

# THE ISSUE OF DOCUMENTING COMPLIANCE WITH THE CONDITIONS REQUIRED FROM ECONOMIC OPERATORS UNDER THE NEW APPROACH ADOPTED IN THE PUBLIC PROCUREMENT LAW

Dr. Mariusz Filipek

Maria Curie-Skłodowska University in Lublin, Poland  
e-mail: [m.filipek@kancelaria-fk.pl](mailto:m.filipek@kancelaria-fk.pl); <https://orcid.org/0000-0002-6483-6064>

**Abstract.** The objective of this paper is to discuss the issues related to documenting compliance with the conditions required from economic operators as part of public contract award procedures. The paper is also aimed to indirectly pay the readers' attention to warranting the observance of the equal treatment principle in respect of economic operators and the need to respect the fair competition principle.

**Keywords:** public contract; Public Procurement Law; fair competition principle

## INTRODUCTION

The provision of documentary evidence confirming compliance with the conditions required from economic operators constitutes a vital component of verifying the reliability of economic operators applying for the award of a public contract. Therefore, the objective of this paper is to discuss the issues related to documenting compliance with the conditions required from economic operators as part of public contract award procedures. The paper is also aimed to indirectly pay the readers' attention to warranting the observance of the equal treatment principle in respect of economic operators and the need to respect the fair competition principle [Nowicki and Bazan 2015, 113-15]. First, it is worth indicating the historic aspects related to the role of a document, its evolution, and the nature of such evidence. This information should be used in the deliberations on documenting compliance with conditions required from economic operators, and, to be more precise, entity-related evidence and subject-matter evidence, as provided for in the Public Procurement Law. To provide a thorough inquiry into the issues being discussed, the author has used the doctrinal method, taking into account the analysis of legislation and case law.

## 2. DOCUMENTING UNDER THE PUBLIC PROCUREMENT LAW

In the legal sense, a document is defined as “any deed, letter, written record or even an object which may be used as evidence [...] establishing or confirming a specific legal relationship, circumstances or facts of a given matter” [Kaczorowski 2004, 274]. In its narrower sense, “it is a letter drafted in a required form, which establishes, confirms or changes a given legal status, bearing certain means of authentication (e.g. a seal).”<sup>1</sup> Documents play various roles in legal transactions. Informational and evidential functions are the two most commonly indicated roles of documents. Taking into account the definition of information as any asset which minimises uncertainty, the informational function is mostly related to recording declarations of will or knowledge of the document issuer. Under Article 77 of the Civil Code, the legislators defined the notion in question as follows: “A document shall be a medium of information which allows the reading of its contents.” Such broad definition arises from the principle of the freedom to choose the form of legal transactions applicable under Polish civil law. The term “document” is laid down in the provisions of the Civil Code as a form of legal transactions, at least in Articles 73 through 81. The freedom to choose the form of a legal transaction may be excluded on a statutory basis, hence in some cases certain legal transactions should be performed in a special form. Such special form requires a record of the legal transaction by preparing a document. From the legal point of view, a document gains a special significance as evidence in proceedings.<sup>2</sup> In line with the objective truth principle, anything which might contribute to the resolution of a case and which is not prohibited by law should be admitted as evidence.

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<sup>1</sup> See *Encyklopedia Popularna PWN*, Wydawnictwo Naukowe PWN, Warszawa 2022, p. 190.

<sup>2</sup> Judgement of Polish National Chamber of Appeal of 19 March 2015, ref. no. KIO 416/14; quote: “Official documents prepared in a required form by relevant public authorities within their powers constitute evidence of the official decision or statement which has been made. Any document which has been prepared in such a way is subject to the presumption of the truthfulness of information contained therein, and until the document is not amended, it cannot be interpreted otherwise. Therefore, if the contracting party had intended to contest the data indicated in the decision, it should have undertaken actions provided for in the Code of Administrative Procedure to amend or invalidate the decision in question. The right and obligation of any contracting party is to verify the submitted tender documents, and to treat them as evidence of compliance with participation conditions. Submitted documents which have been falsified or obtained illegally should be disqualified. However, if this is not the case, any details which are consistent with the factual circumstances must be treated as evidence of compliance with the requirement to have specified knowledge and experience, provided that it is not precluded by quantitative or value-related limitations related to a given service, product supply or construction works, as defined in the Terms of Reference.”

