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Competition Law Implications for Joint Bidding During Public Procurement*

Implikacje w zakresie prawa ochrony konkurencji płynące ze wspólnego ubiegania się o zamówienie publiczne

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ABSTRACT

In 2023, the European Commission adopted revised Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreement, following a thorough evaluation and review of the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements. The chapter of the Guidelines on commercialization agreements was expanded to include a new section on bidding consortia and guidance on the distinction with bid rigging. The Commission proposed to use the term "bidding consortium" for simplicity instead of "joint bidding". Public procurement and competition law aim to achieve similar goals. Coordinated actions of competitors may jeopardize the outcome of public procurement. This is particularly the case when several potential suppliers attempt to join forces in a public procurement. In the article, the authors analyze the legal framework of the EU Member States for assessing proposals resulting from joint activities and bidding. Particular attention is paid to the regulatory and practical constraints faced by suppliers and contracting authorities.

Keywords: joint bidding; bidding consortia; public procurement; competition law; constraints

INTRODUCTION

Despite the goals pursued by public procurement regulations and competition law rules, procurement is often protracted or does not take place at all. The case law examined below shows that joining of the competitors' capacities might be regarded as restrictive of competition by its very nature.

However, when an anticompetitive agreement is found, then sanctions under national law shall be imposed. The Law on Competition of the Republic of Lithuania[1] establishes a negative effect. It is the inclusion of the supplier – a group of business entities, acting on the basis of a joint venture agreement, into the list of unreliable suppliers. Then two negative consequences follow. First, whenever the supplier is found to be unreliable, a procedure for termination of the contract is initiated and the supplier does not receive the results of the economic and commercial activities pursued. Second, it also means that the supplier's possibilities to participate in another commercial partnership are limited/prohibited.

In the case of public procurement, contracting authorities are obligated to use funds rationally. The authorities must purchase goods, services, or works that meet the organization's needs at the lowest price offered.

The complexity of the problem is also reflected in the search for ways and methods to reconcile the needs of contracting authorities, the capacity of potential suppliers, the market situation and the potential impact on competition. One

[1] Law on Competition of the Republic of Lithuania of 23 March 1999 (version of 1 February 2017, amended on 12 January 2024).

example of such a search is the network entropy and conditional network entropy approach proposed by I.G. Fountoukidis, I.E. Antoniou and N.C. Varsakelis.[2]

This article analyses cases, where for example a group of suppliers participates in a public tender on the basis of a joint venture agreement. The suppliers are obliged to act in mutual trust, taking into consideration each other's interests, and to pool their operational capacities in order to fulfil the obligations assumed (fiduciary duties between partners). Joint venture agreement should specify the obligations of each party and the proportion of the value of those obligations to the total value of the contract. Moreover, the person in charge within the group and shared liability of the parties of the agreement in the event of non-performance of their obligations to the contracting authority has to be identified. The inclusion of these clauses into the agreement enables an optimal balance between the unification of the joint efforts of the market players and the requirements of competition law.

THEORETICAL AND LEGISLATIVE FRAMEWORK

Article 101 of the Treaty on the Functioning of the European Union[3] prohibits all agreements between undertakings, decisions by associations of undertakings, and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. In this context, agreements that extend beyond the borders of a single Member State are significant. For other agreements, comparable provisions are established in national legislation.

The theoretical threat to competition arises when two potential competitors agree to participate jointly in a public procurement and thus agree on the terms of the offer, including the price. From one side, according to J. Bouckaert and G. Van Moer, similar practices can reduce costs by efficiently reallocating production across firms, e.g. when firms are subject to idiosyncratic cost shocks or capacity constraints.[4] Joint bidding also facilitates the participation of small and medium-sized enterprises (SMEs) in public procurement processes.[5] From another perspective, there is a concern that such entities will be able to set a price that is more favorable

[2] I.G. Fountoukidis, I.E. Antoniou, N.C. Varsakelis, *Competitive Conditions in the Public Procurement Markets: An Investigation with Network Analysis*, "Journal of Industrial and Business Economics" 2023, vol. 50.

[3] Consolidated version, OJ C 326/1, 26.10.2012, hereinafter: TFEU.

[4] J. Bouckaert, G. Van Moer, *Joint Bidding and Horizontal Subcontracting*, "International Journal of Industrial Organization" 2021, vol. 76.

