
REJECTION OF AN OFFER DUE TO NON-COMPLIANCE WITH THE TERMS OF THE CONTRACT – UNDER POLISH PUBLIC PROCUREMENT LAW

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ABSTRACT

This paper discusses the legal framework governing the rejection of bids in Polish public procurement proceedings due to non-compliance with the contracting authority's requirements. The contracting authority, as the organizer of the procedure, is entitled to define the subject matter of the contract in line with its objective needs. Economic operators must align their offers with these specifications. Under Article 226(1)(5) of the Polish Public Procurement Law (PPL), any offer whose content diverges – whether better or worse – from the defined conditions must be rejected. Case law of the National Appeals Chamber (NAC) emphasizes that such non-compliance must concern substantive requirements, including scope, quality, quantity, and execution conditions. Importantly, the contracting authority must precisely demonstrate which elements of the offer fail to meet the stipulated conditions and provide both factual and legal justification in its rejection notice. Mere assumptions, subjective interpretations, or vague evidence cannot justify rejection; the discrepancy must be clear, specific, and based on unequivocal contractual provisions. Allowing rejections based on general or speculative grounds would undermine fundamental principles of public procurement, including transparency, equal treatment, and the obligation to select the most advantageous offer.

Introduction

The contracting authority, as the organizer and host of public procurement proceedings, is vested with the right to describe the subject matter of the contract – namely, precisely what it intends to procure and obtain – in accordance with its own objective and legitimate needs (of course, assuming that the description of the subject of the contract meets the requirements specified in the Public Procurement Law). This prerogative stems from the fundamental principle that the authority, being the entity responsible for the use of public funds and the proper execution of tasks of public interest, must be allowed to define the parameters of the goods, works, or services it requires. In turn, the role of the economic operator seeking to obtain the award of the contract is to align itself with the contracting authority's needs and to offer exactly what has been described and required in the procurement documentation.

Legislative basis and jurisprudence

Situations arise in which economic operators submit offers that concern a subject matter different – regardless of whether inferior, superior, or merely divergent – from that which the contracting authority has specified. The Polish legislator has expressly anticipated such scenarios and determined that they must result in the rejection of the offer. This obligation is clearly set out in Article 226(1)(5) of the Polish Public Procurement Law (PPL), which provides that the contracting authority shall reject an offer if its content does not comply with the terms of procurement. The jurisprudence of the National Appeals Chamber (NAC) has provided interpretative guidance on the scope and application of this provision.

As indicated in the case law of the NAC, *„under Article 7(29) of the Public Procurement Law, contract terms should be understood as, among other things, conditions arising from the description of the subject matter of the contract, which means that the content of the bids submitted by economic operators should be compared to the requirements set by the contracting authority. This refers to the substantive requirements, including the scope, quantity, quality, terms of implementation, and other elements that are essential for the performance of the contract to a degree that satisfies the expectations described by the contracting authority, as well as the substantive aspect of the service offered by the economic operator. For these reasons, in order to apply this provision, it should be possible to demonstrate which substantive element of the bid is inconsistent with the requirements described by the contracting authority and what this inconsistency consists of. To reject a bid*

under the aforementioned Article 226(1)(5) of the Public Procurement Law, it is necessary to establish and demonstrate that the content of the bid is inconsistent with the specifications specified in the Technical Specifications, provided that the alleged discrepancy cannot raise any doubts”¹.

Situations arise where an economic operator submits a completed product specifications form along with its offer, clearly stating that the economic operator is offering devices with parameters different from those required by the contracting authority. It is clear that some equipment is programmable, allowing for operation with different parameters. However, the economic operator, not the contracting authority, has knowledge of such parameters. Therefore, even if the contracting authority suspected that the equipment offered by the economic operator could be configured to the parameters expected by the contracting authority, this fact cannot be a basis for accepting the economic operator's offer as correct (in line with the contracting authority's requirements). The content of the offer should be unambiguous, and the contracting authority cannot assume the actual content of the offer or whether, despite the declared incorrect parameters, it might be possible to achieve parameters consistent with the terms of reference.

As indicated in the case law of the NAC, „the contracting authority relied on the content of the Appellant's offer and, due to the declared discrepancy with the required parameters, rejected it, which was correct, even if the offered equipment objectively met the contracting authority's requirements. However, compliance of the offered equipment with the terms of reference requirements does not automatically mean compliance of the offer's content with the terms of the contract. In this procedure, the Appellant's offer clearly did not meet the terms of the contract and was therefore subject to rejection. Therefore, the contracting authority rejected the offer for equipment meeting the terms of reference requirements from the procedure, but this was not due to the contracting authority's incorrect evaluation of the offer, but rather to its incorrect preparation and formulation by the Appellant”².