In particular, documents may serve as evidence [...]. Given such definition of evidence, priority should be given to official documents, understood as documents prepared in a required form by relevant public authorities within their powers, whose contents constitute evidence of the official decision or statement which has been made.<sup>3</sup>

Discussing the issue of documenting proceedings and providing access to documents as part of such proceedings, it is necessary to note Article 18 of the PPL which sets out the rules for the open access to procedures, confidentiality of information, and disclosure of personal data. The rule of open access to public procurement procedures is mainly expressed in Article 71(1) of the PPL. It places an obligation on the contracting authority to document the course of their public contract award procedures, by way of preparing a procedure record, in conjunction with Article 74(1) of the PPL. Under the provisions of this Article, wide access is provided to information placed in procedure records, and in attached documents, including tenders, requests to participate in the procedure, and subject-matter and entity-related evidence. The preparation of such records demonstrates the observance of the rule of open access to proceedings and procedure transparency. The rule of open access, stipulated in Article 18 of the PPL, is aimed at ensuring the possibility for all interested parties to get acquainted with information about given procedures and any documents and statements attached to relevant records. The contracting authority is obliged to provide access to information and documents which refer to the procedure conducted by the contracting institution. As a rule, the record must reflect the course of every procedure from the moment of its instituting to closure. Taking into account the provisions of Article 7(18) of the PPL, procedures are instituted by sending or publishing a contract notice, sending an invitation to negotiations or

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<sup>3</sup> Cf., in particular, judgement of Polish Supreme Court of 9 August 2019, ref. no. II CSK 341/18, according to which “the distinction between declarative and constitutive official documents is relevant in that the presumption of truthfulness of statements made in a document by an issuing authority, arising from the provisions of Article 244(1), in conjunction with Article 252 of the CAP, refers to declarative documents only (in the part in which an official document is of a descriptive nature); the criterion of truthfulness or falsehood refers to declarations of knowledge, not to declarations of will, and furthermore, it is vital to note that the said presumption, also applicable to declarative documents (insofar as an official document is of a descriptive nature) refers only to the contents of the declaration of knowledge of the issuer of such documents, and therefore it does not refer to the declarations of knowledge made by the parties appearing before the issuing authority which makes a record of them; hence an official document is evidence of the official statements made therein (Article 244(1) of the CAP), only insofar as it certifies a given status and only in respect of the issuer’s declaration of knowledge contained in the certification, hence the rule of the burden of proof, as laid down in Article 252 of the CAP, is applicable only within the said boundaries in respect of the truthfulness of the issuer’s declaration of knowledge.”

an invitation to tender. The procedure should be conducted as an orderly sequence of activities which are based on the contract conditions specified by the contracting authority. It should result in the selection of the most advantageous tender or in the negotiation of contractual terms of a public contract, and should be concluded with the execution of a public contract or in rendering the procedure invalid. In this context, documents filed to confirm compliance with the conditions for participating in a public procurement procedure play a significant role.

### 3. CURRENTLY APPLICABLE SOLUTIONS GOVERNING DOCUMENTATION

In the new Public Procurement Law,<sup>4</sup> the existing solutions have been reordered, and a number of new ones have been introduced. An economic operator applying for a public contract should meet the conditions applicable to an entity participating in the procedure, and conditions applicable to the subject-matter, as set out in procurement documentation for given supplies, services or construction works. One of the key secondary legislation adopted under the PPL is the Regulation of the Minister of Development, Employment and Technology of 23 December 2020 on entity-related evidence, and other documents or statements which a contracting authority may request from an economic operator. This legislation replaces the Regulation of the Minister of Development of 26 July 2016 on the types of documents which a contracting authority may request from economic operators in the course of contract award procedures. Defining entity-related evidence, it is necessary to refer to Article 7(17) of the PPL, according to which it is an instrument to confirm the absence of grounds for exclusions, and compliance with the conditions of participation in the procedure and/or with selection criteria. A statement referred to in Article 125(1) of the new PPL, i.e. statement of no grounds for exclusion and of compliance with the conditions for participation in the procedure or with selection criteria in the scope indicated by the contracting authority is an exception here. Under Article 7(20) of the new PPL, subject-matter evidence is defined as instruments to confirm the compliance of the offered supplies, services or construction works with the requirements, properties or criteria specified in the description of the subject-matter of the contract or tender evaluation criteria, or requirements related to the performance of a given contract.<sup>5</sup> Subject-matter

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<sup>4</sup> Journal of Laws of 2019, item 2019 as amended.

