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# **In-house procurement under the Polish Public Procurement Law**

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# What is in-house procurement?

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In-house Procurement



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Contracts concluded by public entities  
with their "own" entities



# In-house procurement vs. entrusting the performance of tasks

## In-house Procurement

- Paid contracts,
- Contracts concluded by public bodies with separate legal entities
- Independence of a controlled entity is formal because it is organisationally and economically dependent on the contracting authority
- The relationship between the contracting authority and the economic operator has an internal vertical nature:

may be awarded to a separate entity controlled by the contracting authority

may be awarded to a separate entity controlled by a group of contracting authorities

may be awarded to a controlling entity by the controlled entity being a contracting authority

## Entrusting the performance of tasks – no public procurement

- Assignments of task are made internally within the same legal entity - these are not civil law contracts, even if accompanied by financial transfers (reimbursement of costs)
- Entrusting the performance of tasks is made on other basis than contract

Assignments of tasks are made by the contracting authority internally within the same legal entity, to its own organizational units, eg. between the organizational units of the State Treasury or between the organizational units of a local government unit

Entrusting the performance of tasks by contracting authorities to separate legal entities, dependent on these contracting authorities, not on the basis of bilateral paid contract, only in connection with performance of tasks, on other basis than a contract



# Codification of in-house procurement rules

New Public Procurement Directives of 2014  
2014/24/EU Directive<sup>1</sup> (classic) and  
2014/25/EU<sup>2</sup> Directive (utilities)

2014/24/EU Directive (classic) –  
codification of in-house procurement  
rules developed based on hitherto ECJ  
case law.

Implementation of PP Directives to Polish  
PPL by means of the Act of 22. June 2016  
– amending the Public Procurement Law  
and some other acts (Journal of Laws item  
1020 as amended)

Entry into force: 28. July 2016

the Act of 22. June 2016 – amending the  
Public Procurement Law and some other acts –  
Article 67 para. 1 item 12-14 (single-source  
procurement as a type of contract award  
procedure)

Entry into force: 1. January 2017

- 1) Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94 of 28.03.2014, p. 65, as amended)
- 2) Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94 of 28.03.2014, p. 243, as amended)



# In-house procurement in Polish public procurement system prior to January 1., 2017

In case of in-house procurement, identified on the basis of ECJ case law, in particular based on cases: Tecal ( C-107/98), Carbotermo (C- 340/104), ANAV (C-410/04), czy Tragsa (C-295/05)

- Contracting authorities awarded contracts without applying the public procurement provisions, referring directly to ECJ case law

As of January 1., 2010 – new provisions in Public Procurement Law – **Article 4 item 13:**

The Public Procurement Law does not apply to contracts awarded to budget economy unit by the public authority performing the functions of a founding body of that unit, if the following conditions are met jointly:

- a) the major part of the activity of a budget economy unit concerns performing of public functions on behalf of that public authority;
- b) the public authority exercises the control over the budget economy unit, corresponding to control exercised over its own units not having legal personality, in particular involving the impact on strategic and individual decisions referring to management of affairs of the unit;
- c) the subject-matter of the contract falls within the scope of the basic activity of the budget economy unit determined in accordance with Article 26 para. 2 item 2 of the Law of 27 August 2009 on public finances (Journal of Laws No. 157, item 1240 as amended)

*/the wording as of January 1., 2017/*

- a) more than 80% of the activity of a budget economy unit concerns performing of public functions for that public authority,
- b) the public authority exercises control over the budget economy unit, corresponding to control exercised over its own units without legal personality, involving the impact on strategic goals and important decisions concerning the management of affairs of the unit;
- c) the subject-matter of the contract falls within the scope of the basic activity of the budget economy unit determined in accordance with Article 26 para. 2 item 2 of the Law of 27 August 2009 on public finances (Journal of Laws No. 157, item 1240 as amended)

1) Introduced by the Article 61 of the Act of 28. August 2009 - provisions introducing the Public Finance Act (Journal of Laws No. 157, item 1241, as amended)



# In-house procurement in Polish public procurement system prior to January 1., 2017

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(based on Article 23 of the Act of 27. August 2009 on public finances (Journal of Laws No. 157, item 1240))

The budget economy unit is a public finance sector unit established to carry out public tasks, which:

- 1) performs assigned tasks for remuneration;
- 2) covers the costs of its activities and liabilities from the earned revenues;
- 3) can be established by:
  - the Minister or Head of the Chancellery of the Prime Minister;
  - by the body or head of the Chancellery of Sejm, Senate, the Chancellery of the President of the Republic of Poland, the Constitutional Tribunal, Supreme Audit Office, the Supreme Court, the Supreme Administrative Court, the provincial administrative courts, the National Council of the Judiciary in Poland, common courts, Commissioner for Human Rights, Children's Ombudsman, the National Broadcasting Council's Office, Inspector General for the Protection of Personal Data, the Institute of National Remembrance, the National Electoral Office and the National Labor Inspection

The budget economy unit acquires legal personality upon entry into the National Court Register.



