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Maciej Perkowski
University of Bialystok, Poland
ORCID: 0000-0002-3909-3967
m.perkowski@uwb.edu.pl

Marta Jamiołkowska
University of Bialystok, Poland
ORCID: 0000-0002-3694-503
m.jamiolkowska@uwb.edu.pl

Legal Implications of In-House Procurement Awarded to Regional Development Funds

Implikacje zastosowania trybu in-house przy zamówieniach publicznych z udziałem regionalnych funduszy rozwoju

ABSTRACT

The article has a scientific and research nature and addresses a problem of significant importance for the implementation of statutory tasks by local government units. The authors focus on the implications of awarding in-house procurement to regional development funds. They analyse the prerequisites for the use of in-house mode of public procurement and assume the hypothesis that the scope of the activities of the contractor of an in-house contract, which is a regional development fund, should include the full conducted activities of such an entity, regardless of the type of contract awarded, as long as these activities are within the scope of the tasks entrusted to it by the contracting authority exercising control over it (or by another legal entity over which this contracting authority exercises control). The originality of the research results concerns not only the chosen approach to the subject of in-house procurement, i.e. elaboration on regional development funds as public procurement contractors, but also the argumentation itself, which was based on the

CORRESPONDENCE ADDRESS: Maciej Perkowski, Professor, University of Bialystok, Faculty of Law, Department of Public International Law and European Law, Adama Mickiewicza 1, 15-213 Białystok, Poland; Marta Jamiołkowska, PhD student, University of Bialystok, Faculty of Law, Department of Public International Law and European Law, Adama Mickiewicza 1, 15-213 Białystok, Poland.

current case law and legal doctrine. The above brings a new cognitive value in the sphere of science and practice and has a potential to help local government stakeholders manage municipal property more confidently.

Keywords: regional development fund; public procurement; in-house; local government units

INTRODUCTION

The public procurement system is an important tool for the performance of duties by units of the public finance sector, as well as an important economic instrument that the state can use to intervene in the economy. Its importance is reflected in statistics. According to the European Commission's estimations, a significant part of public investment in the EU economy is carried out through public procurement, which accounts for 14% of the European Union's GDP, making it a fundamental element of the investment environment.[1] Due to the sensitivity of the functioning of this market for the entire economy and the need to give it appropriate rules regarding transparency in the spending of public money and impartiality in the selection of specific contractors, the area of public procurement is a highly regulated zone. In Poland, the core legal framework for the public procurement system is constituted by the Act of 11 September 2019 – Public Procurement Law.[2] This is a legal act that also implements the EU requirements for public procurement established in 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.[3]

One of the instruments of public procurement law is the so-called in-house procurement, which is a form of awarding a public contract on a sole-source basis. Its specific feature is that, if certain conditions are met, the contracting authority is not obliged to comply with the basic, "competitive" regulations on public procurement, despite the fact that it entrusts the performance of tasks to a third party.[4] Historically, the first regulation of in-house procurement was under Directive 2014/24/EU and was implemented into Polish legislation under the Act of 29 January 2004 – Public Procurement Law,[5] being a legal "predecessor" of the genre-identical and currently in force Act of 2019. What is particularly important, the Polish legislator did not use the possibility to completely exclude the application of the PPL provisions for

[1] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Making Public Procurement work in and for Europe", Strasburg, 3.10.2017, COM(2017) 572 final.

[2] Consolidated text, Journal of Laws 2022, item 2185, as amended, hereinafter: PPL.

[3] OJ L 94/65, 28.3.2014.

[4] A. Wójtowicz-Dawid, *Zawieranie umów cywilnoprawnych, w tym zamówienia in-house, a pomoc publiczna*, [in:] *Pomoc publiczna udzielana przez gminy*, LEX/el. 2020.

[5] Consolidated text, Journal of Laws 2019, item 1843, as amended.

in-house procurement. This was to allow contractors to use the legal remedies set forth in the 2004 PPL, as well as to allow the President of the Public Procurement Office to control the award of the in-house contracts.[6]

Although the institution of in-house procurement has been functioning in Polish law for years, and – as statistics indicate – is very popular among public entities,[7] its practical functioning still raises various kinds of doubts which have not been fully explored by representatives of the doctrine. One such problem is the issue of in-house procurement in the context of the establishment and functioning of regional development funds.

The key legal basis that regulates the functioning of such funds is Article 13 (1a) of the Act of 5 June 1998 on voivodeship self-government.[8] Pursuant to it, in the sphere of public utility, a voivodeship may, in order to carry out certain duties, establish a regional development fund in the form of a limited liability company or a joint stock company. The type of tasks that a local government may entrust to a regional development fund to carry out is specified in Article 11 (2) AVSG. The indicated provision lists the components of the voivodeship's policy on development for which the voivodeship government is responsible. Among the various activities provided therein, it indicates, i.a., obtaining and combining financial resources, both public and private, for the implementation of tasks in the public utility sphere, supporting technological progress and innovation, as well as creating conditions for economic development, including creating a labour market.

