

**Indications of anticompetitive conduct of entrepreneurs
within public procurement**

Indications of anticompetitive conduct of entrepreneurs within public procurement

Public procurement is system stimulating competition pressure. Citizens of Slovakia expect that public finances will be expended within public procurement effectively. This form of acquisition of goods, works and services works effectively only if entrepreneurs compete with each other in submission of best bid from the relation quality-price view.

If entrepreneurs coordinate their procedure, it is always against provider and it means not only non-effective expenditure of public finances, but also breach of the Act No. 136/2001 Coll. on Protection of Competition in the wording of further laws. Collusion or coordination of conduct of entrepreneurs within public procurement is considered to be one of the hardest forms of agreements restricting competition, so-called cartel agreements, being prohibited pursuant to the article 4 par. 3 letter f) of the Act. The Office is allowed to impose sanctions of up to 10% of firms` turnover for breach of the Act.

The Office obtains from providers very few information on the fact that suspicion of anticompetitive procedure exists. To intervene effectively against coordinated procedures of entrepreneurs the Office refers to providers to pay attention to suspicious anticompetitive conduct and to inform the Office on this fact.

Within public procurement participants to it become rivals in their effort to acquire order on supply of relevant goods, works and services. However, real competition occurs only in case, if all tenderers submit their bids **independently** on a basis of their own economical, technical calculations and independently on competition. However, also opposite case occurs, when submitting bids in public procurement companies cooperate in different manners. Any formal or informal agreement, information exchange, on a basis of which strategy of other participants to procurement can be divined, may lead to coordination of their conduct. According to expert studies such coordination may increase goods price by more than 30%.

1. Why is public procurement area predisposed to cartel agreements?

Although cartels or collusion may occur nearly in each sector, in some sectors and activities they occur with higher probability than in other. In public procurement collusive conduct is frequent phenomenon in many countries. Favourable conditions of collusion exist in this process, because:

- High market concentration exists – relatively few subjects operating in the market are here and it is easy to identify rivals. Fewer subjects in the market, it is easier for them to unite and agree on prices, bids, customers or areas. Collusion may also occur, when number of firms is sufficiently high, but small group of important suppliers is here and the others are “marginal” operating only in the small market part.

- Rivals meet repeatedly in many tenders, what allows agreeing “win-win” solution for all in certain time sequence. Collusion is more likely, if rivals meet each other and create also platform on regular contacts, for example on ground of associations or corporations.
- Product nature – probability of collusion increases, if product is homogenous, does not come under often innovations, technological changes or if procured goods, work or service may not be easy substituted by other products or if restrictive particularities for procured goods exist. More standardized the product, the competing firms easier reach agreement on joint price structure.
- Relatively high barriers to entry market exist.
- High level of market transparency exists – obligatory information publishing enables rivals to be better informed on market, to disclose corruption, but it may also support collusion, because it makes easier to control, whether “agreed procedure” is respected and whether someone does not “cheat”.
- Anticompetitive agreement existence may be easily kept secret (entrepreneurs may evoke impression of competition among them).

2. Cooperation forms

Cooperation among rivals within bids preparation stage in public procurement is not permitted, since proposal should be independent with the aim to acquire order by better bid comparing to rivals.¹

The most often forms of conduct coordination of participants to public procurement are:

i) *Agreements on price*

Generally, the purpose of agreements on price is increase, determination or preservation of price for provision of goods or services. Agreements on price may take different forms – preservation of fixed prices, determination or cancellation of price discounts, acceptance of procedure/formula of price calculation, observance of certain fixed price differences between different types or quantities of products, observance of schemes determining minimal fees or prices and so on.

Within public procurement entrepreneurs submitting bid may for example agree on price of “winning bid” or on procedure of price modification of other tenderers.

In many cases participants to collusion on price determine also control mechanism with the aim to ensure agreement fulfilment.

¹ If entrepreneurs submit joint bid, they are not in rivals’ position and their cooperation is not considered to be agreement restricting competition.

ii) *Agreements on market dividing*

Such agreements may take many forms; usually competing firms divide certain customers or groups of customers, goods or locality mutually. For example one rival will supply or offer its products only to the customers or customers groups assigned to it and it will not address the customers assigned to other cartel members. In another cases rivals agree that they will sell their products only to customers in certain geographical areas and they refuse to sell or determine inappropriately high prices to customers from geographical areas assigned by agreement to other company. In public procurement they may for example submit only formal bids, if it relates to clients or areas, which have not been assign to them.

iii) *Other forms of procurement manipulating*

Within so-called bid rigging rivals agree in advance which will submit winning bid on procured goods, work or service and the other entrepreneurs only formally send their “worse” bid. It appears in different forms, for example:

- *Not-submission or withdrawal of bid* – in such case one or more rivals, from which submission of bids is expected or which have already submitted bid, agree that they refrain from bid submission or withdraw already submitted bid. Thereby they achieve that bid of rival determined in advance will win.
- *Formal bid submission* – it appears in cases, where some rivals agree that they will formally submit bids, which will have worse parameters than agreed winning bid. The purpose of such bids is not the effort to win in tender, but to create impression of competition bid submission with the purpose to cover high prices. This technique is very often form of bid rigging.
- *Bid rotation* – all cartel members submit their bids, but they rotate in submitting the winning bid. Rotation condition may be various, for example rivals may rotate according to the size of their contract, each of them receives the same volume of contract or they receive such a volume of contracts reflecting the size of individual companies.
- *Subcontracts* – they represent a frequent form of bid rigging. Rivals agreeing on not submitting a bid or those submitting a bid not having a chance to win, would win the subcontracts or contracts on supplies from the successful tenderer as a bargaining counter. Such a conduct de facto negates the competition principle in procurement, since it does not matter who would win an order. Draft on new act on public procurement already being under legislation procedure does not enable the rivals to share the order through the subcontracts.
- *“Prey” sharing* – may have several forms, for example giving up a bid for bargaining counter. In this case an agreed winner has to pay a charge for it. Or the beforehand agreed winner accept the condition to cover the costs connected with bid submitting to other tenderers. These costs will be included into price.

Almost all forms of bid rigging have one common feature: agreement among some or all participants to tender, according to which a winner is designated in advance. Such a conduct restricts or eliminates competition.

Anticompetitive conduct according the Act on Protection of Competition may occur parallelly in various aforementioned forms.

3. Indications of anticompetitive behaviour

Any forms of collusive behaviour already mentioned are illegal, they are considered to be "*hard core cartel*", their adequacy or necessity could not be justified in any way. Even it does not matter whether entrepreneurs concluded a formal written agreement or only an oral one.

Agreement on price or other forms of bid rigging could be proved based on direct or indirect evidence. As the mutual coordination and information exchange among the participants is very difficult to reveal, the sanction for these violations should be high as they should serve as prevention of such behaviour.

Though the cartel agreements are usually concluded in absolute secrecy and only their participants know the agreed plan, some factors, indications signaling the coordinated procedure among the participants to public tender exist. These factors are connected mainly with the behaviour of firms when submitting bids and fixing prices. If the providers find out more from the indications mentioned below, they should inform AMO SR on it.

i) Bids

- Always the same company wins the public procurement in the given sector. This could be even more suspicious if one or more companies constantly submit non-successful bids.
- Always the same tenderers submit the bids, the winner regularly rotates and each company becomes a successful tenderer once a time.
- Fewer rivals submit their bids than usually.
- Winning tenderer conclude a contract on subcontracts with the rivals submitting non-successful bids for the same project. Draft of new act on public procurement excludes such an option.
- Only a single tenderer contacted the suppliers of some components or has been finding the information on their prices necessary to submit a bid.
- For the procurements at the local markets are the items of local tenderers and rivals from the other areas the same, though objectively the differences in some expense items, for example transport expenses, may occur.

ii) *Prices*

- Some bid prices are considerably higher than prices in published price lists, bid prices of the same firms in past or the estimated costs.
- From time to time the company submits a considerably higher price bid than it submitted in other case comparable in costs.
- Bid prices decrease always when a new tenderer participates to a public procurement or a tenderer participating only seldom occurs.
- Significant, unjustified difference between the price of winning bid and other bids exists.

iii) *Suspicious statements or behaviour*

Though the cartel members endeavour to keep their agreements in secrecy, occasional mistakes or carelessness in their statements, possibly certain models of behaviour or statements may indicate collusion. Mainly the following situation need to be watch carefully:

- Proposals or bid forms submitted by various entrepreneurs include identical irregularities (for example the same calculation or spelling mistakes) or the similar handwriting, typeface or the same office supplies have been used. This could indicate that a winning tenderer could have prepared some or all bids of non-successful entrepreneurs.
- Bid or price documents include white spaces or other physical adjustments indicating price changes at the last moment.
- Company delivers its bid together with the bid of other tenderer.
- Company submits its bid though it is not capable to realize the contract successfully (formal bid submitting).
- Tenderer makes any remarks on prices used within sector or association, statements indicating (non-public) knowledge of rivals' prices, statements that an individual customer or contract "belongs" to individual entrepreneur, statement that a bid was "courtesy", "complementary", "symbolic" or "covering", any statements indicating that the entrepreneurs have been discussing the prices together or they have reached an agreement on prices.
- Information that during the procedure of bid preparation a meeting or communication among tenderer took place.

Though the mentioned indicators may indicate collusion, the Antimonopoly Office of the Slovak Republic needs to make an analysis of indicators, or to gather other evidence and decide whether an illegal conduct occurred or not.

4. What you can do as providers

The anticompetitive agreements within the procedure of public procurement represent a serious violation of Act on Protection of Competition and their revealing and sanctioning is in public interest.

From this reason we would highly appreciate your cooperation in providing information which could assist us in their revealing.

The Antimonopoly Office of the Slovak Republic may ensure the anonymity of person giving information. Notification on possible collusion itself does not constitute a public procurement interruption. Notification may be submitted later as well.

You may send your information to: Antimonopoly Office of the Slovak Republic (Protimonopolný úrad Slovenskej republiky), Drienova 24, 826 03 Bratislava, e-mail: pusr@antimon.gov.sk, fax: +421 2 4333 3572, +421 2 4829 7365, tel.: central: +421 2 4829 7111.