<sup>5</sup> Judgement of Polish National Chamber of Appeal of 6 August 2021, ref. no. KIO 1698/21; quote: “Under Article 7(20) of the PPL, subject-matter evidence is defined as instruments to confirm the compliance of the offered supplies, services or construction works with the requirements, properties or criteria specified in the description of the

evidence is governed by the provisions of Articles 104-107 of the PPL. They include statements and documents confirming that the supplies, services or construction works offered are compliant with the conditions set out by the contracting authority, as referred to in Article 25(1)(2) of the PPL. They may have the form of markings (they may be required in the case of contracts having special environmental, social or other properties, on terms laid down in Article 104. Where the economic operator, due to reasons beyond its control, is unable to obtain the labelling specified by the contracting authority or its equivalent, the contracting authority, within the time limit set at its discretion, shall accept other relevant subject-matter evidence, including, in particular: manufacturer's technical documentation, if a given economic operator proves that construction works, supplies or services to be performed meet the conditions required for obtaining a given labelling or specified requirements indicated by the contracting authority), certificates (issued by an entity authorised to assess compliance or test reports issued by such entity, or equivalent certificates. The contracting authority shall accept other evidence, e.g. manufacturer's technical documentation, where the economic operator does not have access to certificates or test reports, or any possibility to obtain the same within due time limit, whereas this availability cannot be attributable to a given economic operator, and provided that a

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subject-matter of the contract or tender evaluation criteria, or requirements related to the performance of a given contract. They may take the form of marking (labelling), certificates, documents or other instruments. The subject-matter evidence required in the course of the public contract award procedure should be indicated by the contracting authority in its contract notice or procurement documents (Article 106(1) of the PPL) and submitted by the economic operator together with its tender (Article 107(1) of the PPL). Moreover, it should be explained that subject-matter evidence being submitted as part of public contract award procedures has a double function. Pieces of such evidence may be used for assessing compliance of the product or service offered with the description of the subject-matter of contract, constituting grounds for the verification of the correctness of the tender in substantive terms, and for confirming the compliance of the supplies, services or construction works with the properties or criteria laid down in tender assessment criteria, which is expressly provided for in Article 105(1) of the PPL. It is commonly known that the contents published on websites, even if they are websites run by manufacturers of equipment or software, include general information which is often outdated or inaccurate. Websites may also be changed or modified after a tender has been submitted, which practically makes it impossible to restore original contents available under a given link. The information referring to the date of update is not accompanied by any details which would allow the identification of what has been changed/updated and to what extent. It is also vital to note that it is not possible to identify an entity which is responsible for uploading contents available under a given website link. It should be stressed that, while scoring a given tender as part of non-price assessment criteria, the contracting authority must be absolutely certain that the information which is the basis for providing a score is true and accurate, which is related to the principle of fair competition and equal treatment of economic operators.

given economic operator is able to prove the construction works, supplies or services meet the requirements, properties or criteria specified in the description of the subject-matter of contract or tender assessment criteria, or requirements related to contract performance), documents or other instruments. The PPL includes an open list of subject-matter evidence, although the contracting authority does not enjoy full independence as to demanding this type of documents. Under the PPL, such evidence must be proportional to the subject-matter of contract and related to it. Demands for subject-matter evidence cannot restrict fair competition or equal treatment of economic operators. At the same time, it should be borne in mind that the contracting authority must accept equivalent subject-matter evidence if it serves as confirmation that the supplies, services or construction works offered are compliant with the requirements, properties or criteria set by the contracting authority. The requests for subject-matter evidence are optional, and are related to the identification of such evidence in a contract notice or in procurement documents. It should be noted that the demand for subject-matter evidence is only legitimate where the contracting authority has defined the properties, demands and criteria which the evidence is to confirm. Failure to provide such information results in the fact that the claim for submission of specific pieces of evidence is unfounded.<sup>6</sup> Subject-matter evidence is related to the description of the subject-matter of contract, rather than to contracting authority's assessment criteria. Pieces of such evidence refer directly to the parameters of the subject-matter of contract, and thus it should be assumed that they are part of a tender understood as an economic operator's declaration of will confirming its undertaking to perform a given contract. Moreover, approaching the said issue from the perspective of declarations of will<sup>7</sup> within the meaning assigned under the civil law, which are an indispensable part of every legal transaction, while by making such declaration of will, a legal subject under civil law may create, change or terminate legal relationships. For declarations of will to be effective, they must regulate legal relationships with other legal subjects. They include both statements made as part of bilateral or multilateral transactions, and statements addressed to specified natural or legal persons [Radwański 2008, 145]. It is important to note that such declarations must be submitted to persons without whom the