The origin of the regulation of regional development funds in Polish law dates back to the Act of 7 July 2017 on amending the Act on the principles of implementation of programs within the scope of cohesion policy financed in the financial perspective 2014–2020 and certain other acts.[9] The essence of their functioning was based on a mechanism according to which funds from the regional operational program, not committed under agreements with recipients of support provided in

[6] Fundusze Europejskie, Urząd Zamówień Publicznych, Europejski Fundusz Społeczny, *Udzielanie zamówień w trybie zamówienia z wolnej ręki w ramach instytucji tzw. in-house w ustawie z dnia 11 września 2019 r. Prawo zamówień publicznych (Dz.U. z 2019 r. poz. 2019 z późn. zm.)*, https://www.uzp.gov.pl/__data/assets/pdf_file/0025/46645/Udzielanie-zamowien-w-trybie-zamowienia-z--wolnej-reki-w-ramach-in-house.pdf (access: 16.3.2023).

[7] Urząd Zamówień Publicznych, *Informacja o polskim rynku zamówień publicznych w roku 2022 na podstawie ogłoszeń opublikowanych w Biuletynie Zamówień Publicznych*, 31.1.2022. According to this source, in the case of proceedings initiated under the terms of the 2004 PPL, the second most popular procurement mode in 2022 was the negotiated procedure (38.86% of all contracts). For proceedings initiated under the terms of the PPL, negotiated procurement accounted for 12.08% of all contracts.

[8] Consolidated text, Journal of Laws 2022, item 2094, as amended, hereinafter: AVSG.

[9] Journal of Laws 2017, item 1475. See R. Poździk (ed.), *Komentarz do ustawy o zasadach realizacji programów w zakresie polityki spójności finansowanych w perspektywie finansowej 2014–2020*, Warszawa 2016.

the form of repayable funds, and funds returned by these recipients would be reused to achieve goals serving development policy, precisely through the discussed institutions.[10] The aim of their introduction was to make the development policy independent of aid funds from the European Union.[11] The legislator wanted to address the risk that, when as a result of possible organisational changes within the EU concerning the rules of distribution of funds among particular recipients, the inflow of funds for development purposes within the framework of regional programmes would be limited.[12] The legislator intended that it would be the regional development funds that, using repayable financial instruments, coordinate regional development policy.[13]

In practice, twelve regional development funds operate in twelve voivodeships in Poland. Their main task is to offer financial support to micro, small and medium-sized enterprises in the form of loans, guarantees or sureties, for which the capital source is the aforementioned repayable financial instruments.[14] Although current legislation allows their establishment only by voivodeship self-governments, representatives of legal doctrine point to the purposelessness of such restrictions and call for granting the competence to create local development funds also to counties and districts.[15]

To conclude this aspect, it has to be acknowledged that regional development funds have significant importance in supporting regional entrepreneurship and, consequently, building the economic potential of the region. Their broad subject matter formula, which goes beyond the management of repayable funds, brings practical dilemmas that scientifically appear as research problems. One such problem is the type and scope of permitted activity of regional development funds who perform in-house public procurement. Hypothetically, the authors of this paper assume that, in the scope of the premise of Article 214 (1) (12) (b) PPL, in the limit concerning the activity of the in-house procurement contractor, which is the

[10] Article 98 of the Act of 11 July 2014 on the principles of implementation of programs on cohesion policy financed in the financial perspective 2014–2020 (consolidated text, Journal of Laws 2020, item 818, as amended).

[11] M. Wielgolaski, *Art. 13*, [in:] *Ustawa o samorządzie województwa. Komentarz*, ed. P. Dembkowski, Legalis 2020.

[12] D. Kowalski, *Regionalne fundusze rozwoju – zalety, wady i ograniczenia*, "Studia Prawnicze i Administracyjne" 2019, vol. 27(1), p. 10.

[13] In the context of the regional development policies financed from the EU funds, see M. Perkowski, R. Poździk (eds.), *Ustawa o zasadach realizacji zadań finansowanych ze środków europejskich w perspektywie finansowej 2021–2027. Komentarz*, Warszawa 2023.

[14] Ogólnopolskie Stowarzyszenie Regionalnych Funduszy Rozwoju, *Regionalne Fundusze Rozwoju: wspólne cele, wspólne działanie*, https://osrfr.org/media-regionalne-fundusze-rozwoju--wspolne-cele-wspolne-dzialanie (access: 16.3.2023).

[15] M. Stec, *O potrzebie nowego spojrzenia na komunalną działalność gospodarczą*, "Finanse Komunalne" 2019, no. 11–12, pp. 106–118.

regional development fund, the full conducted activity of such an entity should be taken into account, regardless of the type of procurement, provided that this activity falls within the tasks entrusted to it by the contracting authority exercising control over it (or by another legal person over which this contracting authority exercises control), and also regardless of any subsequent subcontracting of part of the tasks entrusted to the municipal company under the in-house agreement.

Therefore, the purpose of this article is to verify the hypotheses indicated above, which will be conducted in a way of analysis of legislation, case law and literature, using predominantly the dogmatic-legal method. In the authors' opinion, this article has a chance to enrich the legal doctrine with a new knowledge on the in-house public procurement issue in the strict context of the awarding of these contracts to regional development funds. According to the authors' best knowledge, there are few publications in the legal literature concerning regional development funds[16] and significantly more studies about in-house procurement.[17] However, no publication directly addresses both issues, analysing at the same time the legal problems that may arise in such a coupling.

