



Challenging procurement decisions - a case study

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Government Contracts –
Public Procurement Law
and Contract Law

Maris Brizgo and Michał Wojciechowski

Facts of the case

- Public tender under EU Directive 2014/18/EC
- Contracting authority – state owned company
- Subject of the tender – transportation services by road for timber
- Tender in 2 lots – 1-year contracts and 3-year contracts

Facts of the case

- Offers could be submitted in both lots
- Contractors may get either award of 3-year contract or of 1-year contract but not both
- Award of 3-year contract excludes award of 1-year contract and vice versa

Facts of the case

- The contractor was previously providing services only to the contracting authority
- The contractor submitted its offer in both lots
- The contractor offered one of best prices for 3-year contract and had good chances to get award for 3-year contract

Selection criteria

- For 3-year contract: positive experience in provision of transportation of timber by road
- For 1-year contract: no such experience was required
- Positive experience should be evidenced with positive reference from a customer

Reference

- Reference from the customer should specify YES/NO answer whether service was provided:
 - in specified quality;
 - in specified amount;
 - within specified time-limits.
- The contracting authority did not specify how to measure «positive experience» and «positive reference»

Explanation

- The contracting authority initially replied to the question «what is meant by positive experience and what would be verified in this regard?» as follows:
 - The service would not be provided in specified quality if (1) the contract in question was terminated, (2) truck was excluded from the contract or (3) the contractor failed to comply with material provisions of the contract in question

Truck exclusion

- The truck of the contractor was excluded by the contracting authority under different contract
- However, the contractor managed to perform the obligations in specified amount and within specified time-limits

Reference by the contracting authority

- The Contracting authority issued following reference to the contractor:
 - Specified quality – NO
 - Specified amount – YES
 - Specified time-limits – YES
- The contractor then asked the Contracting authority whether such reference is positive if only one issue bears «NO»

Explanation

- The Contracting authority replied to the question of the contractor that such reference is negative (i.e. if at least on issue bears «NO»)
- The contractor received this answer one day after expiry of statutory time-limit for challenge of tender provisions

Result and challenge

- The contractor was excluded from 3-year contract lot and was awarded with 1-year contract
- The contractor challenged the exclusion and asked for award of 3-year contract
- The state authority terminated 3-year contract lot and permitted to enter into 1-year contract with the winners, including the contractor

Result and challenge

- Other competitors challenged ruling of the state authority regarding 3-year contracts in the court
- The supreme court granted an interim measure and suspended the termination of 3-year contract lot
- As a result of the interim measure the contracting authority entered into 3-year contracts with the winners except for the contractor

Result and challenge

- The granting of the interim measure was based on reasoning that the contractor did not have *locus standi* to challenge tender provisions after expiry of statutory time-limit

Judgement of 1st instance court

- The court uphold the state authority decision and confirmed that it was lawful and legitimate;
- In case if interim measure permits to enter into procurement contracts which was prohibited by state authority decision then in case if such state authority decision is uphold by final court judgement then the procurement contracts in question should be terminated

Judgement of 1st instance court

- Initial answer by the contracting authority did not provide for clear understanding what is meant by «positive experience» and it may have objectively understood different from what was expected by the contracting authority;
- Since the contracting authority explained meaning of «positive experience» clearly only after challenge deadline, the contractor was not able to proceed with the challenge of tender provisions in statutory time-limits

Judgement of 1st instance court

- If the contractor was precluded from the challenge of tender provisions within statutory time-limits then it may submit challenge application until expiry of deadline for challenge of tender results;
- The last explanation regarding meaning of «positive experience» materially altered the meaning of «positive experience»

Judgement of 1st instance court

- Latvian law exhaustively provided for exclusion events whereas contractor could be excluded only if a contract would be terminated by the contracting authority and contracting authority is not allowed to supplement this list;
- Therefore in such circumstances disqualification by the contracting in events other than exhaustively specified by the law would be deemed unlawful and not permitted.

Judgement of 1st instance court

- Directive 2014/24/EU is not applicable to particular tender because it was not implemented and transposition deadline has not expired when particular tender was announced.

Thank you

Māris Brizgo

Ellex Klavins

Latvia

Maris.brizgo@ellex.lv



***How would the „timber case” look like
if it happened in Poland?***

In general it would be ...

a) faster

b) more „formalistic“

c) more unpredictable

d) it might be less European (?)