# In-house procurement in legislative process

Suggested solutions:

1. **No in-house procurement provisions** in public procurement law - **no exemption may be invoked.**

/The EU legislator leaves it to Member States whether to implement or not to implement into national legislation the exemption on the public- public cooperation/

**Argumentation:**

- implementation of exemption from the application of PPL provisions in case of in-house procurement will limit the competitiveness on the Polish market,
- The number of companies operating on the market will decrease, due to resignation of public institutions from awarding a contract in a competitive manner.

2. Basing Polish PPL provisions on public-public cooperation literally on Directive provisions, ie. **exemption from application of PPL provisions in case of public – public cooperation, incl. in-house procurement.**

**Argumentation:**

- the contracting authorities should have the freedom to choose the most optimal means to achieve the objectives assigned to public institutions.



# In-house procurement in legislative process

## The amendment in the Act on maintenance of cleanliness and order in municipalities

1. **As of 2011** - the compulsory tendering for municipalities for collection or for collection and management of municipal solid waste<sup>1)</sup> to ensure the protection of competition as a result of restoring the waste market to municipalities (local public administration bodies).

/Previously, every householder individually chose a waste collection company, thus apart from municipal companies, many private enterprises were established, the introduction of compulsory tendering was to protect the market from being dominated by municipal companies /

2. **Modification - abolition of compulsory tendering** - when awarding a contract, there is a possibility to apply one of many other procedures provided for by the Public Procurement Law, including eg. single-source procurement, which usually cannot be subject to such social control as in case of tendering procedures.

1) Under the Article 6d para. 1 in connection with Article 6g of the Act of 13 September 1996 on maintenance of cleanliness and order in municipalities (Journal of Laws No. 132, item 622, as amended)





# In-house Procurement under single-source procurement - compromise solution

The contracting authority may award a contract under single-source procurement, if at least one of the following circumstances occurs:

*/Article 67 para. 1 item 12 PPL/*

The contract is awarded by the contracting authority referred to in Article 3 para. 1 (1) to (3a) to a legal person, if the following conditions are jointly met:

- a) the contracting authority exercises control over that legal person, equivalent to the control exercised over its own units, involving dominant influence on the strategic goals and important management decisions relating to the affairs of that legal person; this condition is also fulfilled where such control is exercised by another legal person controlled by the contracting authority in the described manner,
- b) more than 90% of the activity of the controlled legal person involves the execution of tasks entrusted to it by the contracting authority controlling it or by another legal person controlled in the manner referred to in point (a) by the contracting authority,
- c) no private capital is directly involved in the controlled legal person;

***/Article 67 para. 10 PPL/***

The prohibition of private capital involvement referred to in para. 1 (12) (c), 1 (13), and 1 (14) (c) shall not apply to:

- 1) legal persons with the participation of a public partner selected pursuant to the Act of 19 December 2008 on public-private partnership (Journal of Laws of 2015, items 696 and 1777), or
- 2) participation of the employees representing not more than 15% of the share capital of the company, holding not more than 15% of votes at the general meeting of shareholders.

***/Article 12 para. 1 of 2014/24/EU Directive/***

## **Public contracts between entities within the public sector**

1. A public contract awarded by a contracting authority to a legal person governed by private or public law shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

- (a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;
  - (b) more than 80 % of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and
  - (c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.
- A contracting authority shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments within the meaning of point (a) of the first subparagraph where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person. Such control may also be exercised by another legal person, which is itself controlled in the same way by the contracting authority.



# In-house Procurement under single-source procurement - compromise solution

/Article 67 para. 1 item 13 PPL/

The contract is awarded by the contracting authority referred to in Article 3 para. 1 item 1-3a to another contracting authority referred to in Article 3 para. 1 item 1-4, which exercises control over the contracting authority awarding a contract, or to other legal person controlled by the same contracting authority, if the following conditions are jointly met:

- a) the contracting authority being awarded a contract exercises control over the contracting authority awarding a contract, corresponding to control exercised over its own units, involving dominant influence on the strategic goals and important management decisions relating to the affairs of that controlled contracting authority; this condition is also fulfilled where such control is exercised by another legal person controlled by the contracting authority being awarded a contract,
- b) more than 90% of the activity of the controlled contracting authority involves the execution of tasks entrusted to it by the contracting authority exercising control, referred to in point a, or by another legal person controlled by this contracting authority in a manner referred to in point (a),
- c) no private capital is directly involved in the controlled contracting authority and contracting authority exercising control;

## **Article 12 para. 2 2014/24/EU Directive**

2. Paragraph 1 also applies where a controlled legal person which is a contracting authority awards a contract to its controlling contracting authority, or to another legal person controlled by the same contracting authority, provided that there is no direct private capital participation in the legal person being awarded the public contract with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.



