

THE MINISTRY OF ECONOMY
Department of Industrial Defence System

OFFSET ACT

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of Industrial Defence System
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Dziennik Ustaw 99.80.903
2001.01.01 amendments Dziennik Ustaw 00.119.1250
2001.09.12 amendments Dziennik Ustaw 01.89.972
2002.04.27 amendments Dziennik Ustaw 02.37.332
2002.06.21 amendments Dziennik Ustaw 02.81.733

Act
of 10 September 1999
on Certain Compensation Agreements Concluded in connection with Contracts
for Deliveries for the Purposes of Defence and Security of
the State.
(Dziennik Ustaw of 8 October 1999)

Chapter 1
General Provisions

Article 1. This Act lays down the principles of concluding and the rights and obligations of the parties to a compensation agreement, referred to as "offset agreement", in connection with a contract concluded for delivery, into the territory of the Republic of Poland, of armament and/or military equipment for the purposes of defence and security of the State produced or manufactured beyond the territory of the Republic of Poland.

Article 2.1 The Act shall not apply to contracts for delivery of armament and/or military equipment the value of which does not exceed an equivalent in the Polish currency of EURO 5,000,000.

1a. Contracts for delivery of armament and/or military equipment concluded by entities dominant or dependent in relation to a foreign supplier shall be deemed to be concluded by the supplier.

2. The Act shall not apply to contracts for repairs and delivery of spare parts for armament and/or military equipment purchased prior to the coming into force of this Act.

3. The Act shall not apply to contracts:

- 1) whose performance results in restoration of worthiness of armament and/or military equipment consisting in deconservation and checking of technical parameters, and where the transfer of ownership of a thing has been made by way of donation,
- 2) financed out of loans contracted by the Government of the Republic of Poland prior to the entering into force of the Act of 7 July 2002 on amendments to the Act on certain compensation agreements concluded in connection with contracts for deliveries for the purposes of defence and security of the State (Dziennik Ustaw No. 81, item 733).

Article 3. Throughout this Act:

- 1) offset agreement – shall mean an agreement concluded by and between the State Treasury and a foreign supplier, specifying, in particular, the value, the object, and the schedule of performance of offset obligations and the terms on which they are to be performed;
- 2) offset obligation – shall mean a direct or indirect obligation of a foreign supplier to purchase shares from the State Treasury and to make contributions to a limited liability company or a joint stock company and/or to conclude and perform a sale contract, delivery contract, licence contract, know-how contract or any other contract for the transfer of rights or performance of services concluded between a foreign supplier and an offset receiver,
- 3) foreign supplier – shall mean a foreign entity performing, under a contract, delivery of armament and/or military equipment for the benefit of the State Treasury or an entrepreneur for the purposes of defence and security of the State,
- 4) offset receiver – shall mean a natural person, a legal person and an organizational unit having no legal personality, which professionally, in its own name, undertakes and performs business activity and has a place of residence or a seat within the territory of the Republic of Poland and also a Polish institution of higher education, research and development entity and a State budget entity that performs tasks connected with operation of armament and military equipment being the object of delivery,
- 5) ⁽¹⁾ armament and/or military equipment - shall mean armament within the meaning of the Act of 29 November 2000 on foreign trading in goods, technologies, and services with strategic significance for State security and for maintaining international peace and security, likewise on amendments to certain other acts (Dziennik Ustaw No. 119, item 1250),
- 6) contract for delivery of armament and/or military equipment – shall mean a sale contract, delivery contract, licence contract, know-how contract or any other contract for the transfer of rights or performance of services whose object shall be armament or military equipment,
- 7) direct offset obligation - shall mean an offset obligation for the benefit of entrepreneurs of special significance for economy and defence linked to a contract for delivery of armament and/or military equipment,
- 8) indirect offset obligation - shall mean other offset obligations not mentioned under point 7,
- 9) offset multiplier – shall mean a coefficient, expressed in a number, of counting offset obligations of a foreign supplier towards the value of an offset agreement,
- 10) value of offset agreement – shall mean a total value of offset obligations of a foreign supplier to which offset multipliers are applied as specified in the offset agreement,
- 11) offset offer – shall mean a proposal for concluding an offset agreement submitted by a foreign supplier constituting an offer within the meaning of Article 66 §1 of the Civil Code.
- 12) entrepreneurs of special significance for the economy and defence – shall mean entrepreneurs, specified in Article 3 of the Act of 23 August 2001 on organizing tasks for the benefit of the State defence performed by entrepreneurs (Dziennik Ustaw No. 122, item 1320) whose object of activity is production, repairs, servicing, research and

development works, likewise trading in armament and/or military equipment.