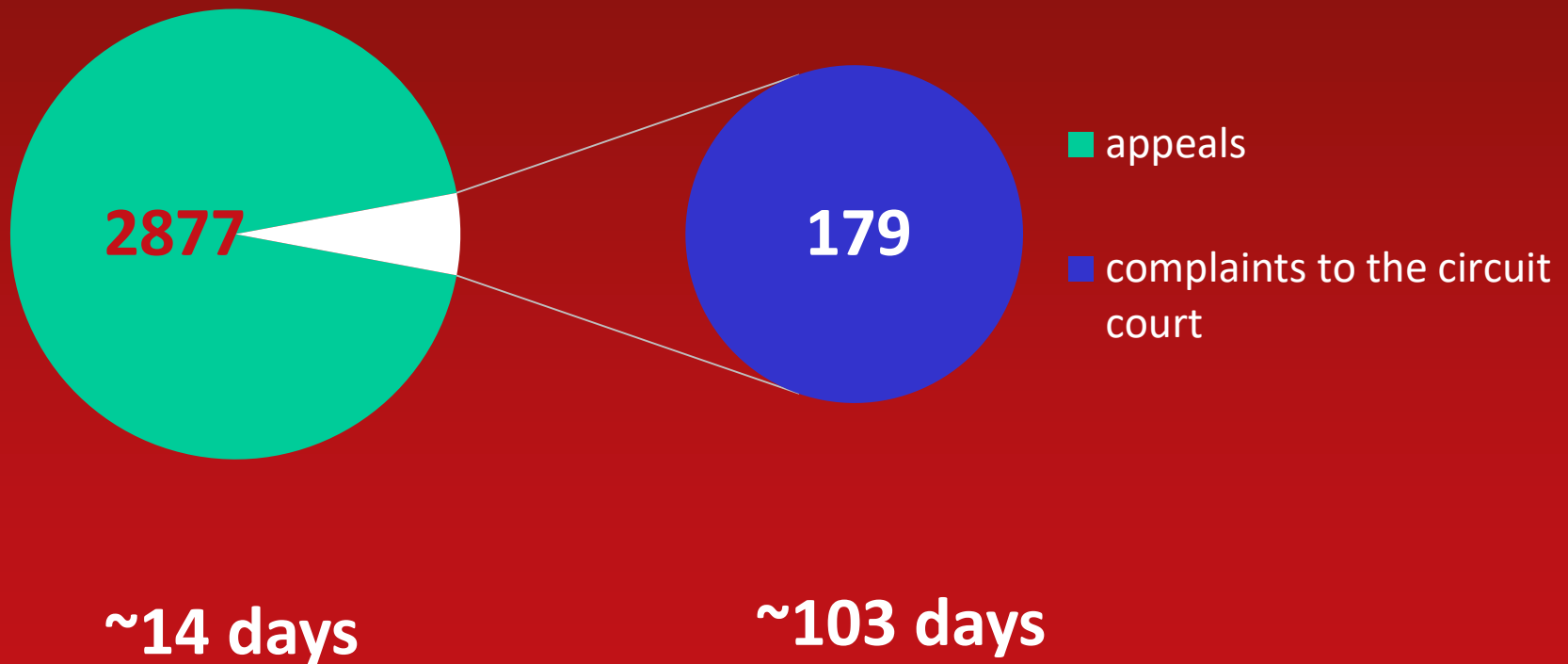
It would be faster because ...

Subject to the exceptions specified in PPL Act, contract award procedure should be conducted **in writing.**

But: The hearing before NCA and the circuit court has its **oral phase**

It would be faster because ...

number of appeals and complaints in 2015



It would be faster because ...

How long did it take to obtain first instance judgment in previous years?



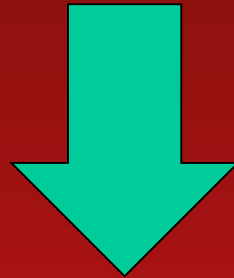
It would be faster because ...