# In-house Procurement under single-source procurement - compromise solution

/Article 67 para. 1 item 14 PPL/

The contract is awarded by the contracting authority referred to in Article 3 para. 1 (1) to (3a) to a legal person, if the following conditions are jointly met:

a) the contracting authority, along with other contracting authorities referred to in Article 3 para. 1 (1) to (4), exercises control over a given legal person, equivalent to the control exercised by them over their own units, whereas joint control occurs if the following conditions are jointly met:

- the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities, provided that an individual representative may represent more than one contracting authority,
- the participating contracting authorities can exercise a joint dominant influence on the strategic goals and important management decisions of the controlled legal person,
- the controlled legal person does not pursue any interests which contradict the interests of the contracting authorities controlling it,

b) more than 90% of the activity of the controlled legal person involves the execution of tasks entrusted to it by the contracting authorities controlling it or by other legal person controlled by these contracting authorities,

c) no private capital is directly involved in the controlled legal person;

***/Article 12 para. 3 of the 2014/24/EU Directive/***

3. A contracting authority, which does not exercise over a legal person governed by private or public law control within the meaning of paragraph 1, may nevertheless award a public contract to that legal person without applying this Directive where all of the following conditions are fulfilled.

(a) the contracting authority exercises jointly with other contracting authorities a control over that legal person which is similar to that which they exercise over their own departments;

(b) more than 80 % of the activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authorities or by other legal persons controlled by the same contracting authorities; and

(c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

For the purposes of point (a) of the first subparagraph, contracting authorities exercise joint control over a legal person where all of the following conditions are fulfilled:

(i) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities. Individual representatives may represent several or all of the participating contracting authorities;

(ii) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person; and

(iii) the controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities.



# In-house Procurement under single-source procurement - compromise solution

/Article 67 para. 8 PPL/

8. To calculate the percentage of activity referred to in para. 1 (12) (b), 1 (13) (b), 1 (14) (b), and 1 (15) (c), the average revenue generated within the 3 years preceding the award of the contract by the legal person or the contracting authority with regard to the services, supplies, or works is taken into account

/Article 67 para. 9 PPL/

9. If due to the day of establishing or commencing activity by the legal person or the contracting authority or due to reorganisation of their activity, the data relating to the average revenue generated within the 3 years preceding the award of the contract is unavailable or inadequate, the percentage of activity referred to in para. 1 (12) (b), 1 (13) (b), 1 (14) (b), and 1 (15) (c) shall be determined on the basis of reliable business projections.

***/Article 12 para. 5 of the 2014/24/EU Directive/***

5. For the determination of the percentage of activities referred to in point (b) of the first subparagraph of paragraph 1, point (b) of the first subparagraph of paragraph 3 and point (c) of paragraph 4, the average total turnover, or an appropriate alternative activity-based measure such as costs incurred by the relevant legal person or contracting authority with respect to services, supplies and works for the three years preceding the contract award shall be taken into consideration.

Where, because of the date on which the relevant legal person or contracting authority was created or commenced activities or because of a reorganisation of its activities, the turnover, or alternative activity based measure such as costs, are either not available for the preceding three years or no longer relevant, it shall be sufficient to show that the measurement of activity is credible, particularly by means of business projections.



# In-house procurement - national legal regulations

## *Art. 36a para. 2a of PPL*

1. The economic operator may entrust the execution of part of a contract to subcontractor.
2. The contracting authority may stipulate the obligation of personal execution by the economic operator of:
  - 1) essential (key) parts of a contract for works or services;
  - 2) sitting and installation works under contract for supplies.

