

Aleksandra Fajfer

Advocate in the Public Procurement Department at TRĘBICKI HOŁOWIŃSKA Law Firm
a.fajfer@th.pl

Piotr Trębicki

Legal Adviser, Partner at TRĘBICKI HOŁOWIŃSKA Law Firm
p.trebicki@th.pl

DOI: 10.35117/A_ENG_25_03_04_05

Misleading the contracting authority and exclusion from the procurement procedure

Abstract: The article examines cases in which a contractor may be excluded from a public procurement procedure under Article 109(1)(8) and Article 109(1)(10) of the Public Procurement Law (Pzp) for misleading the contracting authority. Additionally, the article analyses the practical challenges associated with the application of the self-cleaning procedure, whose effectiveness depends on the contractor's ability to remain competitive in the public procurement market. The article concludes that, although misleading the contracting authority can result in serious consequences in the procurement process, the self-cleaning procedure provides a mechanism for the contractor to rectify the situation and restore credibility.

Keywords: Exclusion from the procedure; Misleading the Contracting Authority; Self-cleaning; Article 109(1)(8) of the Public Procurement Law (PPL); Article 109(1)(10) of the Public Procurement Law (PPL)

In the public procurement system, one of the key principles should be fair competition and transparency in the procedure. Misleading the contracting authority constitutes conduct by a contractor that violates these fundamental principles. However, as misleading the contracting authority is one of the most serious breaches a contractor can commit, it may primarily result in the exclusion of the contractor from the procedure. In Poland, this issue is regulated by the Act of 11 September 2019 – Public Procurement Law (Journal of Laws of 2024, item 1320, hereinafter referred to as the 'PPL'). The purpose of this article is to discuss the issue of excluding a contractor from a procedure for misleading the contracting authority, as well as the legal consequences of such conduct.

Pursuant to Article 109(1)(8) of the Public Procurement Law (PPL), the contracting authority may exclude from the procedure a contractor who, as a result of deliberate action or gross negligence, has misled the contracting authority when presenting information that they are not subject to exclusion, fulfil the conditions for participation in the procedure, or meet the selection criteria, where such misinformation could have had a significant impact on the decisions made by the contracting authority in the procurement procedure. The exclusion may also apply to a contractor who has concealed such information or is unable to provide the required evidentiary documents.

Additionally, pursuant to Article 109(1)(10) of the PPL, the contracting authority may exclude from the procedure a contractor who, as a result of recklessness or negligence, has provided misleading information, where such misinformation could have had a significant impact on the decisions made by the contracting authority in the procurement procedure.

Table 1 presents the differences between intentional and unintentional misleading of the contracting authority.

Tab. 1. Differences between intentional and unintentional misleading of the contracting authority

	Article 109(1)(8) of the PPL	Article 109(1)(10) of the PPL
Behaviour	<ul style="list-style-type: none"> • Misleading the contracting authority • Concealing information • Failure to provide the required evidentiary documents 	<ul style="list-style-type: none"> • Misleading the contracting authority
Degree of culpability	<ul style="list-style-type: none"> • Intentional action • Gross negligence 	<ul style="list-style-type: none"> • Recklessness • Negligence
Scope of the subject matter of the information provided	<ul style="list-style-type: none"> • Non-exclusion from the procedure • Fulfilment of the conditions for participation in the procedure • Compliance with the selection criteria 	
Impact on the contracting authority's decision	<ul style="list-style-type: none"> • Significant 	<ul style="list-style-type: none"> • Significant

Misleading the Contracting Authority occurs when a contractor provides false information, leading the contracting authority to make decisions that are detrimental to the objectives of the public procurement procedure. In the context of public procurement, such situations may primarily involve:

- 1) False statements contained in documents submitted as part of the procedure, such as the European Single Procurement Document (ESPD);
- 2) Concealing material information that could influence the outcome of the procedure;
- 3) Providing incomplete data, for example, omitting significant details in the tender submission that could affect the evaluation of the contractor's offer.

Such actions may result in the exclusion of the contractor from the procedure, highlighting the importance of correctly and transparently presenting information.