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<sup>6</sup> Judgement of Polish National Chamber of Appeal of 27 February 2020, ref. no. KIO 295/20; quote: "The contracting authority's demand to submit documents in a situation where no requirements as to a given part of supplies, services or construction works, referred to in the requested documents, have not been listed in the Terms of Reference, is ineffective, as it does not have any legal or factual basis. Likewise, such demand must be deemed unfounded in a situation where a document which the contracting authority has demanded as a confirmation of compliance with specified requirements it not indispensable for the procedure to be effected."

<sup>7</sup> Act of 23 April 1964, the Civil Code, Journal of Laws No. 16, item 93.

said act would not become effective. These documents must be treated as a confirmation of compliance of the product or service offered with contracting authority's expectations set out in the Terms of Reference. Therefore, the failure to provide such confirmation also constitutes grounds for rejecting a given tender. What should also be stressed is the fact that the demand for subject-matter evidence is only possible if the contracting authority indicates the required piece of evidence in its contact notice or procurement documents. The contracting authority's demand is subject to the principles laid down in Article 106(2) of the PPL, i.e. "The contracting authority shall request subject-matter evidence which is proportional to the subject-matter of contract and related to the subject-matter of contract." [Mazurek, Grabowska-Szweicer, Michałowska, et al. 2011, 5-7]. The assessment of tenders should be conducted solely on the basis of documents, parameters and criteria expressly defined in procedure documents. The rejection of a tender based on documents other than the ones listed in the documentation prepared by the contracting authority constitutes a breach of essential rules of public procurement procedures.

Under the PPL, entity-related evidence includes instruments aimed at confirming that there are no grounds for exclusion, and that the conditions for participating in the procedure or the selection criteria have been met, except the statement referred to in Article 125(1) of the Act. On the one hand, pieces of such evidence refer to well known statements or documents filed by economic operators to confirm the aforementioned facts, on the other hand, other solutions which differ from the existing ones are also present. As part of a public contract award procedure, the contracting authority must request entity-related evidence to confirm that there are no grounds for exclusion, while the request for evidence to confirm that the conditions for participation in the procedure or selection criteria have been met is optional. It should be noted here that the determination of economic operator's capacity to apply for the award of contract is a key part of every public procurement procedure. As per the PPL, this is done on the basis of entity-related evidence submitted by economic operators.<sup>8</sup> The pieces of evidence were defined in Article 7(17) of the new PPL, as instruments confirming that there are no grounds for exclusion, and that the conditions for participation in the procedure or selection criteria have been met, whereas

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<sup>8</sup> Judgement of Polish National Chamber of Appeal of 6 August 2013, ref. no. KIO 1787/13; quote: "The burden of proof in relation to a given statement – in line with the Roman maxim *ei incumbit probatio qui dicit non qui negat* – first and most of all rests with the party or procedure participant which makes a statement about the occurrence of a given fact, not on the participant who denies such statement; however, in appeals procedures under the PPL, each of the participants (a party or acceding economic operator) should demonstrate initiative in respect of providing evidence for the purpose of legitimate defence or to confirm allegations."

a statement referred to in Article 125(1) is not such piece of evidence. It is the economic operator who is obliged to prove that it meets the conditions for participating in the procedure by submitting statements and documents specified by the contracting authority. There is no presumption of economic operator's compliance with the conditions for participation in the procedure. The submitted documents must clearly demonstrate that the economic operator concerned meets the said conditions. The demonstration of meeting the conditions must refer to the assessment of the correctness of these documents, while the interpretation of this provision of the PPL should take into account the circumstances provided for in the Act.<sup>9</sup> Therefore, the conviction that a given economic operator does not meet the conditions for participation constitutes grounds for excluding the said economic operator from the procedure.<sup>10</sup> It seems illegitimate to interpret the conditions for participation in the procedure in a manner which goes beyond their literal meaning, and consequently to limit the group of entities which may apply for the award of a contract, i.e., to the detriment of economic operators filing tenders in the course of the procedure, only by referring to the rationality of a given conditions in the light of the subject-matter of contract being requested, or the related intentions or interests of the contracting authority.

