sentence does not apply to subcontracts of a value in excess of PLN 50,000. The contracting entity may determine a lower contractual value for the obligation to deliver copies of subcontracts.</p> <p><u>Article 143d para 1 of the PPL</u></p> <p>143d 1. A contract for works shall include in particular provisions concerning:</p> <p>1) the economic operator's obligation to deliver to the contracting entity a draft subcontract for works as well as amendments thereto and a copy of a subcontract for works executed by him, including amendments thereto, certified for compliance with the original;</p> <p>2) determining the time limit for the contracting entity to submit objections to a draft subcontract for works as well as amendments thereto or objections to a subcontract for works, including amendments thereto;</p> <p>3) the economic operator's obligation to deliver to the contracting entity a copy of subcontracts for supplies or services executed by him, including amendments thereto, certified for compliance with the original;</p> <p>4) the rules for paying the economic operator's remuneration subject to delivery of proofs of</p>		
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<p><i>subcontractor or subsequent subcontractor referred to in paragraph 1 or the need to make direct payments amounting to more than 5% of the value of a public contract may be a basis for the contracting entity to withdraw from the public contract.</i></p> <p><i>8. The provisions of the Civil Code Act of 23 April 1964 shall apply to the joint and several liability of the contracting entity, the economic operator, the subcontractor or the subsequent subcontractor for the construction works completed, unless it is stipulated otherwise in the Act.</i></p>	<p><i>payment of the remuneration due to subcontractors or subsequent subcontractors;</i></p> <p><i>5) the payment dates of the subcontractor's or subsequent subcontractor's remuneration;</i></p> <p><i>6) the rules of executing subcontracts with subsequent subcontractors;</i></p> <p><i>7) the amounts of contractual penalties for:</i></p> <p><i>a) failure to pay or to pay on time the remuneration due to subcontractors or subsequent subcontractors,</i></p> <p><i>b) failure to deliver for approval a draft subcontract for works, including amendments thereto,</i></p> <p><i>c) failure to deliver a copy of a subcontract, including amendments thereto, certified for compliance with the original,</i></p> <p><i>d) not amending a subcontract with respect to payment dates.</i></p>		
<p>Possible elements of legal uncertainty (better if already dealt with in national courts)</p>	<p><u>Does Article 36b para. 1 of the PPL constitute the obligation for the contracting authority?</u></p> <p><u>What are the consequences of failure in providing the list of planned subcontractors by the tenderer?</u></p> <p>According to the NAC's case law, information provided by contractors under Article 36b of the PPL is not binding on them. The offer of the Contractor who has not indicated business names of future subcontractors is not subject to rejection on the basis of non-compliance with the terms of reference. The decision as to whether the contractor will perform the entire subject of the contract alone, or whether he will entrust the performance of a part of the contract to subcontractors, depends on the contractor, and the contractor can also take it after entering into the contract (see e.g. KIO 2320/17).</p>		
<p>Example of application from the national level (where applicable)</p>			

Article 74 of the Directive ► Article 138g para. 1 of the PPL

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
138g. 1. The provisions of this Chapter shall apply to contracts for social services and other specific services, hereinafter referred to as “contracts for social services”, where the value of a contract is equal to or greater than the equivalent in PLN of the following amounts: 1) EUR 750,000 – in the case of contracts other than utilities contracts or contracts in the fields of defence and security; 2) EUR 1,000,000 – in the case of utilities contracts.	<u>Article 138h-138n and 138p – 138s of the PPL</u> (see below in the following sections of the matrix)	As a general rule, the PPL applies to contracts for social services and other specific services if the estimated value of a contract is equal to or above the applicable EU threshold. However, Article 138o of the PPL provides also some general procedural requirements which apply below the EU threshold.	N/A
Possible elements of legal uncertainty (better if already dealt with in national courts)	<u>Is it possible to award contracts for social services and other specific services not in a simplified procedure stipulated in Articles 138h-138n and 138p–138s of the PPL but in a procedure conducted in accordance with the general provisions of the PPL?</u>		
Example of application from the national level (where applicable)	The PPO has published the model rules of procedure for awarding a public contract for social services and other specific services referred to in Art. 138g para.1 of the PPL (source: https://www.uzp.gov.pl/baza-wiedzy/wzorcowe-dokumenty/wzorcowe-regulaminy).		

