



JOINT BIDDING IN TENDERS

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WHEN DOES THE CONSORTIUM CONSTITUTE A COLLUSION UNDER THE POLISH COMPETITION LAW?

- a) under the Polish public procurement law (PPLaw), contractors may jointly apply for a contract. There are no additional regulations regarding the consortium. Article 24 para. 1 item 20 of the PPLaw obliges the ordering party to exclude from the procedure a contractor who has entered into an agreement with other contractors to distort competition in the contract awarding procedure, provided that the ordering party is able to prove it. **This provision may therefore also apply to joint bidding**
- b) UOKIK current position: the creation of a consortium by competitors constitutes an agreement restricting competition **if the consortium members could submit their bids separately** (thus violation of Article 6.1.7 of the Act of 16 February 2007 on Competition and Consumer Protection; in addition consortium as bid rigging – Article 305 of the Polish Penal Code - criminal liability of individuals).

POLISH CASE-LAW (I)

- **decision of the President of the OCCP No. RLU 38/2012 of 31 December 2012** - regarding the tender for the collection and transport of municipal waste in Bialystok.

The Court of Appeal confirmed the position of the President of OCCP, indicating that *when considering the possibility of the contract being carried out by the undertaking by itself, its potential should be analysed. Although the undertakings did not have adequate resources to carry out the contract separately at the time the consortium was established, they were able to overcome the shortages and submit separate offers;*

- slight change in interpretation - **Judgment of the National Appeals Chamber of 19 July 2018 (Case No. KIO 1295/18)**, National Appeals Chamber clearly emphasized that *the purpose of the regulation of Art. 23 of PP law („undertakings may jointly apply for a contract”) is not only to enable the contractors, who - for various reasons - are unable to perform the contract separately, to be awarded a contract, but also to help those entities that are capable of obtaining the contract and performing it by themselves which however would be economically unjustified. National Appeals Chambers considered the contractors’ reasons for establishing the consortium as justified.*

POLISH CASE-LAW (II)

The reasons were, among others (**Case No. KIO 1295/18**), :

- to minimise the risks associated with the involvement of those undertakings performing other investment projects,
- the need to engage joint technical and human resources accumulated in Poland and, as a consequence, to reduce the costs of performing the investment,
- to ensure complementarity of capacities of the parties, and
- to divide contractual risks.

FURTHER RELEVANT QUESTIONS

- a) It's legal to set up a consortium by undertakings from one and the same capital group;
 - the concept of single economic unit;
- b) The risk of exchange of sensitive commercial information when setting up the consortium;
- c) The risk of examination of consortium by the President of the OCCP as a reportable concentration (*non-full function joint venture*)

THANK YOU

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