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Partnership and Collaborative Contracting in the Procurement of Public Construction Works Projects in the EU and in Poland

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Abstract:

Purpose: *The purpose of the paper is to present some findings as to the promotion and inclusion in the EU and Polish public procurement laws applicable to the delivery of large public construction works and infrastructural projects, approaches and solutions proposed by concepts of public-private partnership (*PPP) *and collaborative contracting* (CC).
Design/Methodology/Approach: *Institutional approach. Basic research questions are: (1) how and to what extent the key approaches and solutions proposed by the partnership and collaborative contracting concepts are promoted and reflected in the EU and Polish public procurement law, (2) how the performance of public procurement systems in the EU Member States is currently measured and if it takes into account the promotion of partnership and collaborative contracting criteria.*
Findings: *Regulatory approaches and solutions proposed by the partnership and collaborative contracting concepts are to a considerable extent promoted and reflected in the EU and Polish public procurement law, however without compromising other important principles and criteria, such as promotion of fair competition or value for money. Single Market Scoreboard measures the performance of public procurement systems using the limited number of formal evaluation criteria and indicators important in the contract formation phase.*
Practical implications: *Promoting partnership and collaborative contracting in public procurement of construction works and infrastructure projects should not compromise fair competition and material criteria of value for money. Further studies are needed on the conditions of effectiveness of partnership and collaborative contracting in the construction works and infrastructure projects.*
Originality/value: *The article points to important problem of the poor performance of large public works and infrastructure projects and selected, potential institutional remedies to that problem, applicable at the project' procurement stage.*

Keywords: *Partnership, collaborative contracting, relational contracting, construction/infrastructure projects delivery, public procurement.*

JEL codes: *H54, H57.*

Paper type: *A research article.*

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1. Introduction

One of the main problems reported in the international literature regarding the functioning of the engineering and construction sector is its poor performance (McKinsey, 2017). Labour productivity in this sector lags behind in comparison with the progress that is being made in this area in the industrial production sector or in the economy as a whole. The problem is particularly visible in large, long-term construction and infrastructure projects (megaprojects) where cost overruns on a scale of 50-100% are a common phenomenon, and exceeding 100% is not an unprecedented situation (Flyvbjerg, 2017).

Over the past 30 years, concepts of modernization and improvement of administrative outsourcing mechanismas through contractual solutions based on principles of partnership and good collaboration, have been widely promoted and discussed. These inspirations and contractual solutions are reflected to a considerable extent in the relevant EU and in Polish public procurement statutory regulations. Procurement of public construction and infrastructure projects in the EU countries is governed at the European level by Directive 2014/24/EU on public procurement and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors.

All EU Member States have transposed the 2014 procurement directives. In Poland the most important statutory public procurements regulation is the Act of 11 September 2019 Public procurement law (PPL). There are also many other relevant detailed implementing regulations in this area. More general legal framework for public procurement transactions in the EU countries provide private/civil contract law regulations. In Poland the most important regulation in this area is the Polish civil code of 23 April 1964 (PCC).

In view of the scale and pace of the ongoing transformation processes in this industry, traditional models of management and contracting applied in delivery of major construction/infrastructure projects often prove to be insufficient. L.White, one of the experts involved under the auspices of FIDIC (International Federation of Consulting Engineers) in the work on the preparation of a new model of contractual cooperation of contractors of large construction and infrastructure projects, explains that conventional contracts are sometimes not able to harmoniously adapt the goals and motivations of the parties within the entire project (White, 2022).

Contractors and suppliers often point to the lack of adjustment of incentive systems between contracting authorities and other participants in construction processes, such as: designers, main contractors, specialist subcontractors, equipment suppliers, advisors / consultants and others, as an important, direct cause of the inefficiency of project delivery processes. Hayford (2018) notes that traditional procurement models are preferred by most contracting authorities because of their simplicity and certainty of risk transfer.

However, they generate commercial incentives contrary to the interests of the contracting authorities. In traditional contracting models, each participant has strong financial incentives for good performance within his responsibilities, but is less interested in how other project participants carry out their tasks and their remuneration does not depend on the success of the whole project.