In the infrastructure sector, where many contractors are based outside the Republic of Poland or even outside the European Union, an additional issue arises regarding the interpretation of legal provisions from a given country and whether they are applicable in a particular procurement procedure.

Judgment of the National Appeals Chamber of 26 September 2023 (KIO 2572/23, KIO 2574/23)

In the context of this analysis, it is worth referring to the judgment of the National Appeals Chamber (KIO) of 26 September 2023 (KIO 2572/23, KIO 2574/23), in which the Chamber examined issues relevant to this article. The KIO emphasised that gross negligence was not only the result of concealing information but also of the contractor's assumption that violations committed in the country where a consortium member was based had no bearing on a procurement procedure conducted in Poland. This misled the contracting authority into believing that there were no grounds for excluding the contractor, ultimately affecting the outcome of the procedure.

A consortium member whose offer was selected as the most advantageous in the procedure failed to inform the contracting authority when completing the ESPD form about

administrative penalties imposed on the company for violations of environmental and labour law regulations in the country where it was based. Furthermore, in its statement regarding the validity of the information contained in the ESPD, the company declared that the information was up-to-date and truthful, acknowledging full awareness of the consequences of misleading the contracting authority.

In this context, it was crucial that the company was aware of the administrative penalties imposed on it, as evidenced by the documentation presented by the parties during the appeal proceedings, including a list of penalties and detailed information on administrative decisions. The contractor wrongly assumed that this information did not need to be disclosed, which, as the Chamber underlined, misled the contracting authority into believing that the contractor was not subject to exclusion from the procedure. The contracting authority's mistaken belief that the contractor was not subject to exclusion affected the outcome of the procedure, as evidenced by its decision to select the offer submitted by the Intercor Consortium as the most advantageous.

In the discussed judgment, the National Appeals Chamber (KIO) also emphasised the importance of the utmost diligence by contractors in completing the European Single Procurement Document (ESPD), which is a key document allowing the contracting authority to assess the contractor's credibility. The Chamber pointed out that the document is categorical in nature due to the significance of the statements made within it. If a contractor selects 'no' in the ESPD, it prevents the contracting authority from evaluating whether the contractor guarantees proper contract execution, even when a situation requiring disclosure exists. This, in effect, places the contractor in the role of 'judge in their own case.'

Another important issue raised by the KIO was that Article 109(3) of the Public Procurement Law (PPL), which allows for a waiver of exclusion if such exclusion would be clearly disproportionate, does not apply when the grounds for exclusion under Article 109(1)(8) of the PPL are met. This means that if a contractor misleads the contracting authority, they lose the possibility of avoiding exclusion on the grounds of disproportionality. Another issue worth noting is that the National Appeals Chamber (KIO) also stated that in cases where the conditions under Article 109(1)(8) of the Public Procurement Law (PPL) are met, Article 109(3) of the PPL, which provides for the possibility of waiving exclusion if exclusion would be manifestly disproportionate, does not apply. This means that if a contractor misleads the contracting authority, there is no longer any basis for applying the mitigating measure under the PPL, that is, the possibility of waiving exclusion due to the manifest disproportionality of such a measure.

In other words, attempting to deceive the contracting authority results in a kind of 'penalty'—the loss of the right to avoid exclusion for other 'lesser' reasons.

False information provided by an entity supplying resources

Similar conclusions can be drawn from the judgment of the National Appeals Chamber of 2 August 2022 (KIO 1854/22), in which the Chamber found that a contractor relied on the capacity of a third-party entity to demonstrate compliance with participation requirements but failed to properly verify the claimed experience of that entity.

The Chamber stressed that reference letters obtained from the third-party entity, as well as conversations with its employees, were not sufficient to assess the actual scope of experience, particularly given that it is common practice for reference letters to contain only a general confirmation of the proper execution of a project with a specific name, without providing detailed information on the specific tasks carried out by the contractor.

According to the KIO, the contractor should have thoroughly examined the actual scope of work performed by the third-party entity, rather than relying solely on its assurances.

