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Selected Legal Problems Associated with Road Investment Preparation Procedures***

1. Introduction

A large number of road development projects currently being carried out is a proof of a significant acceleration in efforts aimed at developing communication infrastructure in Poland. This was made possible due to radical changes introduced to legal regulations, among other things.

Over the past several years a number of new legal acts related to road construction were introduced, as well as the existing ones were amended. The purpose was to simplify and consolidate legal regulations and thereby to facilitate and shorten the process of road development project preparations. The introduced changes have not always, however, proved to be good and functional; sometimes, instead of facilitating the legal procedures, they significantly hindered them.

Consequently occurring long duration of the process of the investment preparation is related to, *inter alia*, the need to obtain numerous decisions and opinions, as well as to create comprehensive documentation [1–4].

This paper presents an analysis of legal determinants of road development project preparation procedures. The most essential legal acts related to the construction of roads were characterised and the main problems arising from their application were identified. The analysis makes use of a specific example of a grade separated road junction located in a traffic route over a motorway.

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2. Legal Basis for Road Development Project Preparation

2.1. Special Roads Act

The most important legal act regulating the procedure of preparing the construction of road infrastructure is the *Act on specific principles of preparation and implementation of investments in public roads*, called the *Special Roads Act* [5]. Its introduction was supposed to facilitate and regulate the entire process of the investment project preparation, which previously was implemented based on multiple, often inconsistent laws.

The *Special Roads Act* has been subject to a thorough metamorphosis since it came into force. The example of positive effects of several of its amendments may include the extension of its range from roads to all public roads in 2006. After a recent amendment to the *Special Roads Act*, the basic legal instrument setting conditions for the possibility of road construction has become a *decision on the permission for the implementation of Road Development Project*. It replaces the previously required: the decision on determining location and construction permit.

In the *Special Roads Act*, the process of project preparation was made independent of local development plans. Furthermore, the *decision on the permission for the implementation of Road Development Project* approves subdivision survey of indicated properties that are located within the designed right-of-way.

In addition, a special procedure for real estate property acquisitions, which have been parcelled out with demarcation lines in the *decision on the permission for the implementation of Road Development Project*. Currently, by legal force, they are transferred for the benefit of the State Treasury or the relevant local government authority on the date on which that decision became legally binding.

Figure 1 presents in a form of a diagram the process of obtaining the *decision on the permission for the implementation of Road Development Project*.

2.2. Environmental Protection Law

As a part of adapting Polish legislation to EU laws, the *Environmental Protection Act* [6], regulating general environmental issues, including issues related to the implementation of road development projects, was introduced in 2001. In accordance with the regulation [7], the necessity to prepare a *report on the environmental impact* concerns also road investments as enterprises which may significantly affect the environment.