Article 4. 1. A foreign supplier shall have the duty to enter into an offset agreement on the principles specified in the Act.

2. (2) A contract for delivery of armament and/or military equipment concluded by the foreign supplier shall enter into force at the moment of entering by him into an offset agreement; The offset agreement should be executed not later than within 60 days from the date of the entering into the contract for delivery of armament and/or military equipment.

3. None of the parties shall withdraw from or terminate the offset agreement.

Article 5. An offset agreement shall ensure participation of foreign suppliers in the restructuring and development of the economy of the Republic of Poland and, in particular:

- 1) development of the Polish industry, having special regard to entrepreneurs of special significance for the economy and defence, likewise implementation of advanced technologies,
- 2) opening of new export markets to the Polish industry or increasing its hitherto existing export possibilities,
- 3) transfer of new technologies and improvements of organization to the Republic of Poland,
- 4) development of research work, development of Polish institutions of higher educations and research and development entities,
- 5) creation of new work places in the Republic of Poland, including without limitation in the regions threatened with unemployment.

Article 6.1. The value of offset agreement concluded with a foreign supplier shall not be lower than an equivalent of the delivery of armament and/or military equipment specified in the contract for delivery thereof.

2. The value of a direct offset obligation shall not be lower than a half of the value of the offset agreement.

Chapter 2

Conclusion of an Offset Agreement

Article 7.1. An offset agreement shall be concluded after negotiations have been conducted on the basis of an offset offer of a foreign supplier.

2. The negotiations shall be conducted by the minister competent for economy.

3. The offset agreement shall be concluded in the name of the State Treasury, subject to provisions of Article 23, by the minister competent for economy having been advised by the Committee for Offset Agreements.

4. The minister competent for economy may commission, under an agreement, the Industrial Development Agency S.A. to carry out any actions connected with preparation of an offset agreement, including but not limited to negotiations and actions connected with the monitoring and inspection of performance of offset agreements.

5. Any costs connected with performance of the actions specified in paragraph 4 above shall be paid out of the State budget in the amount specified in the agreement concluded with the Industrial Development Agency of Industry S.A.

6. The minister competent for economy shall entrust servicing by bank of offset agreement to a State bank. The scope and terms of the servicing shall

be specified in an agreement concluded between the minister competent for economy and a State bank.

Article 8.1. A foreign supplier shall submit an offset offer to the minister competent for economy not later than within the time limit set for submission of offers in the proceedings concerning the award of public procurement contracts on the principles specified by separate provisions. In specially justified cases, the minister competent for economy may, on application by an offerer, prolong the time limit for the submission of offers.

2. The offer, referred to in paragraph 1 above, shall include in particular:

- 1) basic information regarding the legal status, assets and the manner of representation of the foreign supplier,
- 2) information about past experience of the foreign supplier concerning offset agreements,
- 3) the proposed value of the offset agreement,
- 4) the proposed object of offset obligations and proposed offset multipliers,
- 5) proposed time limits for the performance of offset obligations.

2a. The information on the duty of a foreign supplier to submit an offset offer shall be inserted in the specification of essential terms of the contract in the part referring to any future duties of a foreign supplier connected with the public procurement contract. The information shall specify any requirements to be met by an offset offer and the time limit for the submission thereof.

3. The offset offer shall be drawn up in the Polish language in the written form under the pain of nullity.

4. The offset agreement shall be appended with letters of intent and/or other documents confirming arrangements made between a foreign supplier and offset receivers concerning performance of offset obligations.

Article 9.1 The Committee for Offset Agreements, hereinafter referred to as the "Committee" shall analyse and express opinion on offset offers submitted by foreign suppliers having regard to the State security and defence and taking into account the economic interests.

1a. If a submitted offset offer does not meet the requirements specified in the Act or in the specification of essential terms of the contract, the minister competent for economy may request that the offer be supplemented, specifying the time limit and scope of such supplementation. If the offer is not supplemented within the time limit, the minister competent for economy shall notify the person conducting the proceedings for awarding public procurement contracts about the occurrence of the circumstances specified in the provisions of Article 19 paragraph 1, subparagraph 8, of the Act of 10 June 1994 on Public Procurement Contracts (Dziennik Ustaw of 1998 No. 119, item 773, of 1999 No. 45, item 437, of 2000 No. 12, item 136, No. 93, item 1027 and No. 110, item 1167, likewise of 2001 No. 56, item 580, No. 76, item 813, No. 113 item 1208, No.128, item 1403 and No. 154 item 1800) and shall refer relevant documents to him.

2. The Committee shall draw up a written opinion on each submitted offer separately within thirty days from the date of expiry of the time limit referred to in Article 8, paragraph 1.