RESEARCH AND RESULTS

At the outset, it should be noted that the 2019 PPL, which came into force on 1 January 2021, does not introduce significant changes in the regulation of the in-house procurement institution compared to the analogous Act of 2004. The legislator did not depart from the previous double qualification structure, i.e. as to the substantive assessment (criteria) and procedural (a way of awarding contracts).[18] Therefore, case law and doctrine based on previously applicable provisions should be relevant for the analysis of the current legal status as well.

The in-house procurement construction discussed in this paper is currently regulated by Article 214 (1) (11) PPL. According to this provision, a contract is awarded by the public contracting authority to a third party if the following conditions are met cumulatively:

a) the contracting authority exercises control over that legal entity equivalent to the control exercised over its own units, consisting in a dominant influ-

[16] See M. Pronobis, *Polityka wykorzystania środków z instrumentów zwrotnych wdrażanych w ramach wybranych regionalnych programów operacyjnych*, "Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu" 2018, no. 527; D. Kowalski, *op. cit*.

[17] For example, see A. Wójtowicz-Dawid, *Pomoc publiczna…*; J. Jagoda, *Porozumienie międzygminne a wykonywanie zadań w trybie zamówienia in-house*, "Samorząd Terytorialny" 2019, no. 6; H. Wolska, E. Przeszło, P. Nowicki, *Nadzór i kontrola zamówień i koncesji in-house*, LEX/el. 2020.

[18] H. Wolska, E. Przeszło, P. Nowicki, *Zakończenie*, [in:] *Nadzór i kontrola zamówień…*

ence on the strategic objectives and significant decisions concerning the management of the affairs of that legal entity, provided that this condition is also met when such control is exercised by another legal entity controlled by the contracting authority in the same manner;

b) more than 90% of the controlled legal entity's activity concerns the performance of tasks entrusted to it by the controlling contracting authority or by another legal entity over which the contracting authority exercises control referred to in letter a;

c) there is no direct participation of private capital in the controlled legal entity.

Importantly, the existence of the above circumstances is required for the entire period for which the public procurement contract has been concluded. In relation to the calculation of the 90% activity mentioned above, the average revenue earned by the legal entity or the contracting authority in relation to services, supplies or construction works for the three years preceding the award of the contract must be taken into account. If, due to the day of establishment or commencement of operations by the legal entity or the contracting authority, or the reorganization of their activities, the data on the average revenue for the three years preceding the award of the contract are unavailable or inadequate, the percentage of activity in question must be determined using "credible commercial forecasts" (Article 214 (6) PPL). Due to the formal limitations of this paper, only the premise contained in Article 214 (1) (11) (b) PPL were subjected to further in-depth analysis.

"NINETY PERCENT LIMIT" CONCERNING THE ACTIVITY OF THE IN-HOUSE PROCUREMENT CONTRACTOR

As a general rule, in order to calculate the 90% activity of the controlled legal entity, the average revenue earned by the controlled legal entity in relation to services, supplies or construction works for the three years preceding the award of the contract should be taken into account. Importantly, such revenue should include all activities conducted by such entity, of which over 90% must be generated within the scope of the entrusted tasks, i.e. tasks entrusted in various forms by the contracting authority to that subordinate entity.[19] According to case law, the source of income is irrelevant to the analysis of meeting the discussed premise, as the entrusting authority of the task does not have to be the payer for a given service at the same time.[20] However, it is necessary for the payments reflected in the revenue structure of the controlled entity to be closely related to a specific order of the contracting

[19] A. Gawrońska-Baran, *Art. 214*, [in:] E. Wiktorowska, A. Wiktorowski, P. Wójcik, A. Gawrońska-Baran, *Prawo zamówień publicznych. Komentarz aktualizowany*, LEX/el. 2022.

[20] Judgment of the District Court in Warsaw of 21 June 2022, XXIII Zs 5/22.

authority to perform the entrusted task.[21] Therefore, the 90% activity threshold should not include ancillary tasks in the form of supplies, services and construction works, from which the contractor derives additional revenue.[22] It does not matter whether this additional revenue is related to its core activity or not. If the actions taken by this entity (and the revenues earned by it) concern the sphere covered by the entrusted tasks but remain neutral to these tasks, such additional activity is not included in the required 90% activity.[23]

Moreover, although the PPL does not define what is meant by the term "entrusted tasks" nor the form in which the assignment of tasks should take place, case law sheds light on this issue. According to the jurisprudence, the concept of "entrusted task" should not be limited to delegating only the own tasks by a specific local government unit. For example, in one of the judgments the National Appeal Chamber (the NAC)[24] had no doubt that the activity concerning the performance of entrusted tasks should include the activity of implementing the municipality's own tasks on its behalf. However, as the NAC emphasised, the concept of an entrusted task should not be limited exclusively to the own tasks of a local government unit, just as it is not justified to limit the entrustment of tasks exclusively to the situation of their transfer by the act of establishing a legal entity. The NAC found that it is essential for the activity of the controlled legal entity to be closely related to a specific order of the contracting authority, who controls that entity, and not to have a commercial character. In light of the jurisprudence, the form in which tasks are entrusted for implementation is of secondary importance – the choice of the form of task entrustment is at the discretion of the contracting authority and may be subject to any restrictions resulting from the relevant legal provisions that the contracting authority is obliged to apply.[25]

