



Republic of Serbia
**COMMISSION FOR
PROTECTION OF COMPETITION**

25 Savska St., 4th Floor, Belgrade

Number: 4/0-02-496/2020-5

Date: July 30, 2020

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Ammonized version

The Council of the Commission for Protection of Competition, pursuant to Article 22(2) of the Law on Protection of Competition (“Official Gazette of the RS”, Nos. 51/2009 and 95/2013) and Article 101 of the Law on General Administrative Procedure (“Official Gazette of the RS”, Nos. 18/2016 and 95/2018- authentic interpretation), in proceedings instituted on receipt of the Request for individual exemption of agreement from prohibition No. 4/0-02-496/2020-1 of July 8, 2020, filed by companies: DDOR osiguranje ado Novi Sad, with registered office at 8 Bulevar Mihajla Pupina Blvd., Novi Sad, company number 08194815, whose legal representative is Giorgio Ambrogio Marchegiani, Chairman of the Executive Board, and Wiener Stadtische osiguranje ado, with registered office at 1 Trešnjinog cveta St., Belgrade, company number 17456598, whose legal representative is Zoran Blagojević, Chairman of the Executive Board, at the 22nd session held on July 30, 2020, adopts the following

DECISION

I PROCEEDINGS INSTITUTED ON RECEIPT OF THE REQUEST FOR INDIVIDUAL EXEMPTION OF AGREEMENT FROM PROHIBITION SHALL BE SUSPENDED, No. 4/0-02-496/2020-1 of July 8, 2020, filed by companies DDOR osiguranje ado Novi Sad, with registered office at 8 Bulevar Mihajla Pupina Blvd., Novi Sad, and Wiener Stadtische osiguranje ado, with registered office at 1 Trešnjinog cveta St., Belgrade.

II IT SHALL BE ORDERED to the Division for Material and Financial Affairs of the Commission for Protection of Competition to refund 141,106.20 dinars (in words: one hundred forty-one thousand one hundred six and 20/100 dinars) within a period of 7 days from the date of adoption of this Decision to Wiener Stadtische osiguranje ado, with registered office at 1 Trešnjinog cveta St., Belgrade, into the company’s account No. 340-0000000034018-17 open with Erste bank ad Novi Sad.

Exposition

The Commission for Protection of Competition (hereinafter, the 'Commission') has received the Request for individual exemption of agreement from prohibition (hereinafter, the 'Request') on July 8, 2020, filed by companies DDOR osiguranje ado Novi Sad, with registered office at 8 Bulevar Mihajla Pupina Blvd., Novi Sad, and Wiener Stadtische osiguranje ado, with registered office at 1 Trešnjiog cveta St., Belgrade (hereinafter, collectively referred to as the 'Parties' or individually as 'DDOR osiguranje' and 'Wiener Stadtische osiguranje').

The Request concerns the Joint Bidding Agreement (hereafter, 'Contract' or 'Agreement') on joint participation in the Public Procurement Procedure – Insurance Services JNMB 07/20, for the Contracting Authority Regionalna deponija d.o.o. Subotica, Bikovo, 280 Bikovački put St. (hereinafter, the 'Contracting Authority'), concluded by the Parties on July 8, 2020, and registered at Wiener Stadtische osiguranje under file No. 428 and DDOR osiguranje under file No. 2709.

The Contract was concluded so that the contractual parties could present a joint bid under the invitation to tender published by the Contracting Authority in the Low-Value Public Procurement Procedure – Property insurance, Supplementary health insurance of employees, Accident insurance, and Professional liability insurance, all of which are types of non-life insurance (hereinafter, the 'Public Procurement'), for a period of 12 months from the coverage start date.

As the reason to conclude the Agreement, the Parties stated that they individually do not meet the additional tender requirements, specifically those that stipulate:

- absolute difference between the guarantee reserves and solvency margin, for types of non-life insurance, as on December 31, 2019, of at least 2,400,000,000 dinars, which is a requirement that is not be met by any of the contractual parties,
- for a bidder to have a harmonized management system with ISO 27001 standard requirements, by way of which it demonstrates that its operations are harmonized with internationally recognized information security management systems, which is a requirement that Wiener Stadtische osiguranje a.d.o. Beograd cannot meet individually as this insurer does not hold the ISO 27001 Certificate.

The Parties have underlined that DDOR osiguranje and Wiener Stadtische osiguranje only together meet the additional tender requirements necessary to participate in the Public procurement procedure and that the joint bid increases the number of potential bidders and competition in this Public procurement.

Attached to the Request, the Parties have provided the Agreement, tender documents, AK-NO/RE form on capital adequacy, and extracts from the Business Registers Agency.

The Request filed by the Parties is presented as discretionary, meaning that the Parties have proposed rejecting the Request which is filed only as a precaution since, according to their understanding, the Agreement does not represent a restrictive agreement referred to in Article 10 of the Law on Protection of Competition ("Official Gazette of the RS", Nos. 51/2009 and 95/2013

– hereinafter, the ‘Law’). Alternatively, should the Commission decide not to reject the Request, the Parties proposed adopting a decision by way of which the Request would be allowed and setting the period of exemption from the prohibition of 12 months from the coverage start date.

Analysis of the documentation provided

After the inspection of the documentation provided, the Commission has established that the Request is true and complete under the Regulation on the content of requests for individual exemption of restrictive agreements from prohibition (“Official Gazette of the RS”, No. 107/2009). Before assessing the fulfillment of requirements for individual exemption, within the framework of procedure for exemption of restrictive agreements from prohibition, the Commission needed to evaluate and analyze the nature of the Agreement concerned, that is, establish whether the Agreement concerned represents a restrictive agreement within the meaning of Article 10 of the Law.