The conditions that must be fulfilled to take part in a given procedure, as elements of the procedure determining economic operators' participation in a vast extent, should be formulated in an accurate and explicit way, and their interpretation should not result in the imposition on economic operators of greater obligations than those resulting from the literal wording of the provisions which refer to a specified participation condition. Compliance with the set requirements should be assessed on the basis of the literal wording of the expectations expressed by the contracting authority. It is not permissible to apply extended and implied interpretation of the description of the methods to assess whether the condition for the participation in the procedure has been met, or to perform the assessment based on

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<sup>9</sup> Judgement of Polish National Chamber of Appeal of 27 January 2011, ref. no. KIO 86/11; quote: "A general statement of no grounds for exclusion filed by the economic operator may not be deemed as a full confirmation of no criminal or disciplinary record, despite the detailed statement of no criminal or disciplinary record. Letters of reference do not need to include the confirmation of meeting all conditions related to experience required by the contracting authority, yet the documents must be subject to clarification if their contents are inconsistent with, or contrary to, the contents of the list (in economic operator's statement)."

<sup>10</sup> Judgement of Polish National Chamber of Appeal of 8 May 2015, ref. no. KIO 815/15; quote: "It is the economic operator that is obliged to submit documents compliant with the legal status in force in a given contract award procedure, and neither the economic operators' ranking as part of given procedure nor the stage of the said contract award procedure affect the requirement to meet the obligation in any way."



such interpretation. The Regulation of the Minister of Development, Employment and Technology, adopted on 23 December 2020 pursuant to Article 126(6) of the PPL, governs the list of entity-related evidence and other documents and statements which a contracting authority may request from economic operators [Jakubecki 2006, 361-63; Uliasz 2008, 4; Piasecki 2016, 97.] Sections 6-10 of the Regulation were devoted to the issue of confirming whether the conditions for participation in the procedure have been met. As per Section 6 of the Regulation, to confirm economic operator's compliance with the conditions for participation in the procedure in respect of the capacity to conduct economic activities, the contracting authority may demand from the economic operator who conducts business operations or professional activities a document confirming that they have been entered in one of the professional or trade registers maintained in the country where the economic operator has its registered office or his/her place of residence. Such documents must be issued at the latest 6 months prior to submission. The regulation expressly defines which documents must be produced to confirm circumstances related to a given condition for exclusion.<sup>11</sup> For instance, information from the Central Register of Beneficial Owners is to confirm that there are no grounds for exclusion under Article 108(2) of the PPL, while the economic operator's statement confirming that the information included in a statement referred to in Article 125(1) is up-to-date is to prove that there are no grounds for exclusion under Article 108(1)(3) of the PPL. Section 9 of the Regulation includes a list of pieces of evidence a contracting authority may request in respect of economic operators' technical or professional capabilities. These include:

- 1) a list of construction works performed no earlier than in the period of last 5 years, and where the period of conducting business activities is shorter – in the period concerned, together with details of the type, value, date and place of performance and entities for which the works were performed, with attached evidence specifying whether the construction works were duly performed, whereas the said evidence includes letters of reference or other documents prepared by the entity for which the

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<sup>11</sup>Resolution of Polish National Chamber of Appeal of 11 February 2010, ref. no. KIO 11/10; quote: "Economic operators should have the possibility to evaluate the required conditions, and make a decision about possible participation in the procedure as early as at the stage of contract notice. The conditions for participation and the description of compliance assessment methods should be stated explicitly in the contents of the contract notice. The requirement of identical contents of notices, those published in the Official Journal of the European Union, in the Public Procurement Bulletin, on the contracting authority's website, and in its registered office, is indisputable. The contracting authority is obliged to indicate statements and documents it demands to confirm that the conditions of participation in the procedure have been met in the contract notice."

works were performed, and where the economic operator is not able to obtain such documents for reasons beyond its control – other relevant documents;

