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# Exclusion of a contractor from participation in a public procurement procedure as a result of contract termination for reasons attributable to them

**Abstract:** The article describes obligatory and optional grounds for excluding a contractor on the basis of Polish Public Procurement Law, taking into account the jurisprudence and views of the doctrine. The attention is paid to the optional ground based on art. 24 sec. 5 point 4 of the Polish Act of January 29, 2004, Public Procurement Law, according to which the contracting authority may exclude from the procurement procedure contractors who, for reasons attributable to them, failed to perform or to a significant extent improperly performed a prior public procurement contract or concession contract concluded with the contracting authority, which led to termination or awarding compensation. In order to be able to use the institution, the contracting party must include an appropriate clause in the contract, providing for the possibility of terminating the contract or awarding damages due to contractor's non-performance or improper performance of the contract, which is a common practice on the Polish public procurement market. However, in the event of such a clause, the contracting authority is obliged to apply it if the condition is met. The article also describes the self-cleaning institution, derived from art. 57 sec. 6 of Directive 2014/24/EU. The self-cleaning procedure can protect the contractor from being excluded from future tenders. However, In order to take advantage of self-cleaning, the contractor has to admit that non-performance or improper performance of the contract is their fault.

**Keywords:** Exclusion; Contract

## Introduction

The fact that the contracting authority withdraws from the contract for reasons attributable to the contractor may have a negative impact on the contractor's image on the public procurement market. However, not only the image can suffer. Contractors are in danger of being excluded from future tenders. Moreover, pursuant to Art. 24 sec. 4 of the Act of January 29, 2004, Public Procurement Law (i.e. Journal of Laws of 2019, item 1843 and of 2020, items 288, 1086), hereinafter referred to as: PPL, the offer of the contractor excluded from the procedure is considered to be rejected. In such a situation, rejection takes place under the law, thus it is not necessary to perform additional actions by the contracting authority, apart from excluding the contractor (KIO judgment of February 22, 2012, KIO 267/12, unpublished). However, even if the contract is terminated for reasons attributable to the contractor, it may avoid being excluded from future tenders. For this purpose, it must meet the conditions of the so-called self-cleaning, discussed later in this article.

## Obligatory and optional grounds for excluding the Contractor

The grounds for excluding a Contractor from future tenders are divided into obligatory and optional.

1. **Obligatory grounds**

The obligatory grounds for excluding a contractor are included in Art. 24 sec. 1 PPL. Pursuant to the above provision, the obligatory grounds for excluding a contractor include:

a) Breach of criminal provisions by the contractor, the current member of its management or supervisory body, a partner in a general partnership or a partnership, or a general partner in a limited partnership or limited joint-stock partnership or a proxy (Article 24 (1) (13-14 of the PPL),
b) Failure to pay contributions and taxes by the contractor (Article 24 (1) (15) of the PPL),
c) Misleading the contracting authority (Art. 24 sec. 1 items 16-17 of the PPL),
d) The influence of the contractor on the activities of the contracting authority and the preparation of the procedure (Article 24 (1) (18) of the PPL),
e) Participation of the contractor or its employees in the preparation of the procurement procedure (Article 24 (1) (19) of the PPL),
f) Agreement of contractors (Article 24 (1) (20) of the PPL),
g) Decision of the prohibition of applying for a public contract (Article 24 paragraph 1 items 20-21 of the PPL),
h) Submission of separate bids by contractors belonging to the same capital group (Article 24 (1) (23) of the PPL).

2. **The optional grounds include:**

a) Bankruptcy and liquidation of the contractor (Article 24 (5) (1) of the PPL),
b) Breach of professional duties by the contractor (Article 24 (5) (2) of the PPL),
c) **The contractor's relationship with the contracting authority (Article 24 (5) (3) of the PPL),**
d) Failure to perform or improper performance of the contract (Article 24 (5) (4) of the PPL),
e) Committing an offense by the contractor (Article 24 (5) (5) and (6) of the PPL),
f) Adjudication by an administrative decision of a fine against the contractor of not less than PLN 3,000 for breach of obligations under labor law, environmental protection law or social security regulations (Article 24 (5) (7) of the PPL),
g) Failure to pay taxes, fees and contributions by the contractor (Article 24 (5) (8) of the PPL).