**2a. The economic operator that was awarded a contract, pursuant to Article 67 para. 1 (12) to (14), where the subject-matter is the provision of services of general interest, or works, is obliged to perform key parts of these services or works by itself.**

## *Art. 67 para. 11 of PPL*

**Before the contract is awarded pursuant to para. 1 (12) to (15), the contracting authority shall place on its Public Information Bulletin website, and if there is no such a website – on its own website, an information on the intention to conclude a contract, which includes at least:**

- 1) name and address of the contracting authority;
- 2) Description of the subject-matter of contract and size or scope of a contract;
- 3) estimated contract value;
- 4) name and address of the economic operator to which the contracting authority intends to award the contract;
- 5) legal grounds and justification for awarding a contract under single-source procurement;
- 6) time limit for the contract performance and the contract duration;
- 7) information on the date and, respectively, on placement or publication of the notice of intention to conclude a contract, referred to in Article 66 para. 2, if it was placed or published, or information that such a notice was not placed or published.



# In-house procurement– exemplary notice in PPB /selected information/

## CONTRACT AWARD NOTICE

**Single-source procurement (in-house)** in accordance with art. 67 para. 1 item 12 of Public Procurement Law

Information on the conclusion of a contract with the following wording:

Name and address of the contracting authority

Municipality Dąbrowa Białostocka, Solidarności Str. 1, 16-200 Dąbrowa Białostocka

### Description of subject-matter of contract, its size and scope:

Collection of municipal solid waste from inhabited properties of the municipality Dąbrowa Białostocka

**Value of a contract:** 558 420,12 PLN net value; 603 093,72 PLN gross value

### Time limit for the contract performance and duration of contract:

Duration of contract from 17.07.2017 until 30.06.2018

The municipality as a contracting authority is a public finance sector unit that holds 100% of shares of the company "Przedsiębiorstwo Gospodarki Komunalnej i Mieszkaniowej" with its registered office in Dąbrowa Białostocka. As the sole shareholder, it plays a decisive role in its strategic goals, business areas, what is reflected in its certificate of incorporation which: specifies the areas of company's activity (§ 10 of certificate of incorporation); control over the activity of the company is exercised by the Supervisory Board (§ 19 of certificate of incorporation); provides that the powers conferred on Assembly of Shareholders are exercised by the Mayor of Dąbrowa Białostocka (§ 20 of certificate of Incorporation); Assembly of Shareholders is assigned with consideration and approval of the Company's report, balance sheet and profit and loss account for the previous financial year (§ 22, point 1 (1) of the certificate), adoption of a resolution on distribution of profits or on covering losses (§ 22, point 1 (2) of the certificate) granting discharge to the Company's authorities (§ 22, point 1 (3) of certificate) from the **performance** of their **duties**.

In exchange for the performance of activities, the Company charges fees directly from the recipients, which account for more than 90% of the company's total revenue. More than 90% of the activities of a controlled legal person involve the performance of tasks entrusted to it by the contracting authority exercising the control or by another legal person controlled by that contracting authority. The said company is primarily engaged in the following tasks: water collection, treatment and supply, drainage and wastewater treatment, construction of pipelines and distribution networks; rental and management of own or leased real estate, collection of non-hazardous waste.

In the controlled legal no private capital is directly involved. The municipality must ensure the continuity of the collection and management of municipal solid waste. So far, the service has been provided by "Przedsiębiorstwo Gospodarki Komunalnej i Mieszkaniowej Sp. o.o." in Dąbrowa Białostocka, which was chosen under the open tendering. The company conscientiously and reliably performed the services of collection of municipal solid waste from inhabited properties in the municipality Dąbrowa Białostocka. Apart from that, the main purpose, as defined in the certificate of incorporation, is to carry out tasks of the municipality Dąbrowa Białostocka concerning the fulfillment of needs of inhabitants (§ 10 of the certificate) in particular collection of non-hazardous waste, collection of hazardous waste, treatment and disposal of non-hazardous waste, treatment and disposal of hazardous waste, waste remediation activities and other waste management services.



# In-house procurement- national legal regulations

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## *Art. 67 para. 12 of PPL*

The contracting authority may conclude the contract awarded under para. 1 (12) to (15) no earlier than after the lapse of 14 days as of the day of announcing the information referred to in para. 11.

## *Art. 146a of PPL*

A contract concluded under Article 67 para. 1 (12) to (14) shall expire with the lapse of 3 months as of the day on which in the controlled legal person referred to in Article 67 para. 1 (12) (c), (13), or (14) (c), private capital became involved, except for the cases referred to in Article 67 para. 10.