Although – as mentioned above – the PPL does not clarify the concept of "entrusted tasks" it may also be reasonable to use a linguistic interpretation for this purpose. This, in turn, leads to the conclusion that the legislator seems to broadly define the scope of entrusted tasks, which should concern 90% of the activity of the controlled entity. Assuming the legislator's rationality, it should be recognised that the use of the Polish word *dotyczyć* (concern) is not accidental but reflects the legislator's intention, who – what is worth emphasising – did not use the phrase "90% of the activity includes performing entrusted tasks".[26] Instead, the legislator used a broader wording, according to which "90% of the activity concerns the performance of entrusted tasks", which leads to the conclusion that the legislator

[21] Decision of the NAC of 19 August 2022, KIO/KD 45/20.
[22] Resolution of the NAC of 18 August 2017, KIO/KU 51/17.
[23] Resolution of the NAC of 22 June 2020, KIO/KD 28/20.
[24] Judgment of the NAC of 4 October 2019, KIO 1842/19.
[25] Judgment of the District Court in Warsaw of 21 June 2022, XXIII Zs 5/22.
[26] A. Gawrońska-Baran, *op. cit.*; P. Granecki, I. Granecka, *Art. 214*, [in:] *Prawo zamówień publicznych. Komentarz*, Legalis 2021; resolution of the NAC of 19 August 2017, KIO/KU 52/17.

deliberately extended the scope of subject matter tasks within the entrustment.[27] According to the Polish language dictionary, the word *dotyczyć* means "to relate to someone or something".[28] Consequently, considering the linguistic interpretation of the discussed provision, 90% of the activity of the controlled legal person should (only) relate to the performance of entrusted tasks.

The above interpretation, which provides for a broad understanding of the tasks within the scope of the required "90% of activities" under the law, also seems to be supported by EU case law. The Court of Justice of the European Union (CJEU) indicates that, in the above context, when awarding an in-house contract, the activity performed by a controlled entity should be interpreted holistically. According to the CJEU judgment in case C-340/04,[29] "it can be considered that a company carries out its activity predominantly for the controlling entity (…), only if the activity of this company is mainly dedicated to that entity, and any remaining activity is of a marginal nature (…), the decisive factor is the income obtained by the company through the decisions of the controlling entity to award it contracts, including income obtained from the beneficiaries of services in the performance of these decisions [authors' underlining]". The CJEU stated that in assessing the required level of activity by the contractor performing the contract, all activities carried out by that person on the basis of the contract granted, regardless of who pays the remuneration for the performance of this activity – the contracting authority itself or the beneficiaries of the services provided – and regardless of the area in which this activity is performed, should be taken into account.[30]

When analyzing the broadly understood acquis of the CJEU, it is also necessary to pay attention to the opinions of its Advocates General. Although they were expressed before the entry into force of Directive 2014/24/EU, they are of significant importance for the historical interpretation of the in-house procurement concept and contribute substantially to understanding the scope of activities that a controlled institution can carry out. In the opinions issued in cases C-340/04[31] and C-26/03,[32] Advocate General Christine Stixs-Hackl indicates that the activity of the assessed entity should be determined not only on the basis of quantitative criteria but also on the basis of qualitative elements. The analysis of the second of the mentioned

[27] Resolution of the NAC of 19 August 2017, KIO/KU 52/17.

[28] Entry: *Odnosić się*, [in:] *Słownik języka polskiego PWN*, https://sjp.pwn.pl/slowniki/odnosić%20się.html (access: 16.3.2023).

[29] Judgment of the CJEU of 11 May 2006 in case C-340/04, *Carbotermo SpA, Consorzio Alisei v. Comune di Busto Arsizio, AGESP SpA*, ECLI:EU:C:2006:308.

[30] See also judgment of the NAC of 4 October 2019, KIO 1842/19.

[31] Opinion of Advocate General Christine Stix-Hackl of 12 January 2006 in case C-340/04, *Carbotermo*, ECLI:EU:C:2006:24.

[32] Opinion of Advocate General Christine Stix-Hackl of 23 September 2004 in case C-26/03, *Stadt Halle and RPL Recyklingpark Lochau GmbH*, ECLI:EU:C:2004:553.

aspects aims to determine how and on whose behalf the controlled entity performs its activity and whether there is a market for this type of activity, and finally whether the controlled entity commercially provides part of the services for persons other than the institution exercising control over it.[33] In the quantitative element, legal and factual aspects related to the activity of a given entity should be taken into account.[34] From the above position, it can be concluded that, from a historical perspective, the key intention underlying the concept of in-house procurement in the context of interpreting the permissible scope of the contractor's activity was a comprehensive assessment of its activity.

