



KNAB

# Country Profile Poland

Raising the Institutional and Professional Capacity of the Corruption Prevention  
and Combating Bureau

8 June 2006

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## **1. General information on the legal system**

Poland is a republic. The Republic of Poland is a unitary State. There is single unified judicial system, and Poland is a Member of the European Union<sup>1</sup>.

The sources of universally binding law of the Republic of Poland should be: the Constitution, statutes, ratified international agreements, and regulations. Enactments of local law issued by the operation of organs should be a source of universally binding law of the Republic of Poland in the territory of the organ issuing such enactments.

According to the Polish tradition of civil law and law system established by constitutions, written legislation is the most important legal source. Court decisions are also considered important sources of law, but courts are not required to follow previous precedence even if it originates from a court placed higher in the judiciary system. The Polish court system is inspired by the traditions of continental Europe.

The courts and tribunals constitute a separate power and are independent of other branches of power. The courts and tribunals pronounce judgments in the name of the Republic of Poland. The administration of justice in the Republic of Poland is implemented by the Supreme Court, the common courts, administrative courts and military courts. Extraordinary courts or summary procedures may be established only during a time of war. Court proceedings have at least two stages. The common courts implement the administration of justice concerning all matters save for those statutorily reserved to other courts.

## **2. Sale and Lease of public real estate**

Because of the past communism regime in Poland, where as a rule the private owned real properties were not welcomed, the position of the state and territorial self-government used to have the dominant position as to the real estate (particularly land) that they owned in Poland. However, it needs to be pointed out that nowadays after the change of the Polish system the return to the private owned real estate is really strong, this particularly concerns apartments in cities.

Together with the above tendency, the state is still vested with the right to be the sole owner of the special categories of real estate (e.g. according to the Act on Water Law, only the State Treasury can be the owner of the flowing inland waters and the land situated under). The special protection also concerns the agricultural land. Generally, when such a land is subject of the acquisition, the Agricultural Properties Agency (which is the statutory legal person) is vested with the right of first refusal.

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<sup>1</sup> Poland has been a member of the European Community since 1 May 2004.

Due to the fact that for a long period of time the private ownership of real estate was not welcomed in Poland, the different legal title to the land was created which I called *the perpetual usufruct*. This kind of legal title is very similar to ownership, however, it is temporary as the perpetual usufruct can be established on the land for the period up to 99 years, but no less than 40. Individuals and legal entities may let perpetually lands owned by the State Treasury and situated within the administrative limits of towns and lands owned by the State Treasury situated beyond those limits but covered by the zoning plan of a town and designated to serve its economic needs, and lands owned by units of territorial self-government (local government) or their associations; other lands owned by the State Treasury, communes (lowest administrative units) or their associations may also be the object of perpetual usufruct. For the duration of his right, the perpetual user pays an annual rent. The perpetual user of the land becomes the owner of the buildings situated on this land.

According to the Report of the Ministry of State Treasury on The State Treasury's Assets as of 31 December 2004 (more current information was not available, as we were informed by the Ministry of State Treasury the report on the assets for 31 December 2005 will be published no sooner than in October 2006) the State Treasury was the owner of 38% of the land in Poland, 4% of the land belonged to the territorial self-government, 3% to the legal persons and 55% of the land in Poland belonged to individuals.

According to the report of the Central Statistical Office the structure of the ownership of the buildings in Poland presents as follows: 88,1% of the buildings in Poland belonged to the individuals, 1,7% to the building co-operatives (*spółdzielnie mieszkaniowe*), 2% to the territorial self-government, 0,6% to the State Treasury, 1,2% to the other entities. Please note that the above data describes were current in 2002. After this date the Central Statistic Office have not prepared any report on the ownership of the buildings. As we were informed by the Surveyor General of Poland the general register of the buildings and apartments regarding the whole area of Poland should be prepared in few years (2011).

## 2.1 **Sale and lease of state-owned real estate**

Both sale and lease of state-owned real estate are regulated by the Act on Real Estate Management of 21 August 1997.