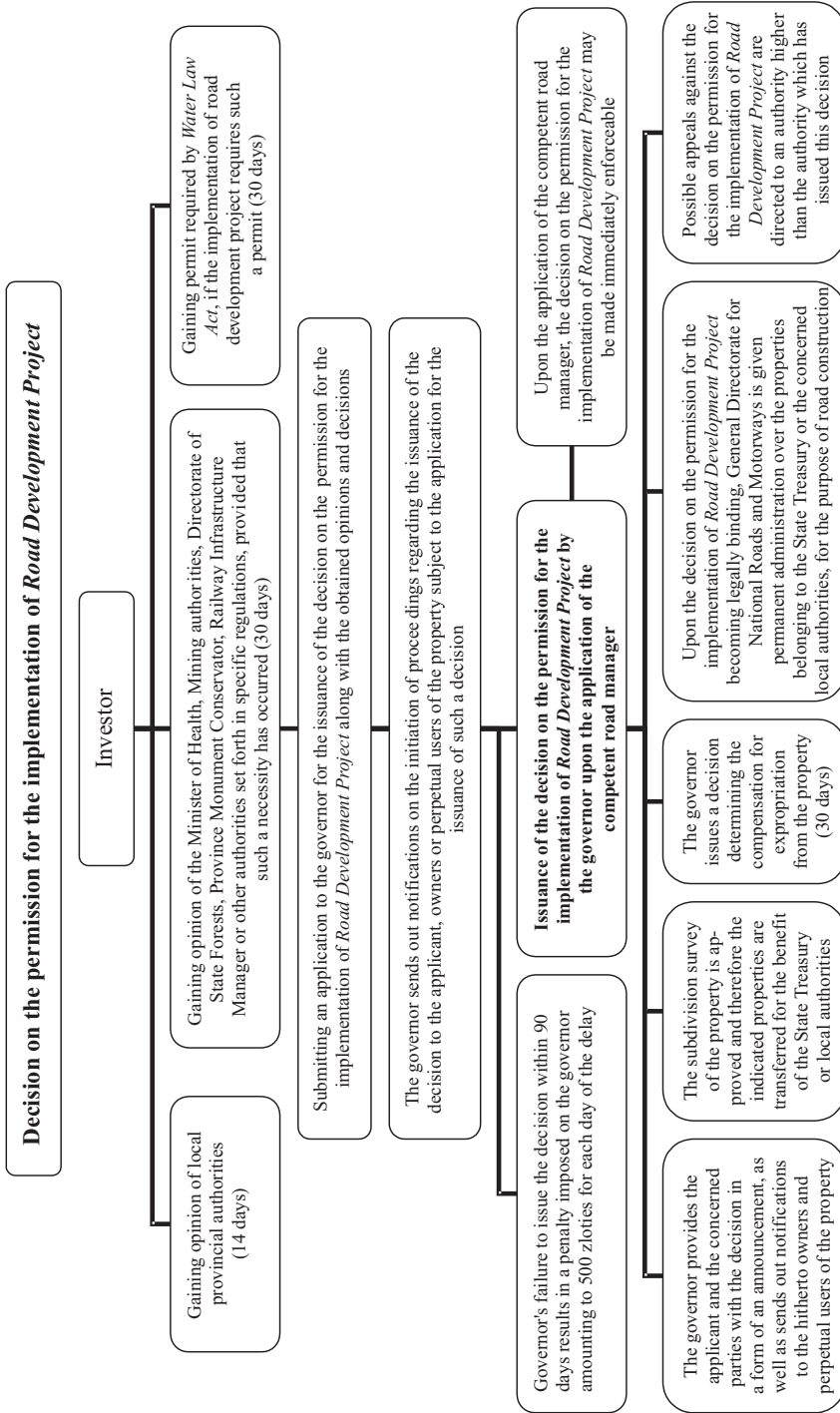


Fig. 1. The process of obtaining a decision on the permission for the implementation of Road Development Project in case of national roads
 Source: elaborated on the basis of the Special Roads Act [5]

Principles and procedures for the issuance of individual decisions and opinions related to the environmental determinants of road development projects have been contained in the *Act on release of the information on the environment and its protection, public participation in the protection and the environmental impact assessment* [8].

Currently, in the entire process of preparing a road development project, a *decision on the environmental determinants* has become the most important document. Its obtainment conditions obtaining all other relevant decisions which are significant in the investment process, including the *decision on the permission for the implementation of Road Development Project*. The basis for drawing up the *decision on the environmental determinants* is a *report on the impact of an investment on the environment*, and the authority responsible for issuing this decision, in the case of national roads, is the Director-General of Environmental Protection. Figure 2 presents in a form of a diagram the process of obtaining the *decision on the environmental determinants* against.

2.3. Public Procurement Law

Tender procedures, as an important element in the process of preparing road development projects, is based upon two mutually complementary acts: *Public Procurement Law* [9] and the *Act on toll motorways* [10]. Figure 3 presents in a form of a diagram the tendering procedure against an example of the motorway construction.

Due to the fact that in recent years the tendering procedure has often been over-extended, amendments to the legal provisions have been introduced, including, among other things, an opportunity to make corrections of insignificant editorial or accounting errors, possibly occurring in the tender offers, without having to turn them down and repeat the whole procedure.

3. Analysis of Investment Preparation Procedure against an Example of a Road Junction in a Traffic Route over a Motorway

In order to assess the effects of recent legislative amendments, this article compares the course of investment process according to the existing regulations with those in force before the recently introduced amendments (Tab. 1). The comparison uses an example of the construction of a grade separated motorway junction, located in a traffic route in the Małopolska region, i.e. the investment prepared before the end of 2005 and executed in the years 2008–2010 [11].