- 2) a list of performed supplies or services, or supplies or services being performed in the event of recurring or continuous orders, in the period of the last 3 years, and where the period and where the period of conducting business activities is shorter – in the period concerned, together with details of their value, subject-matter, dates of performance and the entities for which such supplies or services were performed, with attached evidence specifying whether the supplies or services were or are being duly performed, whereas the said evidence includes letters of reference or other documents prepared by the entity for which the supplies or services were performed, or, for recurring or continuous supplies or services, are being performed, and where the economic operator is not able to obtain such documents for reasons beyond its control – the economic operator's statement; as regards recurring or continuous supplies or services, the letters of reference or other documents should be issued within the period of the last 3 months;
- 3) a list of persons delegated by the economic operator to perform a public contract, in particular persons responsible for the provision of services, quality control or management of construction works, together with details of their professional qualifications, licences, experience and education required to perform the public contract, as well as the scope of the activities they are responsible for and information about the basis for these persons' availability to the economic operator;
- 4) description of technical devices and organisational and technical measures applied by the economic operator to assure high quality, and the description of the economic operator's research facilities;
- 5) list of supply chain management systems and supply chain tracking systems which the economic operator will be able to use to perform the public contract;
- 6) declaration of consent for the inspection of the economic operator's production and technical capabilities, and where necessary, the inspection of research resources and quality control measures which the economic operator is due to use – where the subject-matter of contract includes complex products or services, or in justified cases, in respect of special-purpose products and services;
- 7) a statement about education and professional qualifications of the economic operator or the economic operator's managerial staff;
- 8) a list of environmental management measures which the economic operator will be able to use to perform the public contract;

- 9) a statement on the amount of average annual employment at the economic operator's establishment, and the number of managerial staff members in the last 3 years, and where the period of conducting business activities is shorter – in the period concerned;
- 10) a list of tools, plant equipment and technical devices available to the economic operator to perform the public contract, including information on the basis for disposing of such resources;
- 11) as regards product supplies: a) samples, descriptions or photographs of the products to be supplied, the authenticity of which must be confirmed by the economic operator at the contracting authority's request; b) a certificate issued by an independent entity authorised to perform quality control, confirming the conformity of the supplied products to specified standards or technical specifications;
- 12) a certificate issued by an independent entity dealing with the certification of economic operator's conformity to specified quality management standards, including accessibility for persons with disabilities, if the contracting authority invokes quality management systems based on relevant European standard series and standards certified by accredited bodies;
- 13) a certificate issued by an independent entity dealing with the certification of economic operator's conformity to the requirements of specified environmental management systems and standards, if the contracting authority invokes the eco-management and audit scheme referred to in Regulation (EC) No 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS), repealing Regulation (EC) No 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC (OJ EU L 342 of 22.12.2009, p. 1, as amended), or to other environmental management standards based on relevant European and international standards, and certified by accredited entities.

#### 4. THE OBLIGATION TO PREPARE THE ESPD AND THE USE OF EVIDENCE

Discussing the issues at hand, it is worth remembering that contract award procedures instituted after 18 April 2018 are subject to the economic operator's obligation to submit a European Single Procurement Document (further in this paper referred to as the ESPD) in electronic form with a qualified electronic signature affixed on it [Radwański 2001, 1107-123]. The European Single Procurement Document is a statement on an enterprise's

financial standing and its technical and professional abilities for the purpose of public contract award procedures. Thanks to this document, economic operators do not need to produce full documentary evidence and multiple forms, which means a simplified access to public procurement. The ESPD is governed by the provisions of Article 59(1-6) of Directive 2014/24/EU and Commission Implementing Regulation (EU) 2016/7 of 5 January 2016 establishing the standard form for the European Single Procurement Document. The ESPD is also regulated under the Public Procurement Law (Article 125). The ESPD is a statement filed by economic operators in all types of public procurement procedures. The ESPD is an economic operator's statement of no grounds for exclusion, confirming compliance with the conditions for participation in the procedure and the verification of selection criteria. The documents must be filed by every economic operator applying for the award of contract, also if economic operators file a joint application, and subcontractors on whose capacities the economic operator relies to demonstrate their compliance with the conditions for participation in the procedure. In line with the provisions of the PPL, the European Single Procurement Document must be prepared in electronic form and signed with a qualified electronic signature in order to be valid. Under the provisions of the Civil Code, to maintain the electronic form of a legal transaction, it is sufficient to make a declaration of will in electronic form and sign it with a qualified electronic signature, and what is important, declarations of will filed in electronic form are equivalent to declaration of will submitted in paper format [Pietrzykowski 2020, 41-49]. Under the Act of 17 February 2005 on the computerisation of operations of entities performing public tasks, an electronic document is a data set which constitutes a distinct meaningful whole, arranged according to a specified internal structure and saved on a digital data storage medium. The term 'electronic document' is also defined in Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (OJ EU L 2014 No. 257, p. 73), in short "eIDAS", where in Article 3(35) it has been indicated that an electronic document is any content stored in electronic form, in particular text or sound, visual or audiovisual recording. Moreover, as laid down in Article 77(3) of the Civil Code, a document is defined as a medium of information which allows the reading of its contents. Issuer's signature is not a prerequisite to consider a given instrument as a document. On the contrary, it has been assumed that a signature is not a decisive factor as regards the existence of a given document [Ambroziewicz 2001, 106]. The contents of a document may be transmitted by any means available. These may be graphic signs, sound, or image. In turn, the medium of a document may have