The said inconsistency of the content of the offer with the terms of reference must be of a fundamental and irremovable nature and should concern the sphere of inconsistency of the obligation ordered in the terms of reference and the obligation offered in the offer.

¹ National Appeals Chamber judgment of 28 February 2023, case no. KIO 398/23.

² National Appeals Chamber judgment of 27 June 2024, case no. KIO KIO 1812/24.

Requirements for lawful rejection

Application of Article 226(1)(5) PPL requires that it be possible to identify and demonstrate precisely which substantive element of the offer is inconsistent with the requirements laid down by the contracting authority and in what manner such inconsistency manifests itself. For an offer to be lawfully rejected on this basis, it is essential to establish and demonstrate the inconsistency between the content of the offer and the conditions specified in the terms of reference. Any identified discrepancy must be free of doubt and supported by clear reasoning.

Obligations of the contracting authority

The rejection notice issued by the contracting authority must set out both the factual and legal grounds for the decision in an exhaustive, reliable, and transparent manner. This obligation flows from Article 253(1)(2) PPL in conjunction with Article 16(1) PPL, which together require procurement actions to be undertaken with transparency, objectivity, and equal treatment of participants. The factual justification must comprehensively demonstrate the reasons underlying the authority's decision, so that the economic operator, if it disagrees, can meaningfully respond to the objections raised.

As indicated in the case law of the NAC, „when assessing the correctness of the contracting authority's actions, the Chamber relies on the factual circumstances communicated to the economic operator in the decision rejecting its offer. In the notification of rejection of the Appellant's offer, the contracting authority should present both the factual and legal justification for this action in a comprehensive, reliable, and transparent manner, which is also required of the contracting authority by the provisions of Article 253(1)(2), in conjunction with Article 16(1). The factual justification for the notification of rejection of offers should exhaustively illustrate the reasons underlying the contracting authority's decision, so that the contractor, if it does not share the contracting authority's assessment, can address the deficiencies identified by the contracting authority”³.

The examination of offers and determination of the reasons for their rejection, including for non-compliance with the terms of reference, should be carried out with due diligence, as with any other action by the contracting authority. When deciding to reject an offer in specific

³ National Appeals Chamber judgment of 31 March 2023, case no. KIO 719/23.

factual circumstances, the contracting authority should be able to prove the existence of the grounds for rejection. The burden of proving the existence of grounds for rejecting the offer rests with the contracting authority, which should precisely indicate the reasons on which its position is based in the justification of this action⁴.

Judicial interpretation

The jurisprudence of the NAC reinforces that non-compliance under Article 226(1)(5) PPL arises when the obligation undertaken by the economic operator in its offer does not correspond to the obligation defined in the terms of reference. It further stresses that a conclusion of non-compliance must be based on certainty, not assumptions, conjecture, or unreliable sources⁵. Rejection therefore requires an unequivocal demonstration of inconsistency supported by specific references to the procurement documentation.

Systemic Implications

Permitting rejection on vague or weakly substantiated grounds would allow any offer to be dismissed at the discretion of the contracting authority. Such an approach would undermine Article 16(1) PPL, which enshrines transparency, equal treatment, and fair competition. From a systemic perspective, strict interpretation of Article 226(1)(5) PPL ensures legal certainty, transparency, and objectivity in public procurement. It safeguards economic operators from arbitrary exclusion and preserves the principle of awarding the most economically advantageous offer.

Conclusion

The rejection of offers under Article 226(1)(5) PPL is subject to stringent substantive and procedural requirements. The contracting authority must establish with clarity and certainty that the economic operator's offer does not correspond to the requirements expressly set out in the terms of reference. It must provide comprehensive factual and legal reasoning in its rejection notice. Any departure from these standards risks undermining the fundamental principles of public procurement and rendering the rejection unlawful. Upholding these

⁴ See National Appeals Chamber judgment of 15 March 2024, case no. KIO 636/24.

⁵ see National Appeals Chamber judgment of 9 February 2023, case no. KIO 233/23.

requirements ensures not only the legality of individual proceedings but also the integrity, predictability, and fairness of the procurement system as a whole.