In the event of the obligatory grounds for excluding a given contractor from the procedure, specified in Art. 24 sec. 1 items 12–23 of the PPL, the contracting authority is obliged to exclude the contractor from the procedure. It is worth pointing out that the contracting authority may exclude a contractor at any stage of the public procurement procedure (Article 24 (12) of the PPL).

In practice, contractors are often excluded, although not always the contracting authority's exclusion is justified. For example, PKP Polskie Linie Kolejowe S.A. excluded three consortia (Torpol and Budimex; ZUE and Strabag, OHL ZS and Elektrizace zeleznic Praha) from the tender for the modernization of the section between Trzebinia and Krzeszowice (from km 29.110 to km 46.700 of line No. 133) of the E30 line between Krakow and Katowice. However, the appeals of the consortium of Torpol and Budimex as well as ZUE and Strabag were accepted. On the other hand, the proceedings regarding the appeal of OHL ZS were discontinued - due to the admission of the charges by PLK (see the judgment of the National Appeals Chamber of April 24, 2017, KIO 620/17, KIO 627/17, https://www.saos.org.pl/ judgments / 301935).

It also happens that the contractor is excluded because of the abnormally low price in the offer. It is also the obligatory grounds for exclusion referred to in Art. 24 sec. 1 point 12 of the Public Procurement Law: "The following is excluded from the procurement procedure: a contractor who has not demonstrated the fulfillment of the conditions for participation in the procedure or has not been invited to negotiate or submit initial offers or tenders, or has demonstrated no grounds for exclusion."

The National Appeal Chamber in its judgment on July 31, 2020 (KIO 1499/20) ruled: "The contracting authority, excluding the contractor, P.E. Ltd. z G. from the contract award procedure in question and by rejecting the contractor's offer did not violate the indicated Art. 24 sec. 1 point 12 of the Order in connection with Art. 24 sec. 4 ZamPublU and thus also the Art. 87 sec. 1 ZamPublU and art. 26 sec. 3 of this Act in conjunction with its Art. 7 sec. 1 and art. 91 paragraph. 1 ZamPublU. "

On the other hand, in the judgment of 13 July 2020 (KIO 1077/20), the National Appeal Chamber decided that PKP Polskie Linie Kolejowe should exclude contractors from the tender pursuant to Art. 24 sec. 1 point 17 of the Public Procurement Law due to the fact that the Ordering Party has been provided, as a result of negligence, with misleading information regarding the lack of grounds for exclusion from the procedure based on the provision of Art. 24 sec. 1 point 19 of the PPL.

In turn, in the judgment of 8 July 2020 (KIO 1053/20), the National Appeal Chamber found it justified to exclude a contractor from the tender due to misleading the contracting authority by referring in the offer to experience that he did not have.

Contrary to the obligatory grounds presented above, the optional grounds may, but do not have to, lead to the exclusion of the contractor. According to Art. 24 sec. 5 point 4 of the Public Procurement Law, "The contracting authority may exclude a contractor who, **for reasons attributable to him, failed to perform or improperly performed to a significant extent an earlier public procurement contract or concession contract** concluded with the contracting authority referred to in in art. 3 sec. 1 items 1-4, which led to the termination of the contract or awarding damages. "

In art. 471 of the Civil Code, there is the term "**default**", which exactly refers to the concept of "**non-performance of the contract**" in the Public Procurement Act. Failure to perform an obligation takes place when **the performance has not taken place and there are circumstances excluding its later fulfillment, i.e. when the debtor has not provided or provided any object other than that specified in the obligation** (see, e.g., T. Pajor, Responsibility, p. 92). ; F. Zoll, in: SPP, vol. 6, 2014, p. 1134). On the other hand, improper performance of an obligation takes place when **the debtor's behavior was aimed at the performance, but the result achieved by him does not meet the requirements of the performance to which the debtor was obliged** (see, for example, judgment in SA in Łódź of April 16, 2014, I ACa 1231/13, Legalis; judgment SA in Warsaw of February 19, 2016, I ACa 715/15, Legalis; judgment of SA in Białystok of September 20, 2017, I ACa 254/17, Legalis.