# In-house procurement- national legal regulations

*Art. 144b of PPL*

1. If the supervisory body of the contracting authority has **reasonable doubts** as regards the correctness of application of Article 67 para. 1 (12) to (15), it **shall prohibit entering into a contract until the matter is clarified, however, for a period not longer than 21 days.**
2. Where the supervisory body finds **no grounds for the award of a contract** pursuant to Article 67 para. 1 (12) to (15), it **shall prohibit entering into the contract, and if the contract has been concluded, it shall request the contracting authority to terminate or withdraw from the contract** within the time limit indicated.
3. In the case of ineffective expiry of the time limit referred to in para. 2, the supervisory body **shall request a court to cancel the contract, in whole or in part.**
4. The provisions of para. 1 to 4 do not affect the entitlements and obligations of supervisory bodies of the contracting authority, resulting from separate regulations.





## Contract award notices (in-house) in the Official Journal of the EU 1.08. - 7.11.2017

No. of notice	Date of notice	Type of contract	Subject matter of contract	Contract value	Contracting authority	Economic operator
441893- 2017	7.11.2017	Works	Renovation of the track	689.514 PLN/ 821.640 PLN  (145.191 EUR)	City of Gorzów Wlkp.	Municipal Transport Company Ltd. in Gorzów Wlkp.
443068-2017	7.11.2017	Services	Preparation and implementation of workshops, training courses and professional camps for projects co-financed from the ESF	129.536 PLN/ 156.924 PLN  (31.027 euro)	University of Zielona Góra	Renewable Energy Center Ltd. (SME)
421273-2017	24.10.2017	Services	Furnishing all properties in the city in containers and bags for collecting municipal waste and receiving municipal waste from these properties	1.752.000 PLN/ 1.814.400 PLN  (419.650 EUR)	Municipality Sulęcín	Municipal Services Office Ltd. In Sulęcín (SME)
398621-2017	10.10.2017	Supplies/ lots (9)	Implementation of 9 Polish promotional programs, each devoted to another Polish export sector	38.382.871 PLN  (9.184.702 EUR)	Ministry of Economic Development	Polish Investment and Trade Agency Inc.
387382-2017	03.10.2017	Services	Preparation and conduct of workshops, training and professional camps for pupils and teachers involved in projects co-financed from the ESF	349.483 PLN  (419.650 EUR)	University of Zielona Góra	Lubuski Centre for Innovation and Agricultural Implementation Ltd. (SME)
383389-2017	29.09.2017	Services	Implementation of public tasks for Podkarpackie Voivodship in the field of financial management	24.000.000 PLN/ 23.902.439 PLN  (5.748.640 EUR)	Podkarpackie Voivodeship	Podkarpacki Development Fund Ltd.
377326-2017	26.09.2017	Services/ lots (11)	Removal of the consequences of a natural disaster in the Forest Inspectorate - removal of app. 120000m <sup>3</sup> of wood	1.782.078 EUR	Forestry Inspectorate Przymuszewo	TTOUL Henryk Gostomski – Brusy (SME), UL Mirosław Małaszycki – Kłębowo (SME) UH Michał Orzłowski – Brusy (SME) itd.



## Contract award notices (in-house) in the Official Journal of the EU 1.08. - 7.11.2017

No. of notice	Date of notice	Type of contract	Subject matter of contract	Contract value	Contracting authority	Economic operator
362876-2017	15.09.2017	Services	Summer and winter cleaning of streets, squares, parking lots, bus stops ... in the city of Katowice from 1.09.2017 to 31.08.2021.	65.956.279 PLN/ 65.924.333 PLN (15.798.289 EUR)	City of Katowice	Municipal Services Office Ltd. in Katowice
332599-2017	24.08.2017	Services	Collection and management of municipal waste, maintenance of urban greenery, summer and winter maintenance of roads, management and maintenance of urban cemeteries (...)	3.541.954 EUR	Municipality Sobótka	Municipal Services Office Hadlux Ltd. in Sobótka
330749-2017	23.10.2017	Services	Collection and management of municipal waste	1.245.865 PLN/ 1.345.535 PLN (298.417 EUR)	Municipality Janikowo	Municipal and Housing Services Ltd. in Janikowo
327470-2017	19.10.2017	Services/ lots (5)	Providing sanitary transport services	1.296.000 PLN (310.426 EUR)	Lublin Oncology Center	Voivodeship Emergency Medical Service Independent Public Health Care Unit in Lublin
308917-2017	05.08.2017	Services	Management of returnable funds post-JEREMIE i post- JESSICA	60.238.663 PLN (14.428.767 EUR)	West Pomeranian Voivodeship	The West Regional Development Agency Inc. in Szczecin
300006-2017	01.08.2017	Services	Performing the role of the operator / management and implementation of the project "Ruska 46 abc - space for culture"	945.027 PLN (226.359 EUR)	Municipality Wrocław	Wrocław Revitalization Ltd.





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Thank you for your attention

Brygida Brańko

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