As a result, the project is rather a collection of subprojects and the nature of the participants' relationships is adversarial. In particular, the author briefly presents his objections to standard contracting models in 5 points: (1) when things start to go wrong, the individual allocation of responsibilities and risks of the participants encourages the blame game to shift responsibility onto each other rather than to cooperate with everyone to solve problems, (2) fixed flat rates in contracts motivate participants to fulfil their obligations to a minimum, even if greater efforts were to bring better final results of the project, (3) no incentive for other participants to limit the cost effects of the changes made. Rather, it is an incentive to demand 'monopolistic' prices for additional services, (4) the obligation to cooperate with each other does not actually work, (5) it is difficult to involve participants quickly and early in the implementation of projects. In the traditional models, contracting is sequential, and the inclusion of contractors occurs only after the design phase is completed.

Solutions to these problems are sought among others, through the development of partnership and integrative contracting models based on more open and in-depth collaboration of participants in project delivery processes and better sharing of risks and benefits. Such models are expected to be the good alternative to traditional, adversarial project delivery models, operating in conditions of unresolved divergences of interests of participants.

The concepts of partnership and collaborative contracting arouses great interest of readers and specialists nowadays. In a broader theoretical and social dimension, this may be seen as a part of the trend towards so-called collaborative economy that is developing in the literature of economics and management (Jastrzębska and Legutko-Kobus, 2017). From the practical point of view however, there is one important problem. Despite the early successes of collaborative contracting adopters, there is a relatively small number of its implementations to date. The industry remains hesitant. (Banaszak *et al.*, 2020).

2. Partnership and Public-Private Partnership

In the language of politics, journalism and legal acts of last decades, the terminology of partnership was omnipresent, and not rarely abused. It has a significant promotional value, as it carries with it common, positive emotional associations of good, equal cooperation and collaboration. However, as a result of inflation of this terminology, it lost its independent explanatory value, at least in legal and economic

analyses. What matters is the character of institutional solutions and their performance, measured against objective criteria.

One of the main goals of the significant reform of the Polish public procurement law introduced by the Act of September 11, 2019 was to ensure a greater balance of the position of the parties to a public contract and a more partnership-based treatment of contractors by public entities. These goals are to be served by the following institutions regulated in the provisions: the principle of cooperation between the parties - Art. 431, Catalog of abusive clauses - art. 433, Mandatory contract provisions - art. 436 and 439, Advances and payment of remuneration in parts - Art. 443, Order completion report - art. 446 (UZP).

The concept of public-private partnership (PPP, in the Great Britain called Private Finance Initiative PFI), in many countries i.a. in Poland has been regulated in a separate legal act, as a contract model different from traditional public procurement. It is particularly useful for the delivery of large public construction works and infrastructure projects.

Contrary to public procurement, this model assumes: (1) full equality and independence of the negotiating and contractual positions of the parties to the contract, (2) extended scope of task transfer, which may include the design, construction of facilities, pre-financing, operation and maintenance of infrastructure in the operational phase, as well as service delivery management, (3) pragmatic division of risks between partners, according to the capabilities of specific partners, (4) initial pre-financing of projects by the private partner (financing) and final coverage (or guarantee of covering) all costs from budget funds or user fees (funding), (5) long-term contracts, up to several dozen years, specified by the statutory act or contract, depending on the necessary period of obtaining a return on the invested private capital, including the corresponding profit margin, (6) flexibility of models enabling adaptation to the delivery of various objects.

According to the early functional definition of the European Commission, PPP is a mechanism for: (1) spreading risk, (2) gaining off-balance-sheet financing (3) increasing innovation in design, (4) construction and operation of infrastructure-based projects (European Commission, 2004). According to the Polish Act of 19 December 2008 on public-private partnership: the public-private partnership consists in joint implementation of the project based on a division of tasks and risks between the public entity and the private partner (Art.1.2).

By the public-private partnership agreement, the private partner commits to implement the project at a remuneration and to cover in whole or in part the expenditure for project implementation or to have them covered by a third party, while the public entity commits to cooperate with the aim of achieving the project objective, in particular by making its own contribution. The remuneration of the

private partner shall primarily depend on the actual use or actual availability of the subject of project (Art. 7.1, 2).

In the opinion of the European Commission, the use of the PPP model should bring many benefits, such as i.a., better project implementation (timeliness, budget protection), obtaining a better quality infrastructure in relation to the price, spreading the cost of financing infrastructure over the entire lifecycle of the facility, accelerating the implementation of projects, improving risk sharing, better management, cost reduction (e.g., in relation to public procurement) etc., (European Commission, 2009, p. 3-4).