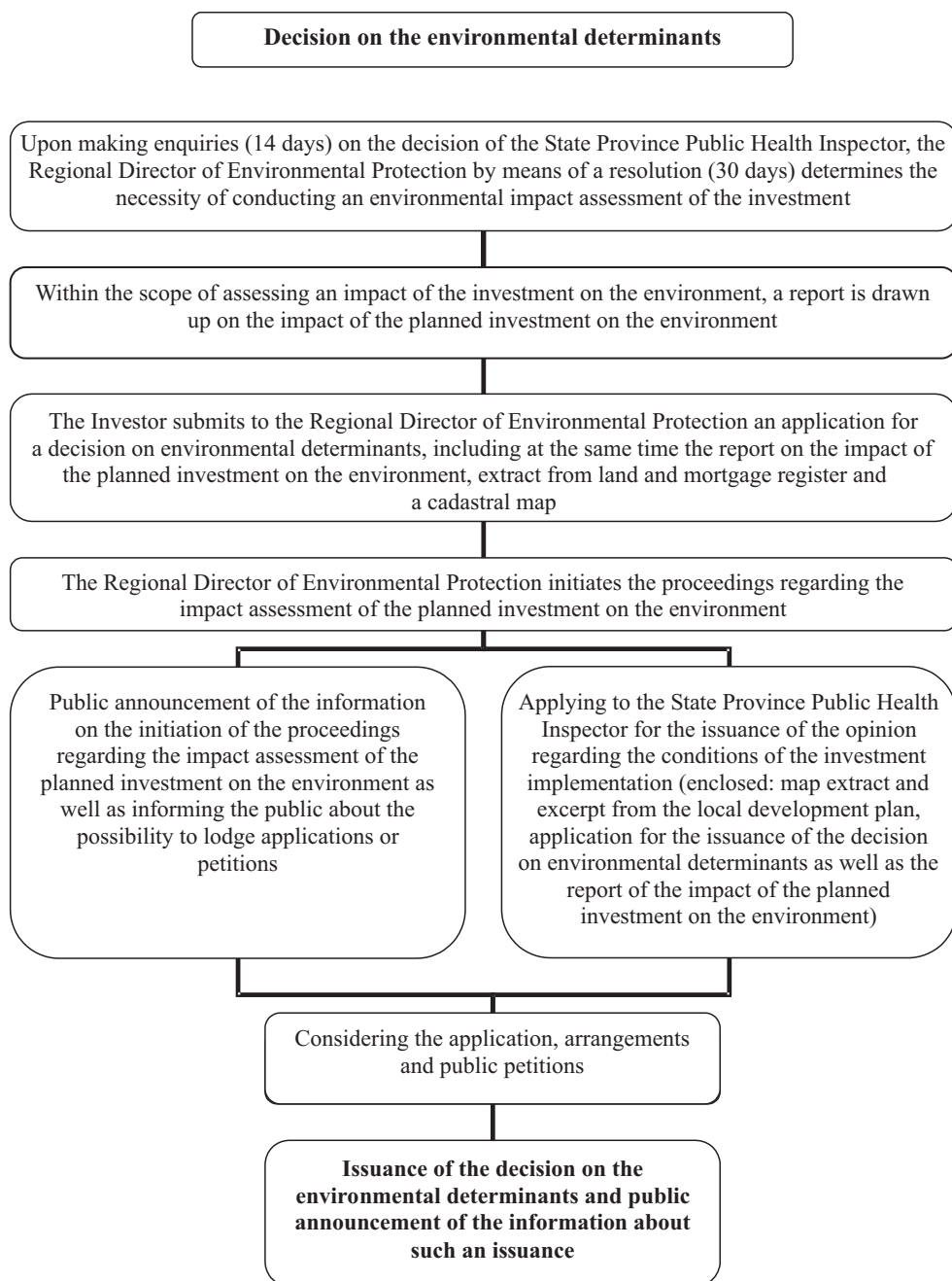


Fig. 2. The process of obtaining a decision on the environmental determinants

Source: elaborated under the *Environmental Protection Act* and the *Act on release of the information on the environment and its protection...* [6, 8]

