

The Commission for Protection of Competition has been approached by undertakings planning to submit a joint bid in public procurement with the request to issue opinion concerning implementation of competition policy regulations.

The submission provides description pertaining to the public procurements implemented in accordance with the Public Procurement Law (“Official Gazette of the RS” no. 116/2008, hereinafter referred to as ‘PPL’), more specifically on the issue of “urgency” where contracting authority is unable to observe time limits, affecting bidders as well. Furthermore, this issue is interrelated with the planned submission of joint bid by two or several bidders pursuant to Article 50 of the PPL. The request applicants perceive the joint bidding arrangement between mutual competitors as cooperation agreement between horizontal competitors containing restrictive traits within the meaning of Article 10 of the Law on Protection of Competition (“Official Gazette of the RS”, no. 51/2009, hereinafter referred to as ‘Law’). Several inquiries presented in the request pertain to the possibility (obligation) of implementation of Article 12 in reference to Article 11 of the Law. Also, the requesting party has referred to some sort of non-compliance between the PPL and the Law in terms of deadlines stipulated in Article 60 of the Law and provisions on the urgency in public procurement regulation. The grounds of such assessment is seen in the following statement and question: when bidders who plan to submit a joint bid are beforehand obligated to submit to the Commission for Protection of Competition (hereinafter referred to as ‘Commission’) request for individual exemption from prohibition of agreement – contract on joint bid in public procurement, and where statutory deadline for issuing opinion of the Commission exceeds the public procurement “urgency” timeframe, is it plausible for bidders to infringe the Law and potentially face imposition of measures in proceedings instituted *ex officio* by the Commission, if the party enters into agreement on public procurement with the contracting authority while previously has not been issued an approval on individual exemption from prohibition of agreement on “consortium” between participating bidders. Furthermore, the requesting party has in similar fashion inquired on the issue of public procurement by lots, as well as on criteria assessed by the Commission in the case of submitted request for individual exemption from prohibition of agreement concluded between bidders under the abovementioned circumstances.

Pursuant to the statements presented, it is concluded that here referred term “urgent” procurement actually mean public procurement implemented in negotiated procedure with or without public invitation to bid, within the meaning of Article 23 or Article 24 of the PPL. This circumstance is without prejudice to issuing opinion of the Commission, although is considered relevant in this case.

On the basis of previously listed relevant circumstances, as well as on the presumption of accuracy of all statements presented in the request concerned, pursuant to Article 21, Item 8 and Article 21, Item 3 in reference to Article 14, Item 8 of the Statute of the Commission for Protection of Competition (“Official Gazette of the RS”, no. 49/2010), the Commission has issued the following

Opinion

The Commission expresses its disagreement with principled position from the request concerned on the non-compliance between the Law and the PPL in terms of the statutory decision period for deciding on the request for individual exemption of restrictive agreements from prohibition by the Commission in relation to deadline specified in the invitation to bid.

Considering that the request concerned addresses the case when public procurement is implemented in negotiated procedure, considered as an “exemption to the rule” and implemented under explicitly itemized circumstances which cannot be observed as regular and frequent, the Commission believes that potential “issue” concerning “deadlines” could be relatively easily resolved.

However, the issue may be considerably more relevant if contracting authorities misuse the negotiation procedure instrument by irregularly implementing the PPL. The issue may be considerably reduced in the case of negotiated procedure with public invitation to bid relative to other type of negotiated procedure.

The Commission has assessed as correct the requesting party’s position that agreement (contract) concluded between bidders (mutual competitors) toward regulating mutual relations in order to submit joint bid, would have characteristics of restrictive agreement from Article 10 of the Law in the public procurement procedure. Considering that such agreement necessarily contains provisions on fixing sale prices and other commercial conditions set in the submitted bid under which the bidders are prepared to potentially enter into awarded contract on public procurement, such agreement would fall outside Article 14 of the Law as well. The aforesaid mean that even under the assumption of fulfilment of conditions from Article 14 of the Law relating to market share percentage, such agreement could not be considered as agreement of minor importance due to compulsory price fixing provisions and other commercial conditions affecting the restrictiveness of such agreement.

Considering that current competition policy regulations (Law and bylaws) of the Republic of Serbia do not explicitly regulate the situation of entering into agreement on “consortium” owing to joint bid participation, the Commission is left to act in accordance with regulations governing the issue of horizontal restrictive agreements. The Commission herein points that pending enactment of new bylaws, parties to such agreements are required to submit to the Commission request for individual exemption from prohibition within the meaning of Article 12 in reference to Article 11 of the Law.