Article 75 of the Directive ► Article 138i of the PPL

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>138i. 1. Contracting authorities shall commence a social service contract award procedure through a contract notice or a prior information notice. The provisions of Articles 11 to 11c shall apply accordingly.</p> <p>2. A prior information notice may cover a period longer than 12 months.</p> <p>3. The provision of paragraph 1 shall not apply to awarding contracts for social services in the circumstances specified in Article 62.1 and Article 67.1.</p>	<p><u>Articles 11 to 11c of the PPL</u> (apply accordingly)</p> <p>11. 1. Contract notices as referred to in this Act:</p> <p>1) are published in the Public Procurement Bulletin (Polish: <i>Biuletyn Zamówień Publicznych</i>) available on the internet portal of the Public Procurement Office;</p> <p>2) are published in the Official Journal of the European Union if they are forwarded to the Publications Office of the European Union.</p> <p>2. - 4. (repealed).</p> <p>5. The contracting entity may publish a contract notice in the Public Procurement Bulletin, even if, given the value of the contract or design contest, publication of the contract notice in the Bulletin is not required.</p> <p>6. The minister responsible for the economy shall determine, by regulation, the standard forms of contract notices published in the Public Procurement Bulletin, taking into account the respective types of notices and the value of a contract or design contest.</p> <p>7. Where the value of a contract is equal to or greater than the amounts specified in regulations issued pursuant to paragraph 8, the contracting authority shall prepare notices in accordance with the model standard forms established in Commission Implementing Regulation (EU) 2015/1986 of 11 November 2015 establishing standard forms for the publication of notices in the field of public procurement and repealing Implementing Regulation (EU) No 842/2011 (OJ L 296, 12.11.2015, p. 1).</p> <p>7a. Notices shall be dispatched to the Publications Office of the European Union in accordance with the format and procedures for the electronic transmission of notices indicated at the Internet address referred to in paragraph 3 of Annex VIII to Directive 2014/24/EU and paragraph 3 of Annex IX to Directive 2014/25/EU, hereinafter referred to as "Internet address indicated in the Directives".</p> <p>7b. Notices in the Public Procurement Bulletin shall be published by electronic means of communication using forms available on the</p>	<p>The general PPL's rules regarding publication of contract notices and prior information notices apply accordingly to the contracts for social services and other specific services.</p> <p>There is no obligation to publish a prior notice when any of the grounds for application of: (i) a negotiation procedure without prior notice or (ii) a single-source procurement procedure stipulated in Article 62 para. 1 and Article 67 para. 1 of the PPL are met.</p>	<p>N/A</p>

website of the Office.

7c. Contracting authorities may additionally publish a notice otherwise than in the manner specified in paragraph 1, in particular in the nationwide press.

7d. The publication of notices in the manner referred to in paragraph 5, in the case of notices subject to the requirement of publication in the Official Journal of the European Union and notices referred to in paragraph 7c, shall not take place before their publication in the Official Journal of the European Union or within 48 hours after confirmation of the receipt of the notice by the Publications Office of the European Union.

7e. The notices referred to in paragraph 7d shall not contain information other than that contained in the notices dispatched to the Publications Office of the European Union. The date of dispatch of a given notice to the Publications Office of the European Union shall be indicated in that notice.

8. The minister responsible for the economy shall determine, by regulation, the value of contracts and design contests whose notices must be forwarded to the Publications Office of the European Union, while taking into account relevant European Union legislation.

11a. Contracting authorities shall be obliged to document:

- 1) the publication of a notice in the Public Procurement Bulletin, in particular to keep proof of its publication;
- 2) the publication of a notice in the Official Journal of the European Union, in particular to keep proof of sending that notice to the Publications Office of the European Union.

11b. 1. Contracting authorities may dispatch to the Publications Office of the European Union notices that are not subject to the requirement of publication in the Official Journal of the European Union due to the value of the contract or design contest concerned. The provisions of Article 11.7 and Article 11.7a shall apply accordingly.

2. Having published a contract notice, contracting authorities may inform directly economic operators which they know and whose activity includes supplies, services, or construction works being the subject of the contract about the initiation of a contract award procedure.

11c. A contracting authority may amend a notice by publishing a

	<i>correction or a notice on amendment. The provisions of Articles 11.7 to 11.7d and Article 11a shall apply accordingly.</i>		
Possible elements of legal uncertainty (better if already dealt with in national courts)	How to apply Articles 11-11c of the PPL “accordingly”?		
Example of application from the national level (where applicable)	N/A		

Article 76 of the Directive ► Article 138k, Article 138l, Article 138m, Article 138n, Article 138q, Article 138r and Article 138s of the PPL

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p><u>Article 138k of the PPL</u> <i>Contracting authorities shall define the manner of conduct of a social service contract award procedure, taking into account the mandatory procedure elements specified in this Chapter and the principles of equal treatment and competition, transparency, and proportionality, as well the provisions of Article 17 and Article 18. The provision of Article 93 shall apply accordingly.</i></p> <p><u>Article 138l of the PPL</u> <i>A social service contract award procedure shall be conducted applying the provisions of SECTION I Chapter 2a, SECTION II Chapter 5, SECTION V Chapter 3, and SECTION VI.</i></p> <p><u>Article 138m of the PPL</u> <i>The provisions of Articles 22 to 22d, Article 24, Articles 29 to 30b, and Articles 32 to 35 shall apply accordingly to contracts for social services.</i></p> <p><u>Article 138n of the PPL</u> <i>Contracting authorities may conduct a social service contract award procedure in which:</i></p> <ol style="list-style-type: none"> <i>1) in response to a notice, all interested economic operators submit tenders along with information confirming that they are not subject to exclusion and that they fulfil the conditions of participation in the procedure or</i> <i>2) in response to a notice, all interested economic operators submit requests to participate in the procedure along with information confirming that they are not subject to exclusion and that they fulfil the conditions of participation in the procedure, or</i> <i>3) they conduct negotiations with economic operators admitted to participate in the procedure.</i> <p><u>Article 138q of the PPL</u> <i>Contracting authorities shall fix a time limit for the submission of tenders or requests to participate in a given procedure taking into account the complexity of the subject of the contract and the time needed to prepare and submit tenders or requests.</i></p>	<p>N/A</p>	<p>Contracting authorities shall define the manner of conduct of a social service contract award procedure. However, Articles 138k – 138n and 138p - 138s indicate general regulations of the PPL that should be applied accordingly.</p> <p>The principles of equal treatment and competition, transparency, and proportionality, as well the provisions of Article 17 (circumstances in which certain persons are not allowed to conduct the contract award procedure and Article 18 (liability of a head of the contracting authority) apply without any modifications.</p>	<p>N/A</p>