It should be emphasised that the Chamber considered the lack of such verification as recklessness and negligence, which resulted in misleading the contracting authority.

Moreover, it is worth noting that the Chamber stated that a contractor cannot replace one third-party entity with another if the contracting authority has already discovered the issue. The possibility of applying Article 122 of the PPL is only available if the contractor independently realises the mistake and takes corrective action before the contracting authority intervenes.

Exclusion period for the contractor

The period for which a contractor may be excluded depends on the nature of the violation and the grounds for exclusion applied. If the violation resulted from intentional misconduct, the exclusion period will be at its maximum, i.e. three years, as this demonstrates a deliberate attempt to undermine the integrity of the procedure. However, if the violation was due to recklessness or negligence, the exclusion period may be shorter—typically one year—especially if the contractor had no intention of misleading the contracting authority.

It is important to highlight that the decision to exclude a contractor and the length of the exclusion period should be proportionate to the severity of the violation and based on an objective analysis of evidence.

Tab. 2. Relationship between exclusion and misleading the contracting authority

Intentional Misleading	Unintentional Misleading
Article 111(1)(8) of the PPL	Article 111(1)(9) of the PPL
2 years	1 year
from the date of the occurrence of the event constituting the basis for exclusion	from the date of the occurrence of the event constituting the basis for exclusion

The exclusion of a contractor from the procurement procedure has far-reaching legal and financial consequences. The direct result of exclusion is the rejection of the contractor’s bid or application.

Self-cleaning procedure

A contractor may mitigate the consequences of exclusion by applying the self-cleaning mechanism. Pursuant to Article 110(2) of the PPL, a contractor subject to exclusion may undertake corrective actions that could restore their eligibility to participate in the procedure. In order to do so, the contractor must demonstrate to the contracting authority that, despite the grounds for exclusion, they have fulfilled all three of the following conditions:

1. They have remedied or committed to remedy the damage caused by a criminal offence, an administrative offence, or their improper conduct, including through financial compensation;
2. They have provided a comprehensive explanation of the facts and circumstances related to the criminal offence, administrative offence, or improper conduct, as well as the damage caused, actively cooperating with the competent authorities, including law enforcement or the contracting authority;
3. They have implemented specific technical, organisational, and personnel measures appropriate to prevent further offences, administrative violations, or misconduct.

It should be emphasised that for self-cleaning to be effective, the contractor must prove that the corrective actions taken are appropriate and sufficient to eliminate the risk of repeated violations. In practice, this means that the contractor must submit evidence to the contracting authority showing that, for example, they have successfully reorganised internal procedures, implemented preventive and corrective systems, and repaired damage caused to

the contracting authority. This position has been upheld by the National Appeals Chamber (KIO), including in its judgment of 14 March 2022 (case reference KIO 375/22), where the Chamber emphasised the requirement for the self-cleaning procedure to be genuine. *The self-cleaning process cannot be merely superficial. It must fully and reliably meet the statutory requirements set out in Article 110(2) of the PPL. Only in this way can the purpose of the procedure be fulfilled, which, according to both EU and Polish legislators, is to ensure that similar situations do not occur in the future.*

Importantly, it is the contracting authority that evaluates the adequacy of the self-cleaning measures submitted by the contractor. If, after analysing the corrective actions, the contracting authority deems them insufficient, the contractor remains excluded from the procedure. In other words, self-cleaning may convince one contracting authority but fail to convince another. The effectiveness and evaluation of self-cleaning measures depend on the specific circumstances and timing of the procurement procedure.

Thanks to the self-cleaning procedure, a contractor not only gains the opportunity to correct past mistakes but, by demonstrating genuine commitment to eliminating the consequences of their actions, can continue operating on an equal footing with other participants in the public procurement market.

In conclusion, misleading the contracting authority constitutes a serious violation of public procurement rules and may result in exclusion from the procedure under Article 109(1)(8) or Article 109(1)(10) of the PPL. These provisions are designed to ensure the fair conduct of public procurement procedures. However, the self-cleaning procedure provides contractors with the opportunity to mitigate the consequences of their actions by implementing effective corrective measures.