3. The opinion specified in paragraph 2 above shall include, in particular:

- 1) an evaluation of the particulars specified in Article 8, paragraph 2,
 - 2) a statement regarding the method of counting offset obligations,
 - 3) including those resulting from the agreements specified in Article 10, paragraph 1, subparagraph 3, towards the value of the offset agreement proposed by the foreign supplier, including an evaluation of proposed offset multipliers,
 - 4) an evaluation of the conformity of offset offers with the assumptions for performance of the offset agreement specified in Article 21, paragraph 1, subparagraph 1.
4. The Committee shall send the opinion specified in paragraph 2 above to the minister competent for economy and the person conducting proceedings of awarding public procurement contract. The opinion of the Committee shall constitute one of the criteria of evaluation of offers for delivery of armament or military equipment.

Article 10.1 Offset obligations of a foreign supplier shall be counted towards the value of offset agreement with taking into account:

- 1) offset multipliers ranging from 0.5 to 2.0,
 - 1a) in cases specially justified by the interests of the economy or by reasons of security and defence of the State, offset multipliers ranging from 2.0 – 5.0 may be applied,
 - 2) the more advantageous for the foreign supplier counting of the direct offset obligation than the indirect one,
 - 3) a possibility of counting the value of obligations under contracts other than contracts for delivery of armament and/or military equipment concluded by the foreign supplier within 36 months preceding the submission of the offset offer, an assumption being made that the offset multiplier applied in such cases is lower than the multiplier applied for counting offset obligations.
2. The Council of Ministers shall specify, by regulation, the detailed principles of counting offset obligations of a foreign supplier towards the value of offset agreement, including without limitation:
- 1) the value of offset multipliers and the method of their application and the cases for which multipliers ranging from 2.0 – 5.0 may be applied,
 - 2) the method of counting offset obligations,
 - 3) the method of counting the value of obligations under the agreements specified in paragraph 1, subparagraph 3,
 - 4) permissible limit of a share of foreign materials and components in an enterprise being an offset obligation.

Article 11.1 Negotiations with the purpose of concluding an offset agreement shall be conducted with a foreign supplier in concurrence with the proceedings of awarding public procurement contract on the principles specified by separate provisions. In the course of negotiations, basing on the opinion of the Committee, the person conducting negotiations may submit proposals for offset obligations together with proposed offset multipliers.

2. The subject matter of negotiations with a foreign supplier shall include, in particular:

- 1) the value of offset agreement,
- 2) the object of offset obligations,
- 3) the value of offset multipliers,

- 4) the time limits for performance of offset obligations.

Article 12.1 The offset agreement shall not be concluded for a period longer than ten years.

2. The offset agreement shall be executed in a written form under the pain of nullity.

Chapter 3

Substance and Performance of Offset Agreement

Article 13. An offset agreement should include, in particular:

- 1) the description of the parties and the dates and places of its conclusion,
- 2) determination of the time of its validity,
- 3) determination of its value and the value of each offset obligation,
- 4) determination of the object of offset obligations,
- 5) the schedule for performance of offset obligations,
- 6) determination of liability for failure to perform or improper performance of offset obligations, including without limitation contractual penalties.

Article 14.1. A foreign supplier who concluded an offset agreement shall have the duty to submit to the minister competent for economy semi-annual and annual reports on the performance of offset obligations. Semi-annual reports shall be submitted not later than within 30 days after the end of a given half year and annual reports not later than within 90 days after the end of a reporting year.

2. The minister competent for economy shall have the right to request, at any time, any information on the level of performance of offset obligations from the foreign supplier, specified in paragraph 1 above.

3. The minister competent for economy shall have the right to request, at any time, any information on the level of performance of the contract from the offset receiver with whom the foreign supplier entered into a contract in performance of the offset obligation, likewise may carry out inspections with respect to correctness of performance of the contract, including without limitation the right to inspect commercial and financial documents connected with the object of offset obligations and to have access to the premises connected with the performance of offset obligation.

Article 15. 1. The minister competent for economy, having been advised by the Committee, shall count offset obligations performed by the foreign supplier towards the value of the offset agreement without delay after the performance thereof. Confirmation of performance of an offset agreement shall take place in the form of a record signed by the minister competent for economy and the foreign supplier.

2. The minister competent for economy may, at the request of a foreign supplier, count towards the value of the offset agreement the value of obligations under the agreements, specified in Article 10, paragraph 1, subparagraph 3, if they may constitute an object of offset obligation.

Article 16. The minister competent for economy may, in the name of the State Treasury, request a guarantee of due performance of offset obligations from the foreign supplier at the latest on the day of conclusion of an offset agreement.