The above conclusions are extremely important because, according to a few opinions in the doctrine,[35] in order to calculate the required 90% income level referred to in Article 214 (1) (11) (b) PPL in the procedure for granting a contract without a tender, it is necessary to take into account the income from the last three years of activity similar to the contract being granted. In light of the above arguments, however, such interpretation does not seem accurate. Moreover, it seems to have been expressly rejected by the NAC.[36] According to the assessment of this authority, the revenue of a legal person should include the entirety of its activity, more than 90% of which must relate to the performance of tasks entrusted to it by the contracting authority exercising control over that legal person. The NAC justifies its position both by the linguistic interpretation of the provision, emphasising that it does not refer to the activity related to the performance of the tasks to be the subject of the contract awarded without a tender, and also by referring to the interpretation of law and jurisprudence of the CJEU. The NAC states that EU case law emphasises the need to refer to the actual activity of a legal person, but without limiting this activity only to its specific aspect intended to be the subject of an in-house contract. The NAC concludes its argument with a clear statement that "the few proposals appearing in the doctrine, indicating that the % of activity referred to in Article 67 (1) (12) (b) PPL should relate only to the service that the contracting authority intends to conclude in the in-house mode, find no support in the currently applicable regulations and can be treated only in the category of *de lege ferenda* proposals".

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[33] W. Hartung, M. Bagłaj, T. Michalczyk, M. Wojciechowski, J. Krysa, K. Kuzma, *Art. 12*, [in:] *Dyrektywa 2014/24/UE w sprawie zamówień publicznych. Komentarz*, Legalis 2015.

[34] W. Hartung, *Samodzielność podstawowej jednostki samorządu terytorialnego w organizacji i świadczeniu usług komunalnych z perspektywy prawa Unii Europejskiej oraz krajowego porządku prawnego*, Legalis 2018.

[35] See I. Skubiszak-Kalinowska, E. Wiktorowska, *Prawo zamówień publicznych. Komentarz*, Warszawa 2016; J. Pawelec, [in:] *Zamówienia na roboty budowlane, usługi, dostawy w systemie in-house. Komentarz praktyczny z orzecznictwem*. *Wzory pism*, ed. J. Pawelec, Warszawa 2016.

[36] Judgment of the NAC of 4 October 2019, KIO 1842/19. Although the NAC ruled on the grounds of Article 67 (1) (12) (a) of the 2004 PPL, in terms of the prerequisite for a certain level of activity, this prerequisite is the same as the key condition for this paper under Article 214 (1) (11) (b) PPL.

From the above analysis of legal provisions and case law (both Polish and EU), it follows that the scope of the 90% limit concerning the activity of the in-house contract performer should be viewed broadly, considering the entire activity carried out by the subordinate entity, more than 90% of which must be generated within the scope of entrusted tasks. Consequently, in calculating the above limit, one should not take into account only the type of activity of the controlled entity that is to be the subject of the in-house contract. Furthermore, within the specified limit, 90% of the entity's activity does not have to include the strict performance of entrusted tasks, but only relate to their performance. This leads to the conclusion that the legislator aimed at extending the catalogue of tasks within the scope of the entrustment.

THE PUBLIC UTILITY SPHERE AND ACTIVITIES OF THE REGIONAL DEVELOPMENT FUNDS

For the sake of completeness of the arguments and a thorough examination of the permissible scope of activity of regional development funds in the context of in-house contracts, it is also necessary to analyse the concept of the "public utility sphere". According to the AVSG, the subject funds can only be created within this sphere. Therefore, the key aspect will be the assessment of whether the activities of regional development funds will involve delegated tasks within the public utility sphere. Since this concept raises disputes in doctrine and jurisprudence, it requires a broader analysis.

First and foremost, it should be noted that the AVSG does not specify the notion of the public utility sphere, so for its interpretation it is worth using the definitions from Article 9 (4) of the Act of 8 March 1990 on districts self-government[37] and Article 1 (2) of the Act of 20 December 1996 on municipal management[38].

From both provisions, it follows that tasks belonging to public utility tasks are characterized by the following features:

- they belong to the own tasks of local government units, i.e. they serve the current and continuous satisfaction of the needs of the local government community;
- the satisfied needs have a collective character, i.e. they concern all or most or a significant part of the members of a given community (e.g. healthcare, public transport, social care, education);
- meeting these needs takes place by providing universally available services.[39]

[37] Consolidated text, Journal of Laws 2023, item 40, as amended.

[38] Consolidated text, Journal of Laws 2021, item 679, as amended.

[39] J. Jagoda, *Art. 13*, [in:] *Ustawa o samorządzie województwa. Komentarz*, ed. B. Dolnicki, LEX/el. 2012.

In the literature, there are also opinions according to which the satisfaction of the collective needs of the local government community should take place directly.[40] As a consequence, such an interpretation would exclude from the catalogue of public utility tasks those tasks whose implementation satisfies the needs of the community only indirectly (e.g. supporting entrepreneurs in creating new jobs as an action aimed at combating unemployment). This was also the direction of the jurisprudence of the Supreme Administrative Court, which in one of its judgments stated that "the activity of a company involving the guaranteeing of loans and credits contracted by local government units does not display the necessary elements for such activity to be considered as the performance of a public utility task. Indeed, this type of activity cannot be regarded as a form of performing tasks aimed at the current and uninterrupted satisfaction of the collective needs of the community".[41] The interpretation, according to which the tasks specified in Article 11 AVSG do not fall within the scope of the definition of "public utility" and, therefore, companies cannot be established for their implementation, is supported by some representatives of the doctrine.[42] Although the above judgment was issued based on the legal qualification of the possibility of creating a company by the County Council to engage in credit and loan activities, it is extremely important from the perspective of the subject of this paper, which also focuses on an entity with similar financial activity in its competence.