However, as practical experiences with the implementation of the PPP model have accumulated, it turned out to be difficult to apply and its performance began to be assessed as a "mixed bag". More attention was paid to the risks associated with its use, such as: long-term and costly negotiation processes, risks of corruption and large-scale fraud, problems with establishing clear long-term evaluation criteria by the authorities, high costs of project implementation, limiting the possibility of enforcing liability for project (Akintoye *et al.,* 2005), reduction of competition on the contracting market, the illusion of being able to pay for the project, the attractiveness of the model may be related to the statistical classification of expenses bypassing the limitations on the level of debt, the public partner may be guided by the estimates made by private partners and lenders whose goals are not in the public interest, long-term contracts it does not match the rapid pace of technological change (European Court of Auditors, 2018).

In the opinion of the European Investment Bank and European PPP Expertise Centre, the most important and necessary prerequisite for the success of PPP contracts was considered to be the governments‘ involvement in supporting this model (EIB, 2017).

Over time, the approach to defining the essence of PPP has changed. In contrast to the previous standardization approach, which was characterized with the search for a single, optimal contractual, organizational and financial model of PPP – which is currently considered impossible or pointless – rather a pluralistic approach has been adopted. PPP is treated as a diverse area of exploration and expertise in different countries, adapted to their conditions, infrastructure construction programs and development. Their common denominator is to be primarily the search for ways to deliver infrastructure projects that allow the best value for money to be obtained for the public sector, while ensuring commensurate profits for private contractors (see more on that: Lissowski, 2019).

3. Collaborative Contracting – General Issues

The terminology used in this area is not standardized. There are many terminological and definitional proposals in the literature (Engebø *et al.,* 2020, p. 281). In the

context of CC, the term collaboration is usually clearly distinguished from the related concept of cooperation. Cooperation is about working with others to achieve your own goals. Collaboration, on the other hand, is about working with others to produce something together and achieve shared goals.

CC does not, however, preclude additional cooperation between CC's partners in other, separate cases. From the general, practical point of view collaborative contracting can be understood as: an approach to contracting, aimed at agreeing interests – primarily commercial – between stakeholders (i.e. not only the parties to the contract) involved in mutual efforts, or having some common goal (Venerus, 2019).

Hayford's more analytical definition characterizes collaborative contracts as containing elements specifically designed to overcome the mismatch of commercial incentives for participants in traditional flat-rate contracts. Among such elements, Hayford mentions in particular: (1) contractual obligations to collaborate and cooperate in good faith, (2) early warning mechanisms, designed to alert other participants and draw their attention to emerging problems, so that solutions can be found and agreed before problems become aggravated, (3) early involvement of the main contractor, key specialists and subcontractors in the design process, (4) governance mechanisms to facilitate collective problem solving and decision-making, (5) remuneration mechanisms that financially motivate each participant to act in the most beneficial way for the project and not only for the participant (Hayford, 2018, p. 4).

There are various partnership and collaborative contracting models, developed mainly in the Anglo-Saxon world, such as e.g., partnership (partnering), managing contractor, EPCM model (engineering – procurement – construction - management), delivery partner, model of alliances / integrated project delivery IPD, progressive design-build, early contractor involvement.

4. Promoting and Facilitating Partnership and Collaborative Contracting Approaches in the EU and Polish Public Procurement Law

The partnership and collaborative contracting appraches are generally promoted or facilitated by the EU and Polish public procurement regulations However without compromising other important systemic principles, such as i.a. fair competition, material criteria value for money. Some examples of particular public procurement regulations promoting and facilitating the key CC postulates are quoted below, in abbreviated form and in the order indicated by O.Hayford.

- Contractual obligations to collaborate and and cooperate in good faith

-Performance of the obligation. The debtor should perform the obligation in accordance with its content and in a manner consistent with its socio-economic purpose and the principles of social coexistence, and if there are established customs

in this respect - also in a manner consistent with these customs. In the same way, the creditor should cooperate in the performance of the obligation.(PCC, Art.354 §1, §2)
-EU member states are obliged to ensure that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators. (Public procurement directive, Art.24; Utilities directive, Art.42)
-Abnormally low tenders. Contracting entities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with applicable obligations referred to in Article 36(2). (Public procurement directive, Art.69.1.3.; Utilities directive, Art.84 1.2.).