[5] H. Reijonen, J. Saastamoinen, T. Tammi, *The Importance of SMEs' Network Partners in Consortium Bidding for Public Sector Tenders*, "International Journal of Public Sector Management" 2022, vol. 35(1), p. 8.

to them because they are no longer competitors in this public procurement. Such practice can cause the reduction of number of competitors or facilitate collusion among them.[6] This can lead even to bid-rigging problem.[7] However, this does not mean that other competitors cannot participate if the competition in the relevant market is sufficient. Everything depends on the market structure and the level of competition within it.

The case law provided below has demonstrated that agreements among competitors to combine their capacities for bidding on public contracts are typically seen as containing hardcore restrictions, which are illegal *per se*. Such agreements are presumed to be harmful and there is no need to prove their negative impact on competition.[8]

RELEVANT CASE LAW

Case law shows that neither competition authorities nor courts strictly adhere to the principle that an agreement between competitors to participate jointly in public procurement inherently restricts competition. However, the presence of certain elements, including agreements on price, increases the likelihood that an agreement will be deemed restrictive of competition based on its objective rather than its impact.

In the Norway taxi case,[9] the Court stated that in order to determine if the agreement between undertakings harms competition, it is important to analyse its provisions, objectives, and the economic and legal context of which it forms part. In the mentioned case, the joint bids involved price-fixing. The Court stated that only what is necessary should be assessed in order to establish the existence of a restriction of competition by object. However, attention also should be paid to

[6] G.L. Albano, G. Spagnolo, M. Zanza, *Regulating Joint Bidding in Public Procurement*, "Journal of Competition Law & Economics" 2009, vol. 5(2); P. Morais, J.M.A. Matos, N. Bessa Vilela, Ž.J. Oplotnik, *Transparency and Risk Allocation in PPP: Addressing Complex Contracts' Mathematical Formulas in the Portuguese Case*, "Journal of Local Self-Government" 2022, vol. 20(2).

[7] C. Carbone, F. Calderoni, M. Jofre, *Bid-rigging in Public Procurement: Cartel Strategies and Bidding Patters*, "Crime, Law and Social Change" 2024; European Commission, 15.3.2021 C(2021) 1631 final Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground 2021/C 91/01 (OJ C, C/91/1, 18.03.2021).

[8] A. Puksas, *The EU Practice of Horizontal Agreements Assessment in Accordance with the Rule of Providing De Minimis Exemption*, "Baltic Journal of Law & Politics" 2012, vol. 5(2), p. 72; P. Van Cleynenbreugel, *Private Damages Actions in EU Competition Law and Restorative Justice: Towards a New Streamlined Institutional Framework?*, "Market and Competition Law Review" 2019, vol. 3(2).

[9] Judgment of the Court of 22 December 2016 in case E-3/16, *Ski Taxi SA, Follo Taxi SA and Ski Follo Taxidrift AS v The Norwegian Government, represented by the Competition Authority*, OJ C 133/5, 27.4.2017.

the question "whether the parties to an agreement are actual or potential competitors and whether the joint setting of the price offered to the contracting authority constitutes an ancillary restraint".

In Denmark, the Court of Appeal of Eastern Denmark (the High Court) found road marking consortium guilty of infringing the Competition Act, however, took into consideration special circumstances and allowed subjects to avoid the punishment.[10] LKF Vejmarkering and Eurostar Denmark were among the largest road marking companies in Denmark. Despite the possibility of participating separately in the public procurement procedures they through the "Danish Road Marking Consortium" bid in three areas together proposing the cheapest price and winning. Other bids were not provided. There was a presumption that each entity could have submitted cheaper bids individually.

On 3 June 2020, the Supreme Administrative Court of Lithuania passed a decision on joint bidding in the case concerning renovation and modernization of buildings.[11] The lower court's decision was upheld under all circumstances. The latter found that the entities had the opportunity to participate individually in the public procurement. The novelty and complexity of the situation raised by the parties were not taken into account. The companies did not engage in competition; instead, they systematically cooperated, both in terms of bidding for construction work and in setting prices. It was determined that the purpose of joint operating agreements is to unite market players who are unable to participate in public procurement on their own, thereby increasing competition. The Court concluded that those who are capable of participating independently should not use joint venture agreements as a means to restrict competition.