Most common topics of public procurement law judgments:

- abnormally low price
- business secret
- exclusion premises
- offer evaluation criteria
- tender security deposit

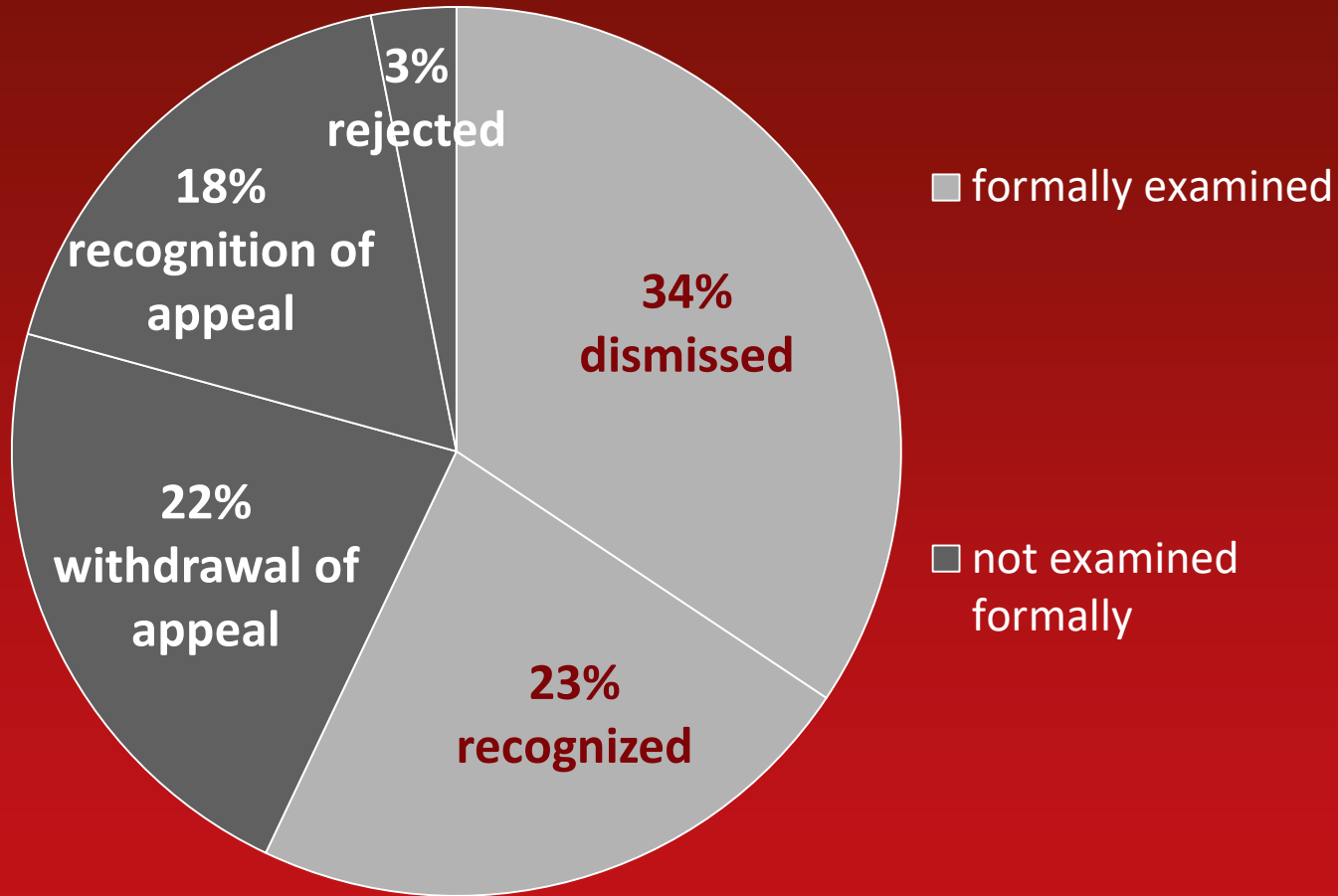
It would be more „formalistic” because ...

positive experience in providing services



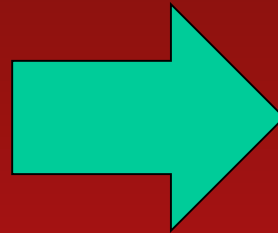
specific Polish regulations indicating the
necessary content of credentials

It would be more „formalistic” because ...



It would be more „formalistic” because ...