- Early warning mechanisms

- Notification of obstacles. If the documentation provided by the investor, construction site, machines or devices are not suitable for the proper performance of works or if there are other circumstances that may prevent the proper performance of works, the contractor should immediately notify the investor (PCC, Art.651).
- Warning about the danger of destruction. If the executed object is destroyed or damaged as a result of defects in the materials, machines or equipment provided by the investor or as a result of the execution of works according to the investor's instructions, the contractor may demand the agreed remuneration or its appropriate part, if he warned the investor about the danger of destruction or damage to the object or if, despite exercising due diligence, he could not determine the defectiveness of the materials, machines or equipment provided by the investor (PCC, Art.655).

- Early involvement of potential contractors

-Preliminary market consultations. Before launching a procurement procedure, contracting authorities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements. (Public procurement directive, Art.40; Utilities directive, Art.58)
-The contracting body may, before launching a procurement procedure, conduct preliminary market consultations in order to prepare the procedure and inform the economic operators of its plans and procurement requirements. (PPL, Art.84.1.).

- Goverrnment mechanisms to facilitate collective problem solving and decision-making

- Competitive dialogue is a procurement procedure where all interested economic operators may submit requests to participate in response to the contract notice. The contracting body shall conduct a dialogue with economic operators invited to participate in the dialogue on the solutions proposed by them, after which they shall be invited to submit tenders (Art. 169 PPL
- Meetings of all economic operators in order to clarify the content of the specifications of terms of the contract (Art.136 PPL).

- Remuneration mechanisms that financially motivate each participant to act in the most beneficial way for the project and not only for the participant

- Joint and several liability. The economic operators jointly competing for the contract shall be jointly and severally liable for the performance of the contract and lodging of a contract performance guarantee (Art. 445 PPL)

5. Measurement of Performance of Public Procurement Systems in the EU

Single Market Scoreboard (SMS) understans the performace of public procurement in material sense, as value for money. It is measured indirectly with the use 12 formal evaluation criteria and indicators important in the contract formation phase, which may have some impact on material performance of projects.

There are the following indicators: (1) the proportion of contracts awarded where there was just a single bidder; (2) proportion of procurement procedures that were negotiated with a company without any call for bids; (3) the value of procurement advertised on TED (Tenders Daily) as a proportion of national gross domestic product; (4) the proportion of procurement procedures with more than one public buyer; (5) the proportion of procedures awarded solely because the offer was the cheapest one available; (6) the mean decision-making period, i.e. the time between the deadline for receiving offers and the date the contract is awarded; (7) how many contractors are smaller firms (small and medium-sized enterprises – SMEs); (8) the proportion of bids from SMEs (9) the proportion of tenders that have been divided into lots; (10) the proportion of contracts awarded after a call for tender whose name and conditions were not clear: (11) the proportion of procedures that did not include the registration number of a seller; (12) the proportion of procedures that did not include the buyer's registration number. Single Market Scoreboard does not take into account promotion of specific partnership and collaborative contracting criteria. (EC, SMS)

6. Discussion and Conclusions

There is a large knowledge gap on the empirical performance of collaborative project delivery methods. Some valuable insights in this respect can be found in the article by Engebø *et al.* (2020).

The authors note that: (1) even though there is increasing number of articles on the subject, few studies are done on how the project delivery method affected project performance; (2) soft elements are an important aspect of collaborative project delivery method. However, few articles study soft elements such as culture explicitly. Soft element such as trust is often regarded as an effect, outcome, or a success factor; (3) there seems to be no unified theoretical framework for collaborative project delivery methods; (4) the empirical studies on collaborative project delivery methods are often descriptive by nature. There is a need for prescriptive studies of the link between contractual elements a collaborative project

delivery method inncludes that promote collaboration; (5) there is also a need for studies on what more than the described contractual elements are needed to promote collaboration in construction projects.

Application of positive incentives such as partnership, collaborative contracting models can be an important factor in improving the performance of some large public construction works and infrastructure projects. However more important seems to be the practical question about conditions (in given environment) that need be met in order for these models to be effective.

Collaboration contracting solutions seem to be much more easily applicable to private construction works an infrastructure projects than to public projects, due to very different interest structures of procuring public entities vs. private economic operators.

Most of the literature on the improvement of public procurement contracting points to the situations where the institutional, bargaining positions of contract parties are not equal, and public authorities have the upper hand.

However different situations where "the tail twirls the dog" are not exception, especially in large international construction works and infrastructue projects.

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