The provision of art. 24 sec. 5 point 4 of the PPL is an independent basis for exclusion from the procedure. This provision specifies **several conditions that must be combined** for the ground for exclusion to be fulfilled. The essential circumstance **is the non-performance or improper performance of the prior public procurement contract or concession contract. Failure to perform may relate to the entire contract or only part of it. Improper performance**, on the other hand, means performance in a manner that deviates from the contract. According to J. Pierog and J. Presz-Król, this means, for example, performance of the contract at a quality level that differs from the expected, performance after the deadline set in it, failure to remove defects or failure to repair damage caused during the performance of the contract, p. 173 in [1].

If the awarding entity demonstrates non-performance or improper performance of the contract, the awarding entity may terminate the contract with the contractor, which will constitute grounds for exclusion in future tenders. The contractor may alternatively exclude the contractor from the tender in the event of awarding compensation for non-performance or improper performance of the contract by the contractor.

To terminate the contract under Art. 24 sec. 5 point 4 of the Public Procurement Law, the contracting authority must prove what the contractor did not do or what obligation he did not fulfill and that it was significant - i.e. the contractor either did not perform the contract at all or performed it improperly to a significant extent or the improper performance was persistent, even if the shortcomings were not were significant (see the judgment of the National Appeals Chamber of March 26, 2018, KIO 454/18). It is therefore the burden of the contracting authority to prove that the contractor has not performed the contract. Moreover: 'the contracting entity should indicate which elements of the improper performance of the contract it considers to be so significant that they constituted the basis for the dissolution of the contractual relationship existing between the given economic operator and the contracting entity, which had its source in an earlier contract. The lack of these elements constitutes a defect in the action performed by the Ordering Party, because, as will be indicated in the further part of the justification, it deprives the contractor of the possibility of effective defense of his rights. It cannot be assumed that any breach of contractual obligations will constitute a premise for withdrawal from the contract and, consequently, for excluding the contractor from the procedure. Thus, these essential elements, from the point of view of the contracting entity, should be indicated in the justification for the activity undertaken. The ground of exclusion is set out in Art. 24 sec. 5 point 4 of the Public Procurement Law is a special case of unreliable performance of contractors, subject to the sanction of exclusion, in line with a more comprehensive premise contained in Art. 24 sec. 5 point 2 of the Public Procurement Law, which refers not only to culpable but also a serious breach of professional duties. " (KIO judgment of December 11, 2017, file ref.no. KIO 2522/17).

It is worth noting that the Court of Justice of the European Union in its judgment of 19 June 2019 in case C-41/18 indicated that Art. 57 sec. 4 of Directive 2014/24 / EU, the implementation of which is provided in Art. 24 sec. 5 point 4 of the Public Procurement Law, entrusts the contracting authority, and not the court, with the need to evaluate the legitimacy of the exclusion. This means that the contracting authority, irrespective of the pending court case, is obliged to assess the legitimacy of excluding the contractor.

In art. 57 sec. 4 lit. g of Directive 2014/24 / EU, it is said that the contractor demonstrates significant or persistent non-compliance with a significant requirement. In this situation, used in art. 24 sec. 5 point 4 of the PPL, the wording "to a significant degree" should be understood broadly. It may refer both to the scope of the contract and its failure to perform it to a significant (significant) extent, and the performance of the contract with a significant breach of its provisions. **On the other hand, a minor breach of even essential provisions of the contract should not be the basis for considering the issue of exclusion**. It should be emphasized that **the fault of the Contractor** when applying the discussed exclusion ground has no significance. It is sufficient that the failure to perform or improper performance of the prior agreement **will occur for reasons attributable to the Contractor**.