All mentioned cases are different, but the idea is the same – public procurement rules allow for the submission of joint bids. However, real and potential competitors cannot use this mechanism to avoid competition in the relevant market, especially if they are capable of acting independently. "Unless bidding consortia generate sufficient efficiencies through integration of operations, competition authorities and courts require that their members cannot bid stand-alone".[12]

One of the latest cases comes from Croatia where the Croatian Competition Agency took the infringement decision identifying distortion of competition in the form of the conclusion of a prohibited horizontal agreement (cartel) in the public

[10] Danish Competition and Customer Authority, *Road Marking Consortium Found Guilty of Infringing the Competition Act*, 5.2.2024, https://www.en.kfst.dk/nyheder/kfst/english/news/2024/20240205-road-marking-consortium-found-guilty-of-infringing-the-competition-act (access: 17.5.2024).

[11] Judgment of the Supreme Administrative Court of Lithuania of 3 June 2020, administrative case no. eA-161-552/2020.

[12] J. Bouckaert, G. Van Moer, *op. cit*.

procurement proceeding.[13] This case reflects the previously mentioned bid-rigging action: "Bidders concluded a bid-rigging cartel by fixing and coordinating the prices in their bids conspiring on the outcome of the public procurement procedure and colluding on the allocation of individual contracts with respect to a particular group of products and a particular year with the view to creating a designated winning bidder in the public procurement procedure based on the frame agreement for a particular group of products and a particular year".[14]

PROBLEMATIC ASPECTS

While there is a risk that entities pooling their capabilities for public procurement may distort competition, it is flawed to consider only the fact that they are actual or potential competitors. The market structure and the realistic possibilities of the entities to not only submit independent bids but also to execute them must also be assessed. Automatically categorizing such agreements as inherently problematic may lead to a situation where economic operators simply do not submit independent bids, resulting in the contracting authority receiving no bids at all or only more expensive ones. Sometimes, pooling capacities allows for a lower price to be offered without preventing other competitors from submitting their bids.

In the case of SMEs, there is a small risk of significantly distorting competition. However, the market structure can lead to situations where the only possibility for submitting a bid is through the joint effort of larger companies, especially when it is challenging for them to independently submit proposals and later meet the procurement requirements without difficulties.

In any case, whenever agreements are found infringing the competition law, a remedy may be applied, excluding the entity from participation in a procurement procedure. Article 57 (4) (g) of Directive 2014/24/EU[15] stipulates clearly: "Where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions".

Quite often, when public procurement is launched, contracting authorities strive to purchase goods, services, or works at the lowest price offered. Then the price is

[13] Croatian Competition Agency, *Summary Annual Report of the Croatian Competition Agency for 2022*, 19.6.2023, https://www.aztn.hr/ea/wp-content/uploads//2023/10/Summary-GI-AZTN-2022.pdf (access: 17.5.2024).

[14] OECD, *Annual Report on Competition Policy Developments in Croatia*, DAF/COMP/AR(2023)43.

[15] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94/65, 28.3.2014).

assumed as an essential criterion for the purchase. Whenever the competition law infringement makes an affect to the purchase price by increasing it, the contracting authority may declare that the joint venturers have committed a material breach of the contract. Where the lowest price criterion is established in public procurement and the price of the goods, services or works is increased by the participants in the joint venture as a result of the joint venture agreement, the contracting authority may initiate the termination of the contract because it did not obtain what it expected – the lowest price.

The aforementioned situation exactly corresponds to Article 57 of Directive 2014/24/EU. "Exclusion grounds" item 4 (g) stipulates, that contracting authorities are eligible to exclude an economic operator from participation in a procurement procedure, by verifying that in compliance with Articles 59, 60 and 61. The same is applicable when contracting authorities are otherwise aware that economic operator has been the subject of a conviction by the final judgment, that the economic operator has entered into a joint venture agreement having the intention to infringe competition rules.

According to the Directive 2014/24/EU, termination of the contract and exclusion from the procurement procedure may not be the only means of limiting the incentive of joint venturers to commit competition law infringements. Recitals of Articles 101 and 102 of Directive 2014/24/EU state that: "(101) Contracting authorities should (…) be able to exclude economic operators who have proved to be unreliable because they have committed, for example, (…) or other serious professional misconduct, such as infringements of the competition rules (…). (102) (…) [Contracting authorities] should also be allowed to exclude candidates or tenderers whose performance under previous public contracts has been found to be seriously deficient in relation to essential requirements (…). National law should provide a maximum duration for such exclusion".