The general rules of selling state-owned real estate are:

- Such real estate can be sold in a tender, however, in certain cases (a closed list of such cases is indicated in Article 37.2 of the Act) the tender is not required (e.g. the real estate is to be sold by the State Treasury to a municipality, to its perpetual user, to a private partner in a public private partnership program or the real estate is to be contributed in kind to a state-owned company or to a foundation, the real estate is to be sold to an entity managing a special economic zone). The Act also indicates a list of entities which are vested with the priority right to acquire the state-owned real estate and, therefore, they must be called to exercise their rights before the tender can be announced. These are e.g. former owners of such real estates (or heirs of such

- persons) who were deprived of this right before 5 December 1990 (or heirs of such persons), tenants of state-owned apartments where the lease agreement of such an apartment is executed for an indefinite period;
- The local authority that is responsible for the management of state-owned real estate located in his area (*starosta*) is obliged to publicly announce a specification of the real estate which is designated to be sold with a detailed description of each real estate (e.g. the legal status of the real estate according to the land and mortgage register, the area of the real estate, the purpose of the real estate, the price for it, etc.). Such specification should be displayed for 21 days in the office of the above local authority and furthermore published in a local newspaper;
  - The announcement on a tender regarding a particular real estate from the above specification that includes the description of the real estate according to the above specification and the time, the place and specific terms and conditions of the tender should be displayed in the above office and made public according to the method traditionally known in a given area and on the internet website of the local office. Such an announcement should be made at least 30 days before the planned date of the tender. Furthermore, if the starting price for the real estate exceeds EUR 10,000, the announcement on tender should be additionally published in at least a weekly available in all the area of the higher municipal local unit (*powiat*). If the starting price is over EUR 100,000 the announcement on the tender should be published twice, no later than two months before the planned date of the tender in a daily available in the whole area of Poland.
  - The tender can be either written or oral – the decision depends on the above local authority that organizes the tender,
  - To become a bidder (in addition to the obligation to fulfil every term and conditions of the particular tender) an entity must pay the bid deposit to the local office organising the tender. The amount of the deposit, according to the Act, cannot be lower than 5 and higher than 20% of the starting price,
  - Each bidder is entitled to file a complaint against the results of the tender and until such a complaint is finally examined, the agreement on the acquisition of the real estate that was the subject of the tender cannot be executed. The complaint should be examined within 7 days. The local authority is obliged to announce the results of the examination of such complaint.
  - Pursuant to the Act, if during the second tender no bid is selected, the negotiations (*rokowania*) being a less formalised procedure than tender can start;
  - The detailed method and rules on tenders regarding the state owned-real estate are established in the Ordinance of the Council of Ministers on the methods of and rules for tenders and negotiations regarding sales of real estate of 14 September 2004;
  - Selling some specific categories of state-owned real estate may demand some further approvals, e.g. the transfer of real estate must be entered into the register of historic monuments requires the approval of the provincial historical monuments authority (*wojewódzki konserwator zabytków*).

The above rules concern also the procedure of granting perpetual usufruct of the state-owned real estate.

The lease of the state-owned real estate requires the prior approval of the governor (*wojewoda*) in case where the period of lease exceeds 3 years. The approvals of other authorities are required in case where the lease is to concern the real estate of special purpose or placement (e.g. in the border area).

## 2.2 **Sale and lease of municipally owned real estate**

The rules for sales of municipally-owned real estate are also governed by the by Act on Real Estate Management of 21 August 1997, and, generally, the same rules apply to them as the rules that refer to the state-owned real estate, however, the management of these real estates (e.g. organisation of tenders, etc.) is conducted by the local municipal offices.

## 2.3 **Penal rules pertaining to corruption**

There is no legal definition of the term "corruption" under the Polish Penal Code. Taking under consideration the common understanding of the word "corruption" the following offences penalized in the Polish Penal Code could be taken into account:

- Acceptance (demand) of the personal benefit of a promise thereof in connection with a performance of a public function (Article 228 max. punishment 12 years imprisonment)
- Payment (promise) of a bribe to the public to a person performing public functions (Article 229 max. punishment 13 years imprisonment)
- Paid protection (Article 230 max. punishment 8 years imprisonment)
- Disclosure of a state secret (Article max. punishment 8 years)
- Disclosure of an official secret by a public officer (Article 266 § 2 max. punishment 3 years imprisonment)
- Money laundering (Article 299 max. punishment 10 years)

The catalogue of the offences that could be classified as corruption is also indicated in the Act on Counteractions Against Bringing into Circulation the Assets Resulting from the Illegal or Unknown Sources and on Counteractions Against Financing The Terrorism of 16 November 2000.