The above view of the case law has been partially criticized in the doctrine,[43] among other things, due to the application by the Supreme Administrative Court of the interpretation of "public utility" narrowed only to the interpretation of this concept against the background of the Municipal Management Act. Due to such an approach, the Supreme Administrative Court did not take into account the significant socio-economic changes that took place in the country and society over the past decades.[44] As M. Stec aptly points out, the most organic tasks of the voivodeship local government and at the same time publicly useful activities are, for example, creating a regional labour market that would meet the needs and aspirations of its residents, or combating unemployment and activating the labour market.[45] As the

[40] A. Szewc, *Art. 13*, [in:] *Ustawa o samorządzie województwa. Komentarz*, LEX/el. 2008.

[41] Judgment of the Supreme Administrative Court of 16 May 2006, II OSK 288/06; judgment of the Voivodeship Administrative Court in Rzeszów of 8 March 2007, I SA/Rz 647/06.

[42] According to K. Bandarzewski, "the scope of public utility tasks is defined in Article 14 (1) AVSG" (*Komentarz do ustawy o samorządzie województwa*, ed. P. Chmielnicki, Warszawa 2005, p. 127).

[43] P. Derlecki, *Wielowymiarowość pojęcia użyteczność publiczna*, "Przegląd Prawa Publicznego" 2018, no. 4, pp. 53–62.

[44] M. Stec, M. Mączyński, *Zakres i charakter zadań samorządu województwa a sfera użyteczności publicznej – wykonywanie istotnej części obowiązków publicznych*, "Kontrola Państwowa" 2016, no. 61, p. 133.

[45] M. Stec, *O potrzebie reinterpretacji (i nie tylko) niektórych pojęć w zakresie samorządowych zadań i kompetencji*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2017, vol. 79(3), pp. 45–46.

mentioned author indicates, the natural way of performing these tasks is the active activity of the local government in the sphere of creating conditions for economic development, and its essential elements should be supporting entrepreneurship (especially small and medium-sized entrepreneurs) and encouraging larger entities to invest in the voivodeship. From this, M. Stec derives that the provisions referring to the concept of "public utility" should be interpreted using a purposive interpretation, which allows expanding the spectrum of tasks of a public utility character. It should be added that such a view is confirmed by the resolution of the Constitutional Tribunal of 12 March 1997 (W 8/96), in which the body unambiguously accepted that "tasks of a public utility character should be understood as broadly as possible, and it seems that they should be identified with public tasks, the implementation of which rests with the government and local government administration".[46]

In addition to the theoretical aspect, it is necessary to consider the practical conclusions. These are formulated in the report by the Supreme Audit Office,[47] confirming that activities in the sphere of public utility also include the activities of provincial companies providing guarantees and loans using EU funds. The Supreme Audit Office ultimately took the position that the above activities serve to create conditions for economic development in the voivodeship and do not go beyond the sphere of public utility. Services of this kind, as provided in the general economic interest, are indicated as a tool for implementing regional operational programs. For example, activities outside the sphere of public utility were recognized as the activities of provincial companies in the field of hotel and tourism services (management of hotels and holiday resorts), production of mineral waters, or catering services.[48] It is also significant that currently, in Poland, several regional development funds have been operating for years, whose main activity is supporting local entrepreneurs using various types of loans or guarantees.

Analysing the above positions in the context of the activities of regional development funds, it should be emphasised that disputes in the doctrine and the non-uniform approach of case law regarding the scope of the "public utility sphere" strongly influence the assessment of the legal basis for creating funds and, consequently, the range of tasks that voivodeship self-governments could entrust to the regional development funds they create. As D. Kowalski points out, this state of uncertainty has not been changed by the clear introduction to the AVSG of the right of the local government to create regional development funds in the form of capital companies under commer-

[46] The resolution concerns the establishment of a binding interpretation of Article 2 (7) and Article 4 (1) (4) of the Act of 10 June 1994 on public procurements.

[47] Najwyższa Izba Kontroli, *Informacja o wynikach kontroli NIK „Realizacja zadań publicznych przez spółki tworzone przez jednostki samorządu terytorialnego"*, no. P/14/019, https://www.nik.gov.pl/kontrole/P/14/019/KGP (access: 16.3.2023), p. 18.

[48] *Ibidem*.

cial law, as there is still uncertainty as to the permissible scope of their activities.[49] This uncertainty could be eliminated by the legislator specifying the definition of the "public utility sphere"[50] or indicating that the voivodeship self-government can create regional development funds regardless of whether such activity is carried out in the sphere of public utility,[51] which was expressed in the form of *de lege ferenda* postulates by some representatives of the doctrine.