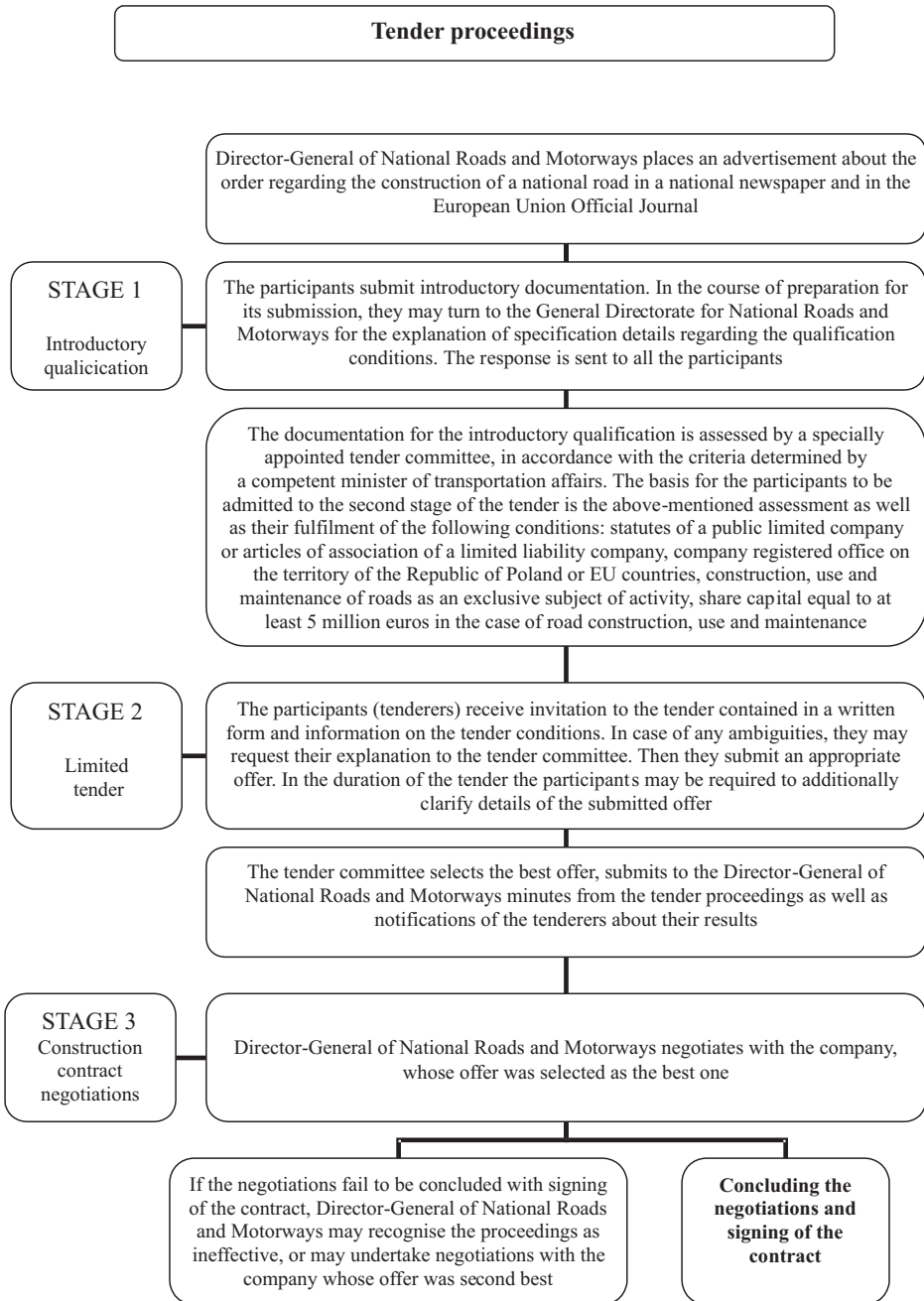


Fig. 3. Tender procedures for the project implementation associated with the construction of a motorway

Source: elaborated under the *Public Procurement Law* and the *Act on toll motorways* [9, 10]

Table 1. Comparison of road development project preparation procedure according to the legal status binding at the end of 2005 and the regulations in force before the end of 2009