In other words, summarizing the current legal framework, it can be argued that partners acting on the basis of a joint venture agreement who infringe competition rules can be both excluded from the procurement procedure and temporarily restricted in their right to participate in public procurement. Partners in a joint legal relationship are accomplices. Participation in public procurement by means of joint venture imposes the concept of fiduciary duties. Thus, joint venture becomes based on trust and kind of a standard of utmost loyalty and good faith, and therefore joint activities in public procurement should not be seen as a higher risk factor for competition law.

The inclusion into the list of unreliable suppliers is a dissuasive measure because according to the provisions of the Public Procurement Law of the Republic of Lithuania,[16] those suppliers are subject to be excluded for a period of 3 years. It

[16] Law on Public Procurement of the Republic of Lithuania of 13 August 1996 No I-1491 (last amended on 21 December 2023).

should be noted, that in Lithuania, inclusion into the list of unreliable suppliers is a legal instrument, applied as a subsequent legal consequence of another decision to unilaterally terminate a public procurement contract: if the termination of the contract is not contested by the economic operator as a whole on the grounds of a material breach of the contract, or if a court declares such a decision to be lawful, then the economic operator in question, who has carried out the contract on its own or in collaboration with its partners, shall be inevitably included into the list of unreliable suppliers.[17]

In the context of joint ventures, it is important to note the Court of Justice clarification in case C-682/21,[18] that the phrase "any person having or having had an interest in obtaining a particular contract who has been or risks being harmed by an alleged infringement", as contained in Article 1 (3) of Directive 89/665, is to be given a wide interpretation.[19] If the national courts are given the authority to interpret the concept of person broadly, then the members of a group of economic operators, in the context of their joint activities (if an infringement of the competition rules is conducted), may be placed into the list of unsuitable suppliers. This would mean that no one of them can be awarded a public procurement contract temporarily as they will be excluded from future public procurement procedures for a certain period of time. Consequently, the inclusion of a participant in a joint venture has an impact on the interest of each of those economic operators in the award of a public contract, falling within the scope of EU law, but this provides each individual member of the group of economic operators with the right to challenge their inclusion into that list.

The fact that inclusion into the list of unreliable suppliers is an effective remedy, when inclusion is conducted for infringements of the competition rules, has been implicitly noted by the Court of Justice. The Court ruled that the possibility of carrying an action against the early termination of the public contract giving rise to their entry on the list of unreliable suppliers does not constitute, for the members of the group which submitted the successful tender, an effective remedy against the decision to enter them on that list and thereby to exclude them, in principle, from future public procurement procedures.[20] A complex legal process must be followed to justify the circumstances of the exclusion from the list. Entry and exclusion may be dependent, as is apparent from the analysis relating to the second question, on different factors. Legal proceedings for exclusion from the list may be initiated

[17] Judgment of the Supreme Court of Lithuania of 6 April 2023, civil case no. e3K-3-180-469/2023.

[18] Judgment of the Court (Fourth Chamber) of 26 January 2023 in case C-682/21, *UAB 'HSC Baltic' and Others v Vilniaus miesto savivaldybės administracija and Others*, ECLI:EU:C:2023:48.

[19] *Ibidem*, paras. 62–63.

[20] *Ibidem*, para. 65.

either in conjunction with an action for termination of the public contract, arguing that there has been no breach of the contract, or separately on the basis of inclusion on the list of unsuitable suppliers.

The contribution/engagement of the partners in a joint procurement activity may vary according to the amount of assets invested by each of them, the amount of work carried out, or the share of knowledge used. The impact on the market due to the fact that the economic operator acted on the basis of the joint venture agreement with the aim of restricting competition can be considered as harm. Irrespective of the general legal liability of the members of the group, the application of the optional ground for exclusion set out in Article 57 (4) (g) of Directive 2014/24/EU must be based on the improper nature of the specific individual conduct of the economic operator. Each member of the group, which, under the legal framework on complicity, is responsible for the proper performance of a public contract, must be given the opportunity to prove, before being placed on the list of unsuitable suppliers and therefore subject to the procedure of temporary exclusion from the public procurement procedure, that, as a result of his participation in the joint activity, the infringements of the competition rules which led to the termination of that contract are not attributable to his individual conduct.