various forms, including both paper and electronic forms.<sup>12</sup> We should bear in mind that economic operators may be excluded from a procedure or be subject to penal liability if, by providing information in the ESPD, they are guilty of misrepresentation, withhold information or are unable to demonstrate evidence to confirm their compliance with participation conditions. Optional exclusion criteria set out in Article 109 of the Act seem important in this context.<sup>13</sup> Thus, the contracting authority may exclude from contract award procedures an economic operator who is in default of its obligations to pay taxes, charges or social and health insurance contributions, unless such economic operator, before the expiration of a respective time limit for submitting requests to participate in a procedure or for submitting tenders, has paid due taxes, charges or social and health insurance contributions together with interest or fines, or has made a binding arrangement to repay such liabilities. This also refers to economic operators who are in breach of their obligations in the sphere of environmental protection, social welfare law or labour law. Exclusion can also be applied to economic operators in respect of whom winding-up proceedings have been instituted, bankruptcy has been declared, to economic operators whose assets are administered by a liquidator or court, to economic operators who are in an arrangement with creditors, where their business activities are suspended or they are in any analogous situation arising from a similar procedure under national laws and regulations where the procedure has been instituted, and to economic operators who are guilty of grave professional misconduct, which renders their integrity questionable, in particular where such economic operator, as a result of wilful misconduct or gross negligence, has failed to perform or

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<sup>12</sup> Judgement of the Polish Court of Appeal in Szczecin of 18 June 2019, ref. no. III AUa 55/19, quote: “The parties’ intention to enter into a contract for a specific task, which, as a rule, does not constitute the basis for statutory social insurance coverage, or the intentional use of such title of a contract, are not decisive factors in determining the legal basis of employment, if the circumstances related to the performance of such contract demonstrate, in a significant extent, the properties of another legal relationship. The actual legal relationship between the parties is identified on the basis of the conditions in which work has been performed, rather than on the basis of the title of an agreement or the parties’ intention, which is subject to limitations set out in article 353(1) of the Civil Code.”

<sup>13</sup> Judgement of Polish National Chamber of Appeal of 26 July 2021, ref. no. KIO 1804/21; quote: “The grounds for economic operator’s exclusion arising from the provisions of Article 109(1) of the PPL are optional exclusion criteria. The word «may» used by the legislator indicates the aforementioned property. The obligation to exclude an economic operator due to the existence of optional grounds for exclusion occurs only where the contracting authority decides to apply them in a given procedure. The way such decisions should be announced as part of a procurement procedure is stipulated in Article 109(2) of the PPL, according to which where a contracting authority intends to exclude economic operators pursuant to Section 1, it shall indicate such exclusion criteria in its contract notice or procurement documents.”

unduly performed a contract, which the contracting authority can demonstrate by appropriate evidence. Economic operators may also be excluded from procedures in the event of a conflict of interest within the meaning of Article 56(2) of the PPL which cannot be effectively eliminated otherwise than through economic operator's exclusion, while exclusion may also apply to economic operators who, for reasons attributable to them, have failed to perform a contract or has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting authority or a prior concession contract which led to early termination of that prior contract, damages, vicarious performance due to default, or the exercise of rights arising from statutory warranty for defects.<sup>14</sup>

## CONCLUSIONS

An economic operator who, as a result of wilful misconduct or gross negligence, has misled the contracting authority while providing information that it is not subject to exclusion, and that it meets the conditions for participation in the procedure or selection criteria, which could have a material impact on the decisions made by the contracting authority as part of a contract award procedure, or who has withheld information or is not able to submit evidence supporting its standing, must be excluded from the public contract award procedure.<sup>15</sup> It should be stressed here that a specific

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<sup>14</sup> Judgement of Polish National Chamber of Appeal of 23 July 2021; ref. no. KIO 1482/21; quote: "Withdrawing from an agreement or charging contractual penalties are some of the components included in the structure of Article 109(1) (7) of the PPL, and they are secondary or consequential actions. It is crucial and necessary for the contracting authority to demonstrate that a given economic operator has failed to perform a contract or has shown significant or persistent deficiencies in the performance of a contract, in the civil-law meaning of the notions, that such non-performance or undue performance relates to a substantive requirement under a contract, and that such circumstances have occurred for reasons attributable to the economic operator. Although withdrawal from a contract is a declaration of will of a constitutive nature, this does not mean that it cannot be defective or invalid. As any declaration of will whose legal effect depends on the fulfilment of specified conditions, in the classical sense, it may be successfully contested by the addressee."