In response to question on the assessment of the fulfilment of conditions for individual exemption from prohibition in the case of joint bidding agreement, in addition to the conditions stipulated in Article 11 of the Law, the Commission would particularly and principally

investigate and assess whether any of the parties to the agreement would be able to individually participate in the tender. If any of the parties to the agreement would be able to submit an independent bid, i.e. to independently fulfil all conditions of tender, including disabling and other requirements, such bidder could not partake in the joint bidding agreement.

The aforesaid indicates that two or several parties to the agreement may expect to receive a positive decision on individual exemption only if evidenced in the proceeding instituted upon their request, that they can only submit a compliant tender if they participate together, or respectively if proven that in the absence of agreement and related submission of joint bid, none of the parties would be able to submit a tender, consequently reducing the total number of bidders. The reduced number of participating bidders fulfilling all tender requirements would reduce the competitiveness of bidding process, i.e. cause fewer number of submitted adequate bids, which could ultimately impact the less favorable outcome of public procurement. The type of implemented public procurement procedure is without prejudice to the foregoing. Such being the case, bidders fulfilling all requirements and criteria set by the contracting authority would be affected by soften competitive pressure, additionally making related procurement less qualitative.

Here is necessary to emphasize on one additional and very important detail concerning requirements potentially causing parties to enter into joint bid agreement. When regulating the principle of ensuring competition, the PPL prescribes that contracting authority may not prevent any bidder from participating in public procurement by unjustified use of the negotiated procedure or by using discriminatory requirements or criteria. Hence, if bidders or potential bidders would assess that some of requirements or criteria are discriminatory in terms of being unnecessary or unjustifiably “strict”, thus causing the “joining” of bidders in order to fulfil such requirements, protection under the PPL is then justifiably brought into question. In similar manner, concerning extremely short deadlines imposed by contracting authorities when conducting negotiated procedure without public invitation to bid, it can be disputed on the malpractice on the part of contracting authority and on the implementation of this kind of procedure without prior fulfilment of statutory requirements. The Commission has assessed that in all cases when public procurements of goods or services are periodically implemented and plausible to anticipate within a reasonable time, there are no reasons or grounds for implementation of these kind of procedures.

Furthermore, as to the “deadline” issue in negotiation procedures, one of the points discussed with contracting authority can definitely relate to the necessity of potential postponement pending decision of the Commission pertaining to the joint bid agreement.

The Commission here expresses its refusal to be involved in speculations on the possibility that contracting authority may decline to conclude agreement with the parties from the joint bid agreement, assessed to have the most favorable bid, simply due to missing enacted decision on individual exemption, or on the circumstance deriving from the concluded public procurement agreement with bidders who are later refused by the Commission for individual exemption from

prohibition, because these cases practically relate to hypothetical situations thus far uncommon to the Commission's practice.

In terms of public procurements subdivided into separate lots, the Commission sees no essential difference against all previously presented.

In addition to all of the above, it is necessary to emphasize that individual exemption from prohibition may be requested "in advance", or respectively prior to publishing all tender requirements and criteria pertaining to particular procurement. This is due to the reasons mentioned above, because early assessment on the fulfilment of conditions for individual exemption would primarily be based on assessing the capability of parties to such agreement to individually, or only jointly, fulfil compulsory requirements and criteria.

The aforesaid is based on the fact that all such cases relate to the so-called "ad hoc" "consortiums" for submitting joint bids in relation to specific public procurements, and not to the so-called "pools" which are differently treated. This particularly relates to the insurance sector.

Finally, in connection with the deadline stipulated in Article 60 of the Law for deciding on request for individual exemption of restrictive agreement, the Commission emphasizes the following: The deadline stipulated in Article 60(1) of the Law is instructive per nature. This further entails that the aforementioned deadline prescribed by legislator is set as commonly sufficient for deciding in individual request cases on the part of competent authority. The statement provided by the requesting party that the expiry of time limit does not imply the approval of individual exemption is taken as correct. Hitherto practice of the Commission regarding proceedings instituted on the basis of requests for individual exemption of agreement from prohibition, leads to the conclusion on the necessity to implement the case-by-case approach. While some cases require more time for deciding, other to a great extent depend on the quality of documents submitted in attachment to the request for individual exemption, as well as on the "quality" of request concerned, that is, the power of arguments used to evidence justification and necessity to enter into agreement by the requesting party. If requests would be submitted in full accordance with the bylaw regulating the content of requests for individual exemption, and if requests would contain all necessary and sufficient data and information, the duration of proceedings before the Commission could be considerably shorter than prescribed.