This significantly extends the Contractor's liability and thus the grounds for exclusion from the procedure. However, the question arises whether the contract should provide for liability without showing fault, or whether the role of the Ordering Party deciding on exclusion is to determine the reasons for the failure to perform or improper performance of the previous contract. In the latter case, the grounds for exclusion will be **all situations leading to a specific effect**, and not only cases specified in the contract. As it seems, this broad approach to the premise of liability is correct, because referring only to the

circumstances provided for in the previous contract should be the task of the party to that contract, not the contracting authority deciding to exclude.

Demonstrating non-performance or improper performance of the contract gives grounds for exclusion only **when the contract is terminated or damages are awarded**. It was rightly noted in the doctrine that "the concept of termination of a contract under the provisions of Article 24 (5) (4) of the PPL should be treated as a collective category, which includes unilateral and bilateral declarations of will aimed at early termination of the legal relationship" [3]. Therefore, in addition to the termination of the contract with the unanimous will of the parties, this term should also be understood as withdrawal from the contract and **termination of the contract.**

The exclusion circumstance independent of the termination of the contract is the awarding of compensation to the contracting authority from the contractor for non-performance or improper performance of the contract. In this case, however, it seems that the term should be understood quite narrowly. The provision itself indicates that the necessity to pay compensation should be ascertained by the court. Therefore, it does not seem possible to take into account the compensation voluntarily paid by the contractor as a condition under Art. 24 sec. 5 point 4 of the PPL. On the other hand, the concept of compensation also includes contractual penalties, but these also have to be awarded, not charged by the contracting authority, and voluntarily paid by the contractor. Although the contractual penalty does not necessarily have to be associated with damage, the provision does not refer to damage, but compensation. Moreover, the content of Art. 57 sec. 4 lit. g of the classic directive refers to damages or other comparable sanctions, which allows to include also contractual penalties [2].

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**The optional nature of the premise of Art. 24 sec. 5 point 4 of the PPL**

It should be noted that the optional exclusion of a contractor consists in the possibility (not an obligation) of including such a clause in the contract or the Terms of Reference. In the event of a reservation of such a clause, the contracting authority is already obliged to apply it if the conditions described above are met. This is also what KIO stated in the judgment of May 22, 2018, KIO 899/18: "The possibility of excluding a contractor from the public procurement procedure pursuant to Art. 24 sec. 5 point 8 Public Procurement Law depends on the indication of this ground for exclusion in the contract notice, in the specification of essential terms of the contract, or in the invitation to negotiate (Article 24 (6) of the Public Procurement Law). Exclusion of an economic operator pursuant to Art. 24 sec. 5 point 8 Public Procurement Law is, therefore, an optional ground for exclusion, but the nature of this optional results from the fact that the contracting authority may, but does not have to, indicate this premise in the Nevertheless, in a situation where the contracting authority decides to

indicate it, in the event of its occurrence, it is already obliged to apply it and exclude any economic operator for whom this condition is fulfilled." The practice on the Polish public procurement market shows that including such a clause in a public procurement contract is standard.

It should also be emphasized that pursuant to Art. 24 sec. 7 point 3 of the PPL, exclusion of a contractor pursuant to Art. 24 sec. 5 point 4 of the PPL may **only take place within 3 years from the date of the event giving rise to the exclusion**. The determination of the date of the event which is the basis for the exclusion is the subject of separate disputes in the doctrine.

