

## **Legal situation of subcontractors in the construction of a Polish nuclear power plant**

In October 2022, it was announced that the US technology offered by Westinghouse - the AP1000 - had been selected to build the first nuclear power plant in Poland. The selection of the contractor paved the way for the start of more detailed design work and the preparation of the investment facilities. The consequences of the above included the announcement in September 2023 of the signing of a consortium agreement by Westinghouse and Bechtel to cooperate in the design and construction of the Lubiatowo - Kopalino nuclear power plant. Then, still in September 2023, the Westinghouse and Bechtel consortium signed a contract with Polskie Elekrownie Jądrowe (PEJ) for the design of the nuclear power plant. Although the contract signed for the time being only covers the design of the power plant as an Engineering Services Contract (ESC), and there is still no information about the EPC-type target contract for the construction of the power plant, information about the selection of seven Polish partners to support, among other things, the construction of the Lubiatowo - Kopalino nuclear power plant was released into the public domain in spring of this year. This opened the way for a discussion on the legal situation of the subcontractor in the nuclear power plant construction process.

This discussion stems, among other things, from the fact that the selection of the contractor for the first nuclear power plant in Poland was not carried out under the public procurement procedure. Nuclear power projects often have a special status due to their scale, strategic importance and national security concerns. For years, in the public space, there have been voices advocating the exclusion of the procedure of selecting the contractor for the nuclear power plant from the regime of the Public Procurement Law (hereinafter 'PPL'). It should be pointed out that the Nuclear Special Act provides, in principle, that the provisions of the PPL apply to contracts awarded in connection with the preparation, implementation and financing of investments in the construction of nuclear power facilities (Art. 41 of the Nuclear Special Act). It was, therefore, necessary to seek exemptions to its application in the PPL Act itself. In practice, this meant that the contractor for the Polish nuclear power plant was selected without conducting a procurement procedure under the provisions of the PPL, which certainly allowed for greater flexibility and consideration of broader aspects than mainly economic ones.

As it should be assumed, the provisions of the PPL are excluded not only at the stage of the contract award procedure, but also further at the stage of concluding a contract on the construction of a power plant and at the stage of contract performance - including amendments to the contract (since the PPL Act indicates that its provisions, in specific cases, do not apply to 'contracts', i.e. arguably contracts as a whole process, and not only to the contract award procedure). The consequence of such an interpretation will be that the provisions of the PPL will also not apply to subcontracts, and the contractor will not be obliged to maintain the standards of protection of subcontractors required under the PPL.

This will exclude, among other things, the application of Article 463 of the Public Procurement Law, which stipulates that a subcontracting agreement may not contain provisions shaping the rights and obligations of the subcontractor, in terms of contractual penalties and provisions concerning the terms of payment of remuneration, in a manner less favourable for the subcontractor than the rights and obligations of the contractor, shaped by the provisions of the agreement concluded between the ordering party and the contractor. The contractor will also not be obliged to submit the draft subcontract agreement, the subject of which is construction works, to the investor in order for the latter to raise any objections, as provided for in Article 464 of the PPL.

Another essential instrument for the protection of subcontractors, which is provided for in the PPL and which, in the absence of the application of the regulations of this Act, will not be applicable, is the entitlement under Article 465 of the PPL to make direct payment to subcontractors or further subcontractors by the investor in the event that the contractor evades the obligation to pay. In addition, this provision introduces a preventive instrument in the form of the investor's right to withdraw from the contract with the contractor in the event of the need to make multiple direct payments to

a subcontractor or further subcontractors or the need to make direct payments of more than 5% of the value of the main contract.

Article 439(5) of the PPL, which obliges the contractor to valorise the remuneration of its subcontractors in the event of the investor valorising the contractor's remuneration, will also not apply to subcontractors performing work on the construction of a nuclear power plant.

These regulations are undoubtedly intended to protect a weaker contractor, such as a subcontractor, by introducing mechanisms to rationalise its liability and guaranteeing it analogous conditions to those set out in the main contract.

In addition to the above comments, it is also worth pointing to Article 44a of the Nuclear Special Act, in force for less than a year, which states that the provisions of Articles 6491-6494 of the Civil Code, i.e. the regulations on the guarantee of payment given by the investor to the general contractor, do not apply to construction work contracts concerning investments in the construction of a nuclear power facility, concluded between the investor and the contractor (general contractor). We are referring here to the provisions concerning the guarantee of payment for construction works, which is granted by the investor to the contractor (general contractor) in order to secure timely payment of the agreed remuneration for the performance of construction works. In other words, for a nuclear power plant investment contract, the general contractor will not be able to request the investor to provide such a payment guarantee.

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