Article 17. Should there occur a significant change in circumstances in the course of performing an offset obligation, the object, the value, and the time limit for performing that obligation may be changed. The provisions of Article 4, paragraph 3, Articles 6 – 10, Article 11, paragraph 2 and Article 12, paragraph 2 shall apply respectively.

Article 18. An offset agreement shall be governed by the law of Poland.

Article 19.1 An offset agreement shall expire, subject to Article 23, on the day of confirmation by the minister competent for economy of the performance of offset obligations by a foreign supplier or on the date of payment of damages for the benefit of the State Treasury for non-performance or improper performance of the obligation.

2. In the event of non-performance of an offset obligation, the value of damages shall be an equivalence of the non-performed offset obligation.

3. In the event of improper performance of an offset obligation, the value of damages shall be not more than an equivalence of the offset obligation which has been performed in an improper manner.

Chapter 4 The Committee for Offset Agreements

Article 20.1 The Committee shall act at the minister competent for economy.

2. The Committee shall be composed of:

- 1) The Chairman of the Council of Ministers,
- 2) The minister competent for economy,
- 3) The minister competent for public finance,
- 4) The minister competent for the State Treasury,
- 5) The minister competent for foreign affairs,
- 6) The minister competent for internal affairs,
- 7) The minister competent for environment,
- 8) The minister competent for labour,
- 9) The minister competent for transport,
- 10) The minister competent for telecommunication,
- 11) The minister competent for health,
- 12) The minister competent for agriculture and rural development,
- 13) The Minister of National Defence,
- 14) The Chief of Internal Security Agency,
- 15) The President of the Office of Public Procurement,
- 16) The Chairman of the Committee for Scientific Research.

3. A representative of the President of the Republic of Poland may participate in the works of the Committee.

4. The Chairman of the Committee may invite any persons other than those mentioned in paragraph 2 and 3 and, in particular, representatives of other ministers and experts to participate in the works of the Committee without voting rights.

5. A representative of the minister competent for economy shall be the Chairman of the Committee. The Deputy Chairman of the Committee shall be elected by the Committee from among its members.

6. The Council of Ministers shall specify, by regulation, the organizational rules of the Committee.

Article 21.1 The tasks of the Committee shall include, in particular:

- 1) the working out of assumptions for the performance of offset agreements with respect to individual public procurement contracts for delivery of armament and/or military equipment,
- 1a) examining in detail the possibilities of and needs for investment and innovation activities, which may be the objects of offset obligations, from the point of view of ensuring greatest benefits for the interests of economy and security and defence of the State,
- 2) analysing and providing opinion on offset offers from the point of view of ensuring greatest benefits for the economic interests of the Republic of Poland, likewise security and defence of the State,
- 3) submission of an opinion on particular offset offers to the minister competent for economy and awarding public procurement contracts for delivery of armament and/or military equipment,
- 4) expressing an opinion on reports of foreign suppliers on the performance of offset obligations,
- 5) submission of reports on the performance of offset obligations by foreign suppliers to the minister competent for economy,
- 6) submission of the opinion specified in Article 7, paragraph 3 to the minister competent for economy.

1a. The Committee shall deliver the assumptions specified in paragraph 1, subparagraph 1, to the orderer of public procurement contract with a view to their placing in the specification of essential terms of the contract.

1b. The possibilities and the needs, referred to in paragraph 1 subparagraph 1 above, regarding direct offset obligations shall be determined by the minister competent for economy in co-ordination with the Minister of National Defence and the minister competent for the State Treasury and those regarding indirect offset obligations by the minister competent for economy in co-ordination with the organs specified in Article 20, paragraph 2, subparagraph 1-12 and 14 – 16.

2. The Council of Ministers may determine, by regulation, the detailed scope of the tasks of the Committee.

Chapter 5

Supervision over Performance of Offset Agreements

Article 22. Supervision over the performance of offset agreements shall be exercised by the minister competent for economy.

Article 23. The conclusion of an offset agreement with a foreign supplier and the confirmation of its performance shall be approved by the Council of Ministers.

Article 24. The minister competent for economy shall submit to the Council of Ministers an annual report on the performance of offset obligations by foreign suppliers by the end of the second quarter after the end of the reporting period.

Chapter 6

Final Provisions

Article 25.1 Provisions of the Act of 15 December 2000 on Protection of Competition and Consumers (Dziennik Ustaw No. 122, item 1319 and of 2001 No. 154, item 1800) shall not apply to offset agreements concluded in connection with a delivery contract for the purposes of defence and security of the State.

1a. The provisions of the Act mentioned in Article 1 above shall apply with respect to the matters commenced and not ended prior to the date of the coming into force of the Act.

Article 26. The Act shall come into force after the expiry of 14 days from the date of promulgation.