<p><u>Article 138r of the PPL</u></p> <p>1. A contracting authority shall reject a tender in the cases specified in Article 89.</p> <p>2. A contracting authority shall also reject tenders in cases other than those specified in Article 89 where it provided for additional grounds for rejecting tenders in the contract notice or in the terms of reference.</p> <p>3. A contracting authority shall select the most advantageous tender which offers the most advantageous ratio of the price or cost to other criteria, in particular the quality and sustainability of social services, the continuity or accessibility of a given service or the criterion of the degree to which specific needs of the service user are addressed.</p> <p><u>Article 138s of the PPL</u></p> <p>1. Having awarded a contract for social services, the contracting authority shall have a contract award notice published. The provisions of Article 95.2 shall apply accordingly.</p> <p>2. Contracting authorities may group contract award notices on a quarterly basis and have them published within 30 days of the last day of each quarter.</p>			
<p>Possible elements of legal uncertainty (better if already dealt with in national courts)</p>	<p><u>How to apply general provisions of the PPL “accordingly”?</u></p>		
<p>Example of application from the national level (where applicable)</p>	<p>As mentioned above, the PPO has published the model rules of procedure for awarding a public contract for social services and other specific services referred to in Art. 138g para.1 of the PPL (source: https://www.uzp.gov.pl/baza-wiedzy/wzorcowe-dokumenty/wzorcowe-regulaminy).</p>		

Article 77 of the Directive ► Article 138p of the PPL

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>138p. 1. <i>A contracting authority may reserve in a contract notice the right to participate in procedures for the award of contracts for health, social, and cultural services covered by CPV codes 75121000-0, 75122000-7, 75123000-4, 79622000-0, 79624000-4, 79625000-1, 80110000-8, 80300000-7, 80420000-4, 80430000-7, 80511000-9, 80520000-5, 80590000-6, from 85000000-9 to 85323000-9, 92500000-6, 92600000-7, 98133000-4, 98133110-8, defined in the Common Procurement Vocabulary, exclusively for economic operators which fulfil all of the following conditions:</i></p> <p><i>1)the objective of their activity is the fulfilment of public service tasks linked to the delivery of these services and the social and professional integration of persons referred to in Article 22.2;</i></p> <p><i>2)they do not operate for the purpose of making profit, they use all their profits to achieve their statutory objectives, and they do not share their profits among their shareholders and employees;</i></p> <p><i>3)their structure of management or their structure of ownership is based on employee ownership or participatory principles, or requires the active participation of employees, users or stakeholders, as specified by the economic operators in their articles of association;</i></p> <p><i>4)within the past three years preceding the date of the commencement of the social service contract award procedure, they have not been awarded a contract pursuant to this provision by the same contracting authority.</i></p> <p>2. <i>In the cases referred to in paragraph 1, the maximum duration of a public procurement contract shall not be longer than 3 years.</i></p>	<p>N/A</p>	<p>Article 138p applies exclusively to public contracts for health, social, and cultural services covered by CPV codes 75121000-0, 75122000-7, 75123000-4, 79622000-0, 79624000-4, 79625000-1, 80110000-8, 80300000-7, 80420000-4, 80430000-7, 80511000-9, 80520000-5, 80590000-6, from 85000000-9 to 85323000-9, 92500000-6, 92600000-7, 98133000-4, 98133110-8, defined in the Common Procurement Vocabulary.</p> <p>The reservation is addressed to tenderers which meet all of the conditions stipulated in Article 138p para 1 subpara. 1- 4 of the PPL.</p> <p>The maximum duration of a reserved contract shall not be longer than 3 years.</p>	<p>See comments on Article 22 para. 2 and 2a of the PPL above.</p>
<p>Possible elements of legal uncertainty (better if already dealt with in national courts)</p>	<p>What is the relation between Article 138p of the PPL and Article 22 para. 2 and 2a of the PPL?</p> <p><u>Is it possible to award a contract: (i) for services listed in Article 138p para. 1 of the PPL or (ii) for other social services and other specific services which are not listed in this Article pursuant to Article 22 para. 2 and 2a of the PPL?</u></p>		
<p>Example of application from the national level (where applicable)</p>			