<sup>15</sup> Judgement of Polish National Chamber of Appeal of 18 June 2021, ref. no. KIO 1299/21; quote: "Only the fact that the contracting authority has not envisaged the exclusion criterion referred to in Article 109(1)(8) of the PPL (pertaining to an economic operator who, as a result of wilful misconduct or gross negligence, is guilty of misleading the economic operator by providing information that it meets the conditions for participation in the procedure, which could have a significant impact on contracting authority's decisions, or to an economic operator who has withheld such information) makes the examination of circumstances from the perspective of this exclusion criterion ineffective."

document may not be classified as entity-related and subject-matter evidence in the course of a single procedure. In my opinion, the classification of a given piece of evidence by the contracting authority as entity-related or subject-matter evidence depends on the purpose for which it is requested.<sup>16</sup> Consequently, as regards the level of types of evidence, the classification of a piece of evidence to the category of documents pertaining to a participating entity or to subject-matter must be conditional upon the role which the contracting authority wishes to assign to a document by requesting it. It is also vital to note that, in relation to the existing legal status, some pieces of evidence have been classified differently as entity-related evidence, while previously they belonged to the group of subject-matter evidence, which can bear some complications related to contracting authority's demands specified in procedure documents. Therefore, it should be asserted that entity-related evidence refers to facts which an entity needs to demonstrate as part of the contracting authority's procedure, whereas subject-matter evidence includes documents confirming compliance of the offered supplies, services or construction works with the requirements, properties or criteria specified in the description of the subject-matter of contract.

#### REFERENCES

- Ambroziewicz, Albert. 2001. "Podpis elektroniczny - pojęcie i funkcje w obrocie." *Przebieg Sądowy* 1:106-15.
- Encyklopedia Popularna PWN*. 2022. Warszawa: Wydawnictwo Naukowe PWN.
- Jakubecki, Andrzej. 2006. "Naczelné zasady postępowania cywilnego w świetle nowelizacji kodeksu postępowania cywilnego." In *Czterdziestolecie Kodeksu postępowania cywilnego. Zjazd Katedr Postępowania Cywilnego w Zakopanem (7-9.10.2005 r.)*. 361-68. Kraków: Zakamycze.
- Kaczorowski, Bartłomiej (ed.). 2004. *Leksykon PWN*. Warszawa: Wydawnictwo Naukowe PWN.
- Mazurek, Grzegorz, Eliza Grabowska-Szweicer, Magdalena Michałowska, et al. 2011. *Odrzucenie oferty wykonawcy*. Wrocław: PRESSCOM.
- Nowicki, Józef E., and Aneta Bazan. 2015. *Prawo zamówień publicznych. Komentarz*, Warszawa: Wolters Kluwer.
- Piasecki, Kazimierz. 2016. "Komentarz do art. 1-366." In *Kodeks postępowania cywilnego*, vol. 1, edited by Kazimierz Piasecki, and Andrzej Marciniak, 90-101. Warszawa: C.H. Beck.

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<sup>16</sup> Judgement of Polish National Chamber of Appeal of 4 November 2011, ref. no. KIO 2273/11; quote: "The provisions of the PPL and related secondary legislation governing the documents required from economic operators must be interpreted taking into account the purpose for which they are submitted. An extract from the National Court Register (KRS) is to confirm the status of the entity in the context of applying for the award of contract."

- Pietrzykowski, Krzysztof. 2020. *Kodeks cywilny. Komentarz*. Vol. 1. Warszawa: C.H. Beck.
- Radwański, Zbigniew. 2001. "Elektroniczna forma czynności prawnej." *Monitor Prawniczy* 22:1107-123.
- Radwański, Zbigniew (ed.). 2008. *Prawo cywilne – część ogólna. System Prawa Prywatnego*. Vol. 2. Warszawa: C.H. Beck.
- Uliasz, Marcin. 2008. "Art. 3." In *Kodeks postępowania cywilnego*, nb 4-7. Warszawa: C.H. Beck.