Poland is a party to the Criminal Law Convention on Corruption of 27 January 1999.

It needs to be also pointed out that on 12 May 2006 the lower house of Polish Parliament (*Sejm*) adopted the Act on Central Anti-Corruption Office who are to be the a special forces for counteracting against the corruption in public and commercial life, in particular in state and self-government institutions. As of today the Act has not been signed by the President yet.

## 2.4 **Squandering**

There are several Acts that refer to the different aspects of liability of a person who commits squandering. The Polish Penal Code, in Article 296, penalizes a person who, by exceeding powers given to him/her or by failing his/her managing obligations, causes a material damage to a business of individual, legal person or organizational unit.

## 2.5 Alienation

There are no specific regulations in Poland that refer to alienation itself. Under the Polish law the alienation understood as the transfer of property with the flagrant infringement of the right of the seller (in particular because of very low amount of the price) could be in some cases be classified as squandering committed by a person who acted in this transfer on behalf of the seller.

## 3. Procurement related issues

The EU procurement Directives have been implemented in Poland by the Act of 29 January 2004 on the Public Procurement Law (the "PPL") and secondary legislation issued thereunder. The PPL has been recently amended in order to adjust the Polish law to Directive 2004/17/EC and Directive 2004/18/EC by the Act of 7 April 2006 on Amendment of the Public Procurement Law, that entered into force on 25 May 2006. The PPL regulates all aspects of public procurement from the start of the procedure to the signing of the contract. It covers also review procedures and the utilities sector.

### 3.1 Liability for public employees

#### Administrative liability

The Act on Liability for Breaching the Public Finance Discipline of 17 December 2004 (the "LBD") provides for the liability for breaching the public finance discipline of, *inter alia*, the following persons: managers of the public finance sector units, employees of such units responsible for performing obligations related to public procurement and persons responsible for the administration of public funds in the units not classified as public finance sector units. The breaching of the public finance discipline within the meaning of the LBD includes, *inter alia*, awarding of the public contracts in violation of the specified provisions of the Public Procurement Law, as well as violation of other rules on public procurement set out in the LBD. The sanctions for breaching the public finance discipline include: an admonition, a serious reprimand, a pecuniary fine and the prohibition to occupy positions related to the disposal of public funds. The maximum pecuniary fine that may be imposed generally amounts to three times the value of the salary of the person responsible. The prohibition to occupy positions related to the disposal of public funds may be imposed only if the employee has shown gross negligence in breaching the public finance discipline. The sanctions are imposed by special adjudication boards. The proceedings are carried out in two instances.

#### Criminal liability

There is no specific code in Poland covering criminal liability in procurement. Such offences are penalized under the Polish Penal Code.

### 3.2 **The complaint mechanisms / enforcement of procurement rules**

#### Entities entitled to submit the review measures

The right to apply review measures is vested in anyone whose legal interest in obtaining a public contract has been or may have been infringed. Prior to the expiry of the time limit for submission of tenders in the case of an infringement, by the awarding entity, of the provisions of the PPL the organizations of contractors entered on the list of organizations authorized by the President of the Public Procurement Office are also entitled to submit review measures.

#### Available review measures

Those wishing to contest a decision of the awarding entity are entitled to use **consecutively** the following review measures:

- protest,
- appeal,
- complaint.

If the value of a public contract is below the threshold of EUR 60,000, then the provisions of the PPL on appeals and complaints do not apply and the supplier or the contractor is entitled only to submit a protest.

#### Protest

A written protest may be lodged to the awarding entity against the content of the public notice of a contract, the acts performed by the awarding entity in the course of proceedings and in the event of an omission by the awarding entity of an act it is obliged to perform under the PPL.

A protest may be generally lodged within 7 days of the date on which the contractor may have become aware or became aware of the circumstances constituting the basis for lodging thereof (different time limits apply in case of a protest against the content of a public notice or a protest referring to provisions of the specification of essential terms of the contract). A protest referring to provisions of the specification of essential terms of the contract should be lodged not later than 6 or 3 days before the time limit for the submission of tenders (and depends on the value of the public contract). Contractors who are interested in a protest being resolved for the benefit of one of the parties may join in the protest proceedings within the time prescribed by the PPL.