For the purpose of checking whether a group of suppliers has not restricted competition before submitting a bid to the contracting authority, there is an opportunity to use a "during-and-after" regression analysis method. Such an analysis compares the prices that the suppliers had set during the negotiations for participation in the joint venture and after the termination of the contract, monitoring the prices offered by the suppliers participating in other tenders for similar services, works or know-how. A comparison of the prices established during the period of the infringement of the competition rules with the prices after the termination of the procurement procedure should indicate whether the existence of the joint operation had an impact on the prices offered by a member of the group of suppliers. Thus, this method could only be used in high-value procurements.

ASSESSMENT OF THE LEGALITY OF JOINT BIDDING

The combined actions of competitors while preparing and submitting a joint bid for a public contract should not be automatically considered *per se* restrictive of competition. There are many factors to be taken into account. The challenges faced by contracting authorities and potential suppliers during public procurement procedures, particularly when intending to combine the capacities of multiple entities, require closer scrutiny.

It is important to make a difference between bid rigging between the undertakings and legitimate forms of joint bidding. Bid rigging is a prohibited manipulation

of a tender procedure for the award of a contract. Bid rigging is recognized as a restricting competition by object. On the other hand, joint bidding could be legal if certain requirements are met.

Bidding consortia agreements are often openly disclosed during tender. Bidding consortium agreements substantially differ from bid rigging, which amounts to the hidden agreement between the parties that coordinate their actions in the tender process. A bidding consortium agreement – irrespective of its legal qualification – will not restrict competition within the meaning of Article 101 (1) TFEU if it allows the parties to participate in projects that they would not be able to undertake individually. In that scenario, the parties to the bidding consortium agreement are neither actual nor potential competitors for the implementation of the project.[21] In such a case the parties should provide different services for the project. There might also be some other reasons, which cause that the parties would not be able to carry out the project individually, e.g. in case of the complexity of the project.

In the legal practice of Lithuania, the question whether the parties are able to compete in a tender individually is a key criterion. The Supreme Administrative Court of the Republic of Lithuania assessed the ability of each of the parties to participate in the tender individually and to perform all the works needed. The Court assessed whether each of the construction companies (respondents) was able to implement all the construction works on its own. The Court noted that the joint venture agreement was concluded between two leading companies in construction business, which in most cases could perform works individually. For performance of some additional works, the respondents could have hired some subcontractors. In practice, the Competition Council or the Court would analyze in detail the tender rules, the size and capabilities of the undertakings as well as investments required for the project and other practicalities.

The European Commission believes that the bidding consortium agreement could qualify as a restriction by object or by effect, depending on the particular circumstances. The Commission outlines two situations.

First, if parties could bid individually, then joint bidding may amount to a restriction by object. Such attitude is widely supported in the above-mentioned practice of the Member States, the attitude of legal scholars,[22] and the OECD.[23]

Second, if the bidding consortium agreement is concluded by more parties than necessary and if there is just one party that could bid individually, this fact might

[21] Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (OJ C 259/1, 21.7.2023).

[22] M. Petr, *Joint Tendering in the European Economic Area*, "International and Comparative Law Review" 2020, vol. 20(1), p. 218.

[23] OECD, *Competition and Procurement: Key Findings*, 2011, https://www.oecd.org/regreform/sectors/48315205.pdf (access: 17.5.2024), p. 43.

not be sufficient to establish restriction by object. However, if a party that has ability to bid individually enters into the bidding consortium with the other parties with the specific aim of pre-empting a competing joint bid from those other parties, it could be considered a restriction by object.

In case the restriction by an object is not established, then the anticompetitive effects depend on the assessment of how the competition would play out without the bidding consortium agreement in question. It is also very important that only the information strictly necessary for the formulation of the bid and the performance of the contract is distributed between the members of the consortium.

As mentioned above, on 3 June 2020 the Supreme Administrative Court of Lithuania passed a decision on joint bidding in tenders concerning renovation of buildings.[24] The main argument for the Court and the Competition Council of Lithuania was the fact that the undertakings, which concluded bidding consortia had the opportunity to participate individually in the public procurement. The authors of this article have not participated in the analysis of this case in the Lithuanian Court, but still there is a slight chance that currently this situation at least theoretically could be approached differently bearing in mind the new Guidelines on horizontal agreements adopted by the European Commission in 2023. In para. 365 of the Guidelines the Commission analyses fictitious example of the case when undertakings "A" and "B" are competing providers of specialized medical products for hospitals. These undertakings enter into a bidding consortium agreement to submit joint bids in a series of tenders organized by the national health system in a Member State. Both undertakings could and already have participated in the tenders individually. Since each of the undertakings could individually compete in the tenders, their joint participation may restrict competition and Article 101 (1) TFEU applies. Still, actions of the undertakings should be valued under Article 101 (3) TFEU.