SUBCONTRACTING IN THE CONTEXT OF IN-HOUSE PROCUREMENT

Practical problems with the application of the in-house procurement, which due to the formal limitations of this paper can only be briefly indicated, are caused by the involvement of subcontractors in such procurement. According to Article 214 (9) PPL, the contractor who has been awarded an in-house procurement cannot entrust a subcontractor with the performance of the part of the procurement concerning the main subject of the procurement. Although the provision uses rather imprecise terms, it is assumed that its intention is for the contractor who has been awarded this type of procurement to be able to entrust a subcontractor with the performance of those elements of the subject matter of the procurement which are auxiliary in nature and do not reflect the essence of the procurement.[52] Nevertheless, such "subcontracting" may, as a rule, only take place through a competitive public procurement procedure regulated in the PPL.[53] Consequently, this means that the legislator has adopted a restrictive assumption that the contractor of the discussed procurement must be capable of independently performing the main subject of the procurement and cannot rely on the potential of other entities in this regard. The Public Procurement Office also seems to support this interpretation. In the opinion of this authority, the possibility of the controlled legal entity to entrust part of the contract to subcontractors, should be interpreted narrowly.[54]

Another natural question that arises in the context of the title considerations is whether the participation of subcontractors affects the condition from Article 214

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[49] D. Kowalski, *op. cit.*, p. 12. In justifying his thesis, the author additionally points out that the authorization of local government referred to in Article 13 (1a) AVSG in no way changes the authorization of the voivodeship local government to operate capital companies, since the local government already had the ability to create companies in the sphere of public utility.

[50] M. Wielgolaski, *op. cit*.

[51] D. Kowalski, *op. cit.*, p. 12.

[52] See A. Gawrońska-Baran, *op. cit.*; judgment of the NAC of 22 June 2021, KIO 731/21.

[53] Resolution of the NAC of 5 July 2022, KIO/KD 18/22.

[54] Urząd Zamówień Publicznych, *Współpraca publiczno-publiczna w rozumieniu ustawy Prawo zamówień publicznych*, https://www.gov.pl/web/uzp/wspolpraca-publiczno-publiczna-w-rozumieniu-ustawy-pzp (access: 16.3.2023).

(1) (11) (b) PPL. The answer to this question is only partly provided by the case law. According to the views of the judicature, the activity that generates revenue counted in the "ratio of 90% of the activity" in order to meet and demonstrate the above premise, must be directly related to the performance of the entrusted task by the entity over which control of the contracting authority is exercised. Consequently, in a situation where the implementation of the entrusted task is actually directed to an external entity over which no control relationship of the contracting authority exists, the revenue cannot be attributed to the revenue from activities carried out within the "internal structure" of the contracting authority.[55] This approach has been aptly criticised by some of the doctrine mainly due to the fact that there is no obligation in law to perform personally the tasks entrusted exclusively to a municipal company, and the very manner of execution of an in-house contract should be subject to a final corporate decision.[56] Such a decision – as rightly noted in the literature – should take into account the efficiency of the whole process under strictly defined conditions, as municipal management is distinguished by the great variety of tasks and their cross-sectional nature.[57] Importantly, the crux of the dispute of the case in which the above-cited ruling was issued was the legal assessment of the revenue that the municipal company received from the local government not for the actual performance of municipal waste management, but for the organisation of this management, which amounted in part to a further outsourcing of the work to third parties selected in "competitive" tenders. The above legal problem, *mutatis mutandis*, is also related to the activities of regional development funds, which often carry out part of their tasks with the help of subcontractors.[58]

Although the conclusions of the aforementioned judgment may have a significant impact on the execution of in-house procurement agreements and the provision of services by regional development funds, it should be noted that there are also important arguments to include the full activity of such an entity in the limit concerning the activity of a contractor for an in-house contract, which is a regional development fund, regardless of any subcontracting that may be carried out later.

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[55] Judgment of the NAC of 16 May 2022, KIO 561/22; judgment of the District Court in Warsaw of 21 October 2022, XXIII Zs 98/22.

[56] F. Łapecki, *Podstawy udzielenia zamówienia in-house na odbiór odpadów komunalnych w oparciu o art. 214 ust. 1 pkt 11 PrZamPubl. Glosa do wyroku Krajowej Izby Odwoławczej z 16.5.2022 r., KIO 561/22 i in*., "Prawo Zamówień Publicznych" 2023, no. 1, pp. 149–152.

[57] *Ibidem*, p. 149.

[58] Regionalny Fundusz Rozwoju Województwa Łódzkiego, Ogłoszenia o przetargach, https://rfrwl.pl/przetargi (access: 16.3.2023); Dolnośląski Fundusz Rozwoju, *Informacja o wyborze najkorzystniejszej oferty dla zamówienia zorganizowanego przez Dolnośląski Fundusz Rozwoju, dotyczącego „Świadczenia przez Wykonawców usługi pośrednictwa finansowego polegającej na udzielaniu i kompleksowej obsłudze pożyczek (...) ze Środków Zamawiającego"*, https://www.dfr.org.pl/wp-content/uploads/2020/06/pakiet_1_2019.p-informacja-o-wyborze-oferty-i-cze_s_c__signed.pdf (access: 6.8.2023).