The lodging of a protest is allowed only before the conclusion of a procurement contract.

The awarding entity should not conclude a procurement contract until the final resolution of the protest is made (however the President of the Public Procurement Office in certain circumstances may consent to the conclusion of the contract prior to the final resolution of a protest). The protest is regarded as finally resolved: a) where no

appeal is available (i.e. in cases of public contracts with the value under the PLN equivalent of EUR 60,000) – upon the resolution of the protest by an awarding entity or upon the expiry of the time limit for resolution of the protest; b) where no appeal has been lodged - upon the expiration of the time limit for the appeal submission; c) in the event an appeal has been lodged: i) on the date of the delivery of the ruling ending appeal proceedings or the award by the panel of arbitrators or ii) in cases where the value of the contract for construction works exceeds the PLN equivalent of EUR 20,000,000 and for supplies and services - of EUR 10,000,000 on the date of the issue of the judgment or a ruling ending proceedings by the regional court or upon the expiry of the time limit for submitting complaint to the regional court.

The awarding entity should consider the protest generally not later than within 10 days of it being lodged. Failure to resolve the protest within this time limit is regarded as its dismissal. The awarding entity rejects any protests lodged past the time limit, by an unauthorized entity or protests which are not available under the PPL. In the case the protest is upheld, the awarding entity repeats the action to which the protest relates or performs the one illegally omitted.

#### Appeal

An appeal is available against dismissal or rejection of a protest. It is lodged to the President of the Public Procurement Office within 5 days of the date of delivery of the resolution of the protest or the expiry of the time limit for the resolution of the protest. The appeal is considered only if the registration fee has been paid. Currently the registration fee amounts to 4,744 PLN (approximately EUR 1,200). The appeal is examined within 15 days from it being lodged by a panel of three arbitrators appointed by the President of the Public Procurement Office (the President of the Public Procurement Office appoints arbitrators by means of publicly accessible computer drawing).

Admitting an appeal, the panel of arbitrators may order the awarding entity either to perform or repeat the performance of an act or nullify it. It is worth noting that the panel of arbitrators cannot order the conclusion of a procurement contract. The panel of arbitrators cannot decide on charges which have not been included in the protest. However circumstances resulting in the annulment of the contract award proceedings are considered by the panel of arbitrators ex-officio.

By virtue of the new regulation of the Prime Minister issued after the adoption of the Act on Amendment of the Public Procurement Law the rules of calculation of the registration fee for appeal have been amended. Currently the value of the registration fee for appeal depends on the value and the nature of the public contract. In case where the public contracts for supplies and services are concerned the registration fee depends on the value of such public contracts and amounts to 10.000 PLN (approx. EUR 2,500) or 20.000 PLN (approx. EUR 5,000). Similarly in case where the public contracts for construction works are concerned, the registration fee amounts to 20.000 PLN (approx. EUR 5,000) or 40.000 PLN (approx. EUR 10,000).

### Complaint

The judgment by the panel of arbitrators or the ruling by the panel of arbitrators ending the appeal proceedings may be complained against to the regional court (*sąd okręgowy*). Complaints are lodged through the President of the Public Procurement Office within 7 days of the delivery of the pronouncement of the panel of arbitrators. If the complaint is admitted, the court reverses the pronouncement complained against and decides on the merit of the case.

### Other comments

Please note that if the awarding entity selected the tender in manifest infringement of the PPL or in case where in contract award proceedings an infringement occurred of the provisions specified in the PPL, such infringement influencing the results of these proceedings (as well as in some other cases set out in the PPL), the procurement contract will be null and void. The President of the Public Procurement Office is entitled to apply to the court for declaring invalidity of such a procurement contract.

It is also worth noting that the President of the Public Procurement Office is entitled to carry out a review of awarded public contracts prior to the conclusion of a procurement contract (so-called "pre-award review"). Such a pre-award review is mandatory where the public contract's value exceeds the PLN equivalent of EUR 20,000,000 for construction works or EUR 10,000,000 for supplies and services. The pre-award review ends when the awarding entity receives post-review recommendations or information about the results of the review indicating: a) the obligation to annul the contract award proceedings, b) obligation to remove the discovered infringements, c) the lack of infringements or infringements identified which did not influence the results of the proceedings.