The European Commission believes that "it appears that a joint offer would be more competitive than the individual offers, in terms of pricing and range of products offered, in particular optional products, which is particularly important for the tendering authority. The bidding consortium agreement appears to be indispensable for the parties involved to submit a truly competitive offer in the tender procedures, compared with the offers presented by the other participants". The Commission concludes that even if the undertakings could compete individually, still there is a chance that their bidding consortium could be justified under Article 101 (3) TFEU. The question whether the bidding consortium of Lithuanian companies could become more competitive in terms of pricing and range of product offered have not been analyzed in detail by the Supreme Administrative Court of Lithuania.

[24] Judgment of the Supreme Administrative Court of Lithuania of 3 June 2020, administrative case no. eA-161-552/2020.

C. Ritter also takes the position that the parties must be able to show that the joint tender improves the value proposition to the customer, achieving those efficiencies would not have been possible through a less restrictive alternative and the joint tender does not "afford such undertakings the possibility of eliminating competition".[25]

CONCLUSIONS

The current legal framework encourages potential suppliers to avoid pooling and participating in the procurement in which they could collaborate with other entities.

The legal advice would be to evaluate joint bidding very carefully. Some of the undertakings even adopt internal company rules prohibiting their employees to enter into joint ventures with competitors because of the high inherent risk.

In case a risky bidding consortium agreement is concluded, then the parties at least must follow certain rules. The parties should not discuss future pricing and business strategy or share the clients. The parties cannot disclose sensitive information, which is not related to the tender. Bidding consortium agreement should not be hidden from the acquiring organization or from other participants of the tender. The parties should evaluate effect of the bidding consortium to the competition in the market. The undertakings should consider whether the bidding consortium could be more competitive in terms of pricing and range of product offered in relation to the offers of the competing undertakings.

A joint venture agreement concluded for participating in a public procurement should not increase the risk of competition law infringements. Partners, acting under a joint venture agreement who break competition rules could be excluded from the procurement procedure and have their right to participate in public procurement temporarily restricted. Partners in a joint legal relationship are accomplices. Participation in public procurement by means of joint venture imposes the concept of fiduciary duties.

[25] C. Ritter, *Joint Tendering Under EU Competition Law*, 2017, https://ssrn.com/abstract=2909572 (access: 17.5.2024).

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ABSTRAKT

Komisja Europejska uchwaliła w 2023 r. zmienione Wytyczne w sprawie stosowania art. 101 Traktatu o funkcjonowaniu Unii Europejskiej, po dokładnej ocenie i przeglądzie obowiązujących Wytycznych w sprawie stosowania art. 101 Traktatu o funkcjonowaniu Unii Europejskiej do horyzontalnych porozumień kooperacyjnych. Rozdział Wytycznych dotyczący porozumień o komercjalizacji został poszerzony o nowy ustęp na temat konsorcjów ofertowych oraz o wytyczne na temat rozpoznawania zmowy przetargowej. Dla uproszczenia Komisja zaproponowała pojęcie konsorcjum ofertowego zamiast wspólnego ubiegania się o zamówienie. Zamówienia publiczne i prawo ochrony konkurencji mają podobne cele do osiągnięcia. Skoordynowane działania konkurentów mogą zagrażać wynikom postępowania o udzielenie zamówienia publicznego. Jest to szczególnie istotne w przypadku, gdy kilku potencjalnych dostawców próbuje połączyć siły w postępowaniu o udzielenie zamówienia publicznego. Autorzy analizują ramy prawne obowiązujące w państwach członkowskich Unii Europejskiej w zakresie oceny ofert wynikających ze wspólnych działań i wspólnego ubiegania się o udzielenie zamówienia. Szczególną uwagę zwrócono na prawne i praktyczne ograniczenia stojące przed dostawcami i zamawiającymi.

Słowa kluczowe: wspólne ubieganie się o udzielenie zamówienia; konsorcja ofertowe; zamówienia publiczne; prawo ochrony konkurencji; ograniczenia