In 2015 there were
2877 appeals

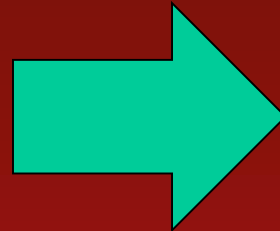


expert witness
opinion was used in
three cases only

0.10% in total

It would be more „formalistic” because ...

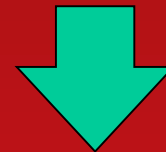
39 arbitrators in 2015



2352 appeals
recognized by a single
arbitrator

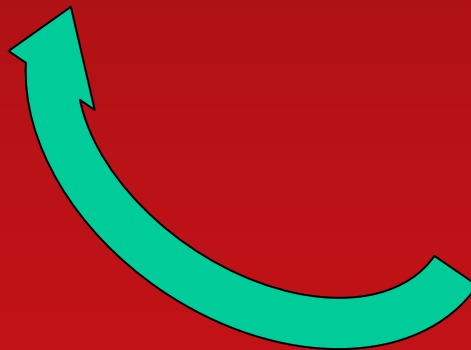


each arbitrator had
at least 60 cases



252 working days in 2015

4.2 days per case



It would be more „formalistic” because ...

How to challenge public procurement in a formalistic way?

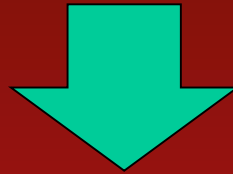
Improper authorization of entity

Reference to well-established „case law”

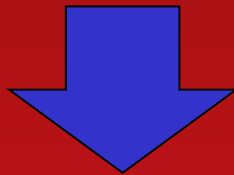
Foreign documents

It would be more unpredictable because ...

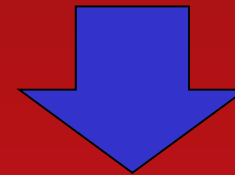
the problem discrepancy of NCA's judgments



Example: **21 arbitrators** decided on issue regarding the tender security deposit submitted by the consortium