Legislation	Road development project preparation procedure	
	according to the regulations in force during the investment preparation period [11] (the end of year 2005)	according to the currently binding regulations (the end of year 2009)
<i>Special Roads Act</i>	obtaining <i>the decision on determining location</i> and construction permit	obtaining the <i>decision on the permission for the implementation of Road Development Project</i>
	acquiring real estate property in the process of expropriation or by civil law contracts by the General Directorate for National Roads and Motorways for the benefit of the State Treasury	properties, parcelled out with demarcation lines determining the investment site, become by legal force the property of the State Treasury or the relevant local government authorities
<i>Environmental Protection Law</i>	environmental impact assessment as a part of proceedings resulting in the issuance of the <i>decision on determining location</i>	<i>decision on environmental determinants</i> of approval for implementation of the investment before the most important decisions (such as the <i>decision on the permission for the implementation of Road Development Project</i>)
	environmental impact assessment of the investment taking into account local development plans	obtaining a decision on the environmental determinants, independent of local development plans
	environmental impact assessment with the <i>decision on determining location and construction permit</i>	environmental impact assessment with the <i>decision on the environmental determinants and the decision on the permission for the implementation of Road Development Project</i>
	Provincial Office as the competent authority for the environmental impact assessments	Director-General of Environmental Protection as the competent authority for the environmental impact assessments
	lack of precise determination of deadlines for issuing decisions and opinions on environmental protection	the exact dates set for the most important opinions and decisions, and in the absence of such a relevant authority is financially penalized
<i>Public Procurement Law</i>	threshold for contracted orders under the simplified procedure – 70 thousand euros; the maximum value of the additional and supplementary orders for services and construction works – 20% of the basic contract value	threshold for contracted orders under the simplified procedure – 127 thousand euros; the maximum value of the additional and supplementary orders for services and construction works – 50% of the basic contract value
	investment financed entirely by the National Road Fund	adjustment of the Polish legislation to the EU regulations supports the use of EU funds
	rejection of attractive offers in case of minor errors that do not affect the offer	possibility of making corrections of insignificant editorial or accounting errors in the offers

Table 2. Summary of positive and negative determinants of the current legal status

Legislation	Selected determinants of existing legal instruments	
	advantages	disadvantages
Special Roads Act	<ul style="list-style-type: none"> combining two decisions - decision on determining location and building permit - into one, namely the <i>decision on the permission for the implementation of Road Development Project</i>, properties subject to the decision on the permission for the implementation of road development project become by legal force the property of the State Treasury or the competent local administration authority, increasing compensation by an amount equal to 5% of the property value in case it is transferred to the relevant road administrator within 30 days from the date on which the <i>decision on the permission for the implementation of Road Development Project</i> has become final; the owners expropriated from residential dwellings or buildings, may receive compensation higher by 10 thousand zloties, exclusion of land development plans from the road development project preparation process, removal of trees and shrubs, located in the right-of-way, without having to obtain permission (exception is the removal of trees from the property entered in the register of monuments) 	<ul style="list-style-type: none"> the necessity of re-assessment of the environmental impact within the scope of the <i>decision on the permission for the implementation of Road Development Project</i>, transfer of land acquisition stage to the end of the preparation process, lack of adequate staff and financial resources in provincial and municipal offices to conduct a large number of proceedings regarding disbursement of compensations, right-of-way demarcation lines also constitute property subdivision lines, complicated procedure of the acquisition of property parts that are unsuitable for the proper use for the hitherto purposes, which results from acquiring the rest of the property for the right-of-ways, unresolved question of determining fair compensation for the expropriated properties, including lost profits arising from the current usage
Environmental Protection Law	<ul style="list-style-type: none"> decision on the environmental determinants of the <i>permission for the implementation of Road Development Project</i> is valid 4 years from the date on which it becomes final, and in the case of investments executed in stages, the validity term may be longer even by a further 2 years, precise dates of issuance of all major decisions, opinions, as well as provisions relating to the impact of the investment on the environment, no obligation to determine in the report the location options in projects related to construction or reconstruction of roads, for which the decision on determining the location has already been issued, making the <i>decision on the environmental determinants</i> independent of the local development plans 	<ul style="list-style-type: none"> the need to carry out environmental impact assessment twice: with obtaining the <i>decision on the environmental determinants</i> and with the <i>decision on the permission for the implementation of Road Development Project</i>, inconveniences caused by the transition period: the process of implementing a new legal instrument (<i>decision on the environmental determinants</i>) and the appointment of a new Environmental Protection Authority (Director-General of Environmental Protection), increased investment costs related to the additional requirements imposed by environmental organizations, such as General Directorate for Environmental Protection or Regional Directorate for Environmental Protection
Public Procurement Law	<ul style="list-style-type: none"> there is a possibility of making corrections in the content of the offer in respect of insignificant editorial or accounting errors, the maximum value of additional and supplementary orders for services and construction works has been increased from 20% to 50% of the basic contract value 	<ul style="list-style-type: none"> the cases of adverse effects of the system functioning, when the offer with the lowest price wins, absence of a definition of abnormally low price, evaluation criteria of tender offers cannot refer to the contractor, including their technical or financial reliability