The Commission has analyzed the documentation provided, including the Agreement, primarily considering information that the Parties individually do not meet the additional tender requirements.

In this regard, the Commission has assessed the fulfillment of conditions, also having regard to the Opinion on the application of Article 10 of the Law on certain forms of cooperation between undertakings in public procurement procedures¹ of June 15, 2015 (hereinafter, the ‘Opinion’).

In the above-mentioned Opinion, the Commission presented its position that agreements on joint participation in public procurement procedures concluded between undertakings that are viewed as competitors within the meaning of the Law, shall not be considered restrictive under Article 10(1) of the Law provided that:

- neither contractual party could independently participate in a public procurement procedure in accordance with the requirements set out in tender documents;
- neither contractual party could participate in a public procurement procedure by submitting a separate joint bid;
- exchange of business-sensitive information between competitors is limited to the public procurement procedure and only relates to information that is necessary to tender for and perform a contract that is potentially awarded in the public procurement procedure;
- agreement contains no provisions prohibiting competition, which could restrict or prevent competition between the contractual parties in other public procurement procedures, whether they act independently, as members of a group of bidders or as members of a group of producers.

Based on the analysis of requirements specified in the tender documents of the Public procurement, including the documentation attached to the Request, the Commission has established the following:

¹ Available on the official website of the Commission: <http://www.kzk.gov.rs/kzk/wp-content/uploads/2016/12/Primena-%C4%8Dlana-10.-Zakona-o-za%C5%A1titi-konkurencije-na-odre%C4%91ene-oblike-saradnje-izme%C4%91u-u-%C4%8Desnika-na-tr%C5%BEi%C5%A1tu-u-postupcima-javnih-nabavki.pdf>

- Based on the AK-NO/RE form “Capital adequacy requirements of an insurance/reinsurance”, the Commission has established that Wiener Stadtische osiguranje does not have the capacity to meet the required difference between the guarantee reserves and solvency margin of 2,400,000,000 dinars that is envisaged as an additional tender requirement of the Public procurement, i.e., that its difference amounts to 468,000,000.70 dinars, while the difference between the guarantee reserves and solvency margin of DDOR osiguranje is 2,318,212,000.00 dinars, meaning that DDOR osiguranje also cannot meet this requirement specified in the tender documents of the Public procurement.

By assessing whether the requirements listed in the above-mentioned Opinion are met and further to the analysis of available information, it is established that the Agreement is concluded between competing undertakings on the market for non-life insurance services but who could not independently participate in the Public procurement concerned. In reaching this conclusion, the Commission has accepted, as a decisive circumstance, the AK-NO/RE form “Capital adequacy requirements of an insurance/reinsurance” which substantiated claims of the Parties on inability to independently tender. The Commission has assessed that without the Agreement concerned, the companies could not be able to independently tender for/perform a contract in this concrete Public procurement procedure.

The Commission has also analyzed the Agreement and assessed that it is concluded for a period until the fulfillment of contractual obligations towards the Contracting Authority in the Public procurement concerned, and that it contains no provisions that could restrict or prevent competition between the contractual parties in other public procurement procedures, whether they act independently or as members of a group of bidders.

On this basis, the Commission has assessed that the Parties, as undertakings, are not competitors in the Public procurement concerned, considering that they could not independently meet all the requirements stipulated by the tender documents. For the reasons outlined above, the Agreement is not considered restrictive under Article 10 of the Law.

Article 12 of the Law stipulates that the Commission may, at the request of a contractual party, exempt individual restrictive agreements from prohibition. Article 91(1) of the Law on General Administrative Procedure stipulates that the procedure may be instituted upon request of a party once the authority receives such a request. Also, under Article 101(1) of the Law on General Administrative Procedure, the procedure may be suspended should the authority determine that there are no conditions for its further administration and that the law does not specify its continuation.

Given that in procedures of individual exemption of restrictive agreements from prohibition only restrictive agreements can be exempt, the Commission has established that there are no conditions for further administration, and based on Article 101 of the Law on General Administrative Procedure has decided as in Paragraph I of the enacting terms herein.

The Commission notes that it has acted solely in accordance with its competencies, under the Law and the Opinion, in deciding on the Request concerned. Furthermore, the Commission has not considered the conduct of the Parties and the Contracting Authority in terms of the requirements for participation in the Public procurement procedure within the meaning of the Law on Public

Procurements (“Official Gazette of the RS”, Nos. 124/2012, 14/2015 and 68/2015) and instructions on how to demonstrate the fulfillment of set requirements.

Given that the Parties have paid a fee referred to in Article 2(2), read in conjunction with Article 3 of the Tariff on the level of compensations for activities within the competence of the Commission for Protection of Competition (Official Gazette of the RS 49/11), and that the procedure is suspended, it is decided as in Paragraph II of the enacting terms herein.

Instruction on legal remedy:

This decision is final in the administrative procedure, while an administrative appeal can be filed before the Administrative Court in Belgrade, 9 Nemanjina St., no later than 30 days from the date of communication of this decision.

A court fee of 390 dinars is to be paid when bringing the action, set out in the Law on Court Fees (Official Gazette of the RS 28/1994, 53/1995, 16/1997, 34/2001 – as amended, 9/2002, 29/2004, 61/2005, 116/2008 – as amended, 31/2009, 101/2011, 93/2012, 93/2014, 106/2015, and 95/2018).

PRESIDENT OF THE COMMISSION

Nebojša Perić