**Self-cleaning**

Derived from Art. 57 sec. 6 of Directive 2014/24 / EU, the self-cleaning procedure may protect the contractor against exclusion from future tenders. If the contracting authority considers the evidence presented under Art. 24 sec. 8 of the Public Procurement Law ("A contractor who is subject to exclusion under section 1 items 13 and 14 and 16-20 or section 5, may present evidence that the measures taken by him are sufficient to prove his reliability, in particular, prove that the damage was remedied). caused by a crime or fiscal offense, pecuniary compensation for harm suffered or compensation for damage, exhaustive explanation of the facts and cooperation with law enforcement authorities, and taking specific technical, organizational, and personnel measures that are appropriate to prevent further crimes or fiscal crimes or improper conduct of the contractor. the first sentence shall not apply if the contractor, being a collective entity, has been prohibited from applying for a contract by a final court judgment and the prohibition period specified in this judgment has not expired. "), the contractor is not subject to an exclusion (Art. 24 sec. 9 of the PPL Act). To take advantage of self-cleaning, the contractor must admit, however, that the reason for the non-performance or improper performance of the contract lies with him. If he denies it, his self-cleaning statement is unreliable. Such a view was presented in particular in the judgment of 3 February 2017, KIO 139/17.

For example, about the ground of exclusion under Art. 24 sec. 5 point 4 of the Public Procurement Law, KIO indicated: "(...) voluntary payment of the contractual penalty by the acceding party is a circumstance that allows for the recognition that the acceding person repaired the damage / compensated the contracting authority for the events which constituted the basis for withdrawal from the contract. directly resulting from the self-cleaning procedure, specified in Article 24 (8) of the PPL. The Chamber found the appellant's statements that the payment of contractual penalties to be unjustified as admission to wrongful actions breaching the contract and is the main argument in favor of the contractor's lack of reliability "(judgment KIO of 9.5.2017, KIO 706/17, Legalis).

The premise for termination of the contract or awarding compensation due to non-performance or improper performance of the contract by the contractor is a certain obstacle in excluding contractors. In practice, termination of the contract or awarding of damages occurs much less frequently than the actual non-performance or improper performance of the contract to a significant extent. In the event that the contractor did not perform the contract properly, which, however, did not lead to the termination of the contract or awarding damages, the exclusion under Art. 24 sec. 5 point 2 of the PPL, i.e. **due to a serious breach of professional duties**.

In addition, according to the KIO judgment of March 26, 2018, KIO 454/18, the termination of the contract with the contractor is not enough to exclude the contractor from future tenders: “In excluding an economic operator, the contracting authority cannot, therefore, rely solely on the fact that the earlier contract concluded with the economic operator was terminated. The contracting authority must also prove that the contract was

terminated (compensation awarded) **due to the contractor's non-performance or improper performance**, and therefore must demonstrate **what the contractor did not specifically do or what the obligation under the previous contract did not perform**. In addition, it is obliged to demonstrate that the non-performance or improper performance took place **to a significant extent**, which means that the contracting authority is obliged to prove that the contractor either did not perform the contract at all or performed it improperly to a significant extent or improper performance was persistent, even if the deficiencies were not significant."

**Summary**
The inclusion in the Terms of Reference of the contract with the contractor of a clause on withdrawal from the contract in the event of non-performance or improper performance of the contract by the contractor is a common practice on the Polish public procurement market. In the event of concluding such a clause, the contracting authority is obliged to apply it if the condition is met. However, the contractor has the right to self-cleaning by redressing the damage caused to the contracting authority. If its reliability is successfully proven, the contractor may avoid being excluded from future tenders.

* This article refers to the legal status as of December 22, 2020, does not take into account the changes introduced by the Act of September 11, 2019 - Public Procurement Law (Journal of Laws 2019, item 2019).

**Source materials**

[1] J. Pieróg, J. Presz-Król, *Jednolity Europejski Dokument Zamówienia*, Przetargi Publiczne, Biblioteka, Wrocław 2018;
[2] J. Pieróg, *Prawo zamówień publicznych. Komentarz*, Wyd. 15, Warszawa 2019;
[3] M. Śledziewska (red.), *Proces udzielania zamówień publicznych,* C.H. Beck, 2019.