5+ were against

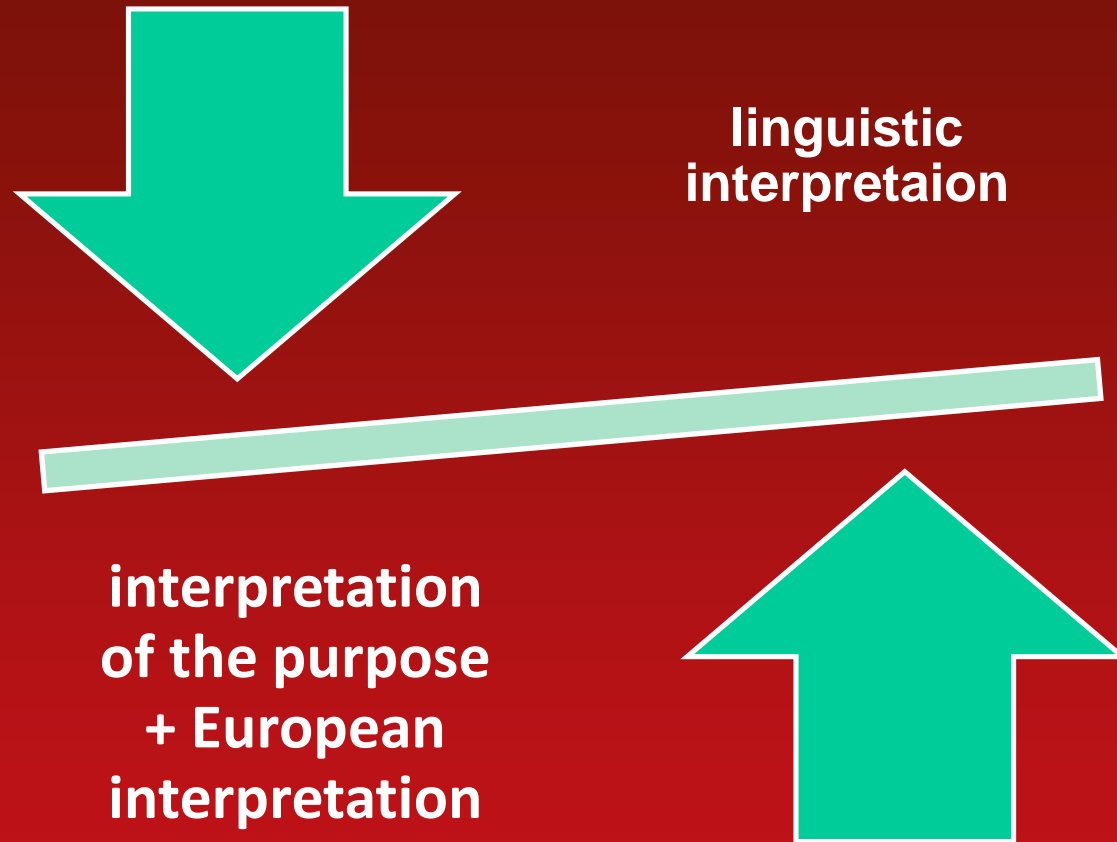


16+ were in favor

It would be more unpredictable because ...

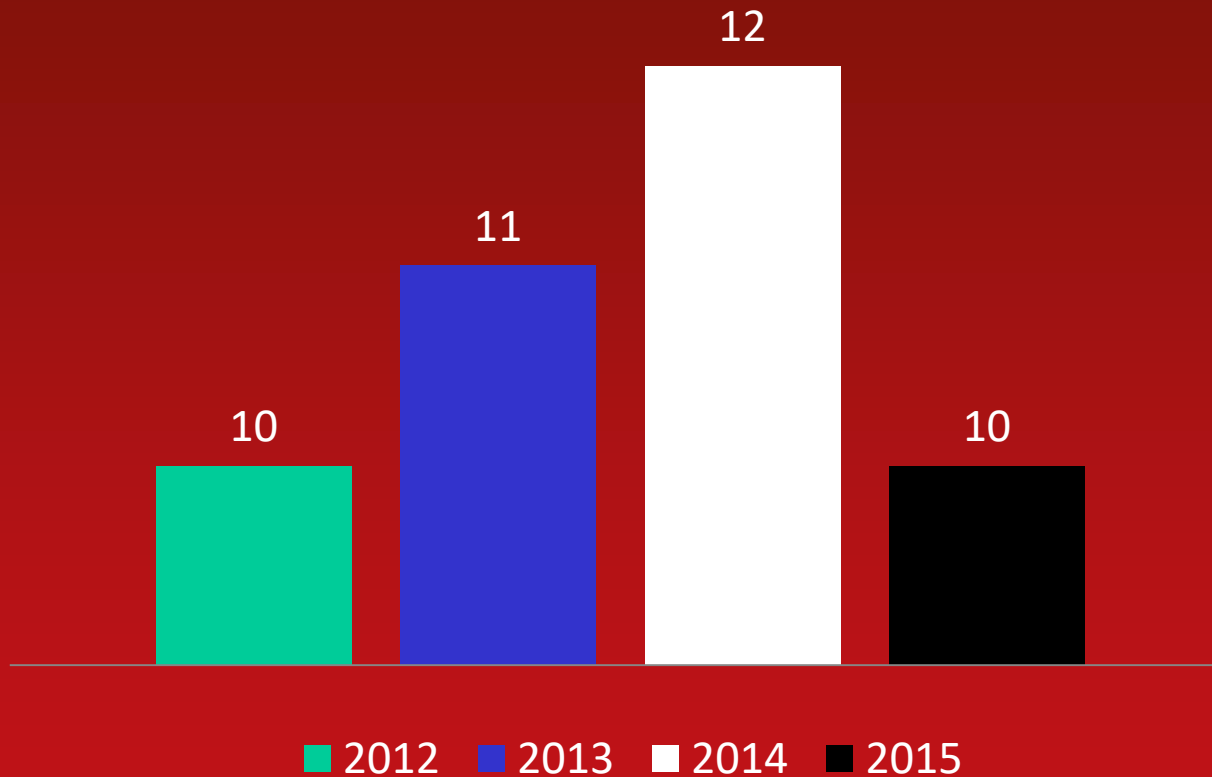


It might be less „European” because ...



It might be less „European” because ...

number of preliminary questions submitted by NCA



It might be less „European” because ...

Only about **1.6%** of all judgements of
National Appeal Chamber referred (in
any way) to CJEU

Thank you

Michał Wojciechowski

DZP

Poland

Michal.Wojciechowski@dzp.pl