4. Conclusions

The process of investment preparation is essential for the implementation period of road construction projects, and consequently, for the pace of development of transportation infrastructure in Poland. The purpose of the analysis of the legal acts regulating the procedure for the preparation of road development projects, as presented in this work, was to identify the main problems arising from the application of current regulations. Based on the analysis of the most important legal acts related to the preparation of road development projects, table 2 summarizes the positive and negative determinants of the current legal status (as of the end of the year 2009).

Despite numerous significant changes, the law governing the issues related to the construction of roads is still not uniform and at different stages of project preparation it generates a lot of problems and misunderstandings arising even from different interpretation of the regulations. In the *Special Roads Act* the question of determining (by means of administrative proceedings initiated *ex officio*) and disbursement of fair compensation for the properties which have already been taken away from the owners requires exceptional reliability and performance, or application of additional rules.

In the tender procedure, it seems that a way to reduce the number of doubts concerning technical specifications could be a cooperation between the investor and potential contractors, already undertaken during the project preparation process. Additionally, the principle according to which an offer wins exclusively due to its lowest proposed price, is also questionable. As a result, it happens that the contractors try to make changes to material and technological solutions after winning the tender. The effect of such changes may be, for example, reducing the durability of the structure.

Lack of suitable interim provisions, reduced numbers of office staff preoccupied with completing the documentation and issuance of decisions, as well as giving major powers to the environmental authorities remain the essential problems with the administration.

References

- [1] Suwara T.: *Uwarunkowania prawne rozwoju infrastruktury drogowej*. Inżynier Budownictwa, nr 1, 2008.
- [2] Wiktorowicz K.: *Bariery utrudniające realizację Programu Budowy Dróg Krajowych na lata 2008–2012*. Generalna Dyrekcja Dróg Krajowych i Autostrad, Warszawa 2009.

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- [3] *Narodowy Program Budowy Dróg – Szanse i zagrożenia*. 3. Forum Polskiego Kongresu Drogowego, Nowy Sącz 2007.
 - [4] Zgórski K.: *Problemy prawne i techniczne związane z przygotowaniem inwestycji drogowych na przykładzie węzła Biezanów w Krakowie*. AGH, Kraków 2010 (M.Sc. Thesis).
 - [5] *Ustawa z dnia 10 kwietnia 2003 r. o szczególnych zasadach przygotowania i realizacji inwestycji w zakresie dróg publicznych*. Dz. U. Nr 80 z 2003 r., poz. 721 z późn. zm.
 - [6] *Ustawa z dnia 27 kwietnia 2001 r. Prawo ochrony środowiska*. Dz. U. Nr 62 z 2001 r., poz. 627 z późn. zm.
 - [7] *Rozporządzeniu Rady Ministrów z dnia 9 listopada 2004 r. w sprawie określenia rodzajów przedsięwzięć mogących znacząco oddziaływać na środowisko oraz szczegółowych uwarunkowań związanych z kwalifikowaniem przedsięwzięcia do sporządzania raportu o oddziaływaniu na środowisko*. Dz. U. Nr 257 z 2004 r., poz. 2573 z późn. zm.
 - [8] *Ustawa z dnia 3 października 2008 r. o udostępnieniu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie oraz o ocenach oddziaływania na środowisko*. Dz. U. Nr 199 z 2008 r., poz. 1227.
 - [9] *Ustawa z dnia 29 stycznia 2004 r. Prawo zamówień publicznych*. Dz. U. Nr 19 z 2004 r., poz. 177 z późn. zm.
 - [10] *Ustawa z dnia 27 października 1994 r. o autostradach płatnych*. Dz. U. Nr 127 z 1994 r., poz. 627 z późn. zm.
 - [11] *Dokumentacja techniczna budowy węzła Biezanów*. Krakowskie Biuro Projektów Dróg i Mostów „Transprojekt”, Kraków 2005.