The President of the Public Procurement Office is also entitled to conduct the review of the awarded contract within 4 years of it being awarded (post-award review). In the event any infringement of the PPL is disclosed, the President of the Public Procurement Office may notify the relevant public finance discipline commissioner of the violation of the public finance discipline, or apply to the court for the statement of invalidity of the procurement contract in whole or in part or impose a pecuniary penalty.

Certain categories of the awarding entities that have infringed the rules of public procurement in a manner described in the PPL are subject to pecuniary penalty that is imposed by the President of the Public Procurement Office. The penalty varies from PLN 3,000 up to PLN 150,000.

In 2004 according to the data available at the website of the Public Procurement Office 2,421 appeals were lodged (of which 1,862 were recognized by panels of arbitrators). Some 46% of the appeals recognized by such panels of arbitrators were upheld and 54% were dismissed. In the same year (2004) 309 complaints were lodged to the regional courts (of which 180 were recognized by the courts). In 43 of

those complaints the regional courts either cancelled or changed the prior rulings by the panels of arbitrators.

### 3.3 **Thresholds for application of procurement rules**

The PPL does not apply to contracts and contests the value of which does not exceed the PLN equivalent of EUR 6,000. Therefore, the public procurement rules apply only to contracts over the above threshold. Below this threshold there are no direct rules which would guarantee fair competition.

Starting from 25 May 2006, the provisions of the PPL relating to the obligation to publish notices in the official gazette "*Biuletyn Zamówień Publicznych*", the time limit for submitting requests to participate in the proceedings, time limits for submitting offers, preliminary offers, provisional offers, as well as provisions on appeals and complaints do not apply in contract award proceedings the value of which does not exceed the PLN equivalent of EUR 60,000. All the remaining provisions of the PPL apply to the proceedings for the award of contracts with the value between PLN equivalent of EUR 6,000 and EUR 60,000.

Until 25 May 2006, i.e. the entry into force of the Act of 7 April 2006 on the Amendment of the Public Procurement Law, the PPL did not apply to the award of sectoral contracts (utilities sector) where the contractual value exceeded the PLN equivalent of EUR 400,000 for supplies and services and EUR 5,000,000 for construction works. By virtue of the said Act on Amendment of the Public Procurement Law, as of 25 May 2006, the PPL does not apply to the award of sectoral contracts where the contract value exceeds the amounts set out in the secondary legislation issued under Article 11 par. 8 of the PPL. Please note that the regulation of the Prime Minister of 19 May 2006 sets out the following thresholds: PLN equivalent of EUR 422,000 for supplies and services and EUR 5,277,000 for construction works.

Please note that there are some specific provisions with respect to public contracts the value of which exceeds the PLN equivalent of EUR 20,000,000 for constructions works and EUR 10,000,000 for supplies and services (so-called "strict procedure").

### 3.4 **Framework contracts in procurement**

Until 25 May 2006, i.e. until the entry into force of the Act of 7 April 2006 on Amendment of the Public Procurement Law, the framework contracts could be used only for the sectoral contracts (utilities sector). Therefore the use of framework contracts was very limited.

On 25 May 2006 a new regulation of framework contracts came into force. It extended the possibility of using framework contracts to the whole public sector. The framework contract according to the new provisions may be concluded for a period not exceeding 4 years. However, given the subject-matter of the contract or the special interest of the awarding entity, such a contract may be entered into for a longer

period. In case where a framework contract is concluded for a period longer than 4 years, the President of the Public Procurement Office should be notified of this fact. The awarding entity may conclude the framework contract after the proceedings have been carried out during which provisions on awarding the public contracts in the form of open tendering, restricted tendering or negotiations with the publication have been applied.

The PPL provides that the central awarding entity may prepare and conduct contract award proceedings, may award public contracts or conclude framework contracts for the account of the awarding entities from the governmental administration if such a public contract is related to the activity of more than one awarding entity. In such a case the awarding entities from the governmental administration may award contracts under such framework contract if it is explicitly provided for in the framework contract. The Prime Minister is entitled to appoint a central awarding entity.

The PPL provides that the value of the framework contract amounts to the total value of all the public contracts that the awarding entity is planning to award during the term of the framework contract. The provision of review measures and on the inspection of the President of the Public Procurement Office generally apply to the proceedings on award of the framework contract.