Indeed, the prerequisites for the award of this type of contract do not include the demonstration of the contractor's ability to perform the entrusted task independently or the prohibition on engaging subcontractors. Moreover, the legislator has not, in principle, limited the categories of contracts that may be awarded in-house, and such a form of entrusting the performance of tasks, even assuming the participation of subcontractors, does not seem to threaten the assurance of a sufficiently high level of competition protection.[59]

CONCLUSIONS

To sum up the above considerations, it should be pointed out that the scope of the 90% limit concerning the activity of the in-house procurement contractor, which is the regional development fund, should be viewed broadly, taking into account the entire activity conducted by this entity, more than 90% of which must be generated within the entrusted tasks. For the calculation of the above "90%" limit, it is not necessary to narrow the scope of the activity under consideration, according to which only the type of activity of the regional development fund, which is to be the subject of a specific in-house contract, would be taken into account. In addition, in the indicated limit, the required share of the activity of the title fund does not have to include the strict performance of the tasks entrusted, but only concern the performance of these tasks. However, significant limitations arise in the case of entrusting part of this type of procurement to subcontractors. Some of these restrictions result from the opinions of the judicature, which is critical of the possibility to include revenues from tasks performed by an in-house contractor using subcontractors. Nonetheless, as the case law seems to be still developing on this issue, it is to be expected that subsequent rulings addressing the described issue will analyse it much more comprehensively, and the doctrine – including this article – will contribute to the adoption by the judicature of a less restrictive interpretation of Article 214 (1) (11) (b) PPL in the above-described context of subcontracting. It is also worth adding that the legal uncertainties regarding the scope of the "public utility sphere" also influence the permitted scope of operation of regional development funds, and thus the scope of tasks that voivodeship self-governments could entrust to these entities. According to the AVSG, it is within the sphere of public utility that the voivodeship may create a regional development fund to implement specific activities. In this article, *de lege ferenda* proposals were put forward, which could eliminate these uncertainties.

The authors believe that such a presented and possibly systemic approach to the issue of creating and functioning of regional development funds has a chance

[59] F. Łapecki, *op. cit.*, pp. 152–153.

to enrich the legal doctrine with new knowledge regarding the permissible scope of tasks that voivodeship self-governments can entrust to regional development funds, and thus limit the range of legal problems generated by the uncertainty of the current law in this area. Moreover, taking into account the fact that regional development funds use (in a broad sense) funds from the EU budget in their activities, and considering the inherent risk of corruption related to public procurement[60] and the extensive set of tools that the EU is able to use for controlling the expenditure of its funds,[61] the issue of in-house public procurement should be treated with particular attention. The context of regional development funds is specific in that despite their special nature,[62] there are no normative acts regulating both the comprehensive rules for transferring funds to beneficiaries and the statutory authorization granted to voivodeship self-governments to issue a local law act in this area. Until the legislative addressing of problems concerning the functioning of regional development funds, resulting from the lack or imprecision of applicable regulations, this gap must be adequately "filled" by legal doctrine, which should effectively inspire case law.

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[60] See M. Kania, *Zwalczanie i zapobieganie korupcji w zamówieniach publicznych – uwagi w ujęciu komparatystycznym*, "Kontrola Państwowa" 2022, no. 67, pp. 149–153.

[61] See M. Bernatt, A. Jones, *Populism and Public Procurement: An EU Response to Increased Corruption and Collusion Risks in Hungary and Poland*, "Yearbook of European Law" 2022, vol. 41; A.P. Chociej, P. Woltanowski, *Kontrola realizacji programów operacyjnych przez Instytucje Zarządzające w kontekście ochrony interesów finansowych Unii Europejskiej*, "Białostockie Studia Prawnicze" 2019, vol. 24(3).

[62] Resolution no. 102 of the Council of Ministers of 17 September 2019 on the adoption of the "National Strategy of Regional Development 2030" (Polish Monitor 2019, item 1060). According to the this document, regional development funds should be considered "an important entity for the implementation of development policies carried out by provincial governments, mainly in the areas of innovation, entrepreneurship, investment in urban areas and reduction of energy intensity".

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ABSTRAKT

Artykuł ma wymiar naukowo-badawczy i dotyczy problemu mającego istotne znaczenie w kontekście realizacji zadań ustawowych przez jednostki samorządu terytorialnego. Autorzy skupiają się na wybranym elemencie tego zagadnienia, a mianowicie na implikacjach zastosowania trybu in-house przy zamówieniach publicznych z udziałem regionalnych funduszy rozwoju. Analizując przesłanki zastosowania zamówienia publicznego w trybie in-house, założono hipotezę, zgodnie z którą w zakresie limitu dotyczącego działalności wykonawcy zamówienia in-house, którym jest regionalny fundusz rozwoju, należy uwzględnić pełną prowadzoną działalność takiego podmiotu, niezależnie od rodzaju udzielonego zamówienia, o ile działalność ta mieści się w ramach zadań powierzonych mu przez zamawiającego sprawującego nad nim kontrolę (lub przez inną osobę prawną, nad którą ten zamawiający sprawuje kontrolę). Oryginalność wyników badań dotyczy nie tylko ujęcia problematyki zamówień in-house w szczególnym kontekście podmiotowym, związanym z funkcjonowaniem regionalnych funduszy rozwoju, lecz także samej argumentacji, która została oparta o aktualne poglądy orzecznictwa i doktryny. Oznacza to pewną nową wartość poznawczą w sferze nauki, posiadającą również potencjalny walor praktyczny, który – rozwijając określone zawiłości prawne – może posłużyć decydentom samorządowym do pewniejszego zarządzania mieniem komunalnym.

Słowa kluczowe: regionalny fundusz rozwoju; zamówienia publiczne; in-house; jednostki samorządu terytorialnego