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COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

Contribution from Poland

-- Session V --

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COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Poland --

1. Size and Policy Objectives

1. In the recent years the value of the public procurement market in Poland has been systematically growing accounting for a large share of the public expenditure. This is particularly due to the boom in the infrastructure projects, often financed from EU funds. Undoubtedly, efficient functioning of this market, with the value of contracts awarded in 2008 amounting to 109.5 billion PLN, which constituted 8.6% of GDP (in 2006 it was approx. 7.5%),¹ is very important for the Polish economy.

2. The system of public procurement in Poland exists since 1994. Since then the law has been repeatedly changed. In 2004 a new Act on Public Procurement² (hereinafter APP) was passed and, in accordance with the EU requirements, opened the Polish public procurement market. It specifies the procedures for awarding public contracts, which are designed to protect fair competition and stimulate the free market.

3. According to the current rules institutions having public funds at their disposal are obliged to organise tenders if the procurement exceeds EUR 14 thousand. This way they can choose the best bid, which most often means the cheapest one. The annual reports concerning contracts awarded between 2006-2008 show that the biggest group of awarding entities (more than 90%) were the public finance sector units, followed by self government administration and independent public health institutions.

4. Safeguarding efficient, transparent and competitive procedures of public bids is the main objective of the policy determined in the APP. The principal rules of the Polish Procurement Law encompass:

- Equal treatment of economic operators;
- Open and fair competition;
- Openness and transparency of award procedures;
- Primacy of open and restricted tendering procedures;
- Impartiality and objectivity.

5. Nevertheless, even the most competitive procedures which are designed to underpin the pillars of transparency and fairness do not always entirely secure the elimination of corruption phenomenon in

¹ Annual Report on activities in 2008 of the Polish Public Procurement Office.

² Act of 29 January 2004 Public Procurement Law, Journal of Law of 2007 No 223, item 1655 (Dziennik Ustaw z 2007r. Nr 223, poz. 1655).

public tenders. Public procurement is one of the key areas where the public and the private sector interact financially, so the risk of corruption or bribery is high. Moreover, due to the secret character of collusive agreements, manipulation is hard to detect and can be hard to prove.

2. Corruption

6. According to the 2008 report of Transparency International year after year a significant decline in corruption in Poland is observed. In the ranking of the least corrupted countries Poland rose by nine places in 2008.

7. In Poland there are several agencies mandated to combating corruption. As regards prosecuting corruption cases in public procurement, the responsible bodies include: the Public Prosecutor Offices, the Police, the Public Procurement Office, the Supreme Chamber of Control, the Central Anti-Corruption Bureau and the Regional Chambers of Audit. Public Procurement Office controls and ensures the effective expenditure of public funds by supervising the completion of public contracts ordered by the State.

8. The most important documents designed to help fight corruption in Poland, also in public procurement, are the *Corruption Control Programme - Anti-corruption Strategy* and its implementing document: *2nd Implementation Phase 2005 – 2009*. The main task of the latter was to carry out actions aimed at preventing corruption and developing appropriate attitudes towards corruption. Strategic objectives of the Programme were to co-ordinate efforts aimed at adherence to anti-corruption legal regulations; to reduce social tolerance for corruption phenomena by awareness raising activities and providing transparent and citizen-friendly public administration structures by the open information society standards. There is also an ‘anti-corruption shield’ – a mechanism aiming at protecting the processes of privatisation and public procurement against corruption.

9. The APP provides for measures that aim at reducing corruption in public procurement. The Act specifies entities who are excluded from contract award procedures, *inter alia*: natural persons and partnerships whose partner or a member of the management board have been validly sentenced for an offence committed in connection with a contract award procedure, offence against the rights of people performing paid work, bribery, offence against economic turnover or any other offence committed with the aim of gaining financial profits, as well as for treasury offence or an offence of participation in an organised crime group or in a union aimed at committing an offence or treasury offence. Therefore, in contract award procedures the awarding entity may request from economic operators declarations confirming their lack of criminal record by means of information from the National Register of Criminal Records.

10. Moreover, the APP reads that persons performing actions in connection with the contract award procedures shall be subject to exclusion if they have been legally sentenced for an offence committed in connection with contract award procedures, bribery, offence against economic turnover or any other offence committed with the aim of gaining financial profit.³

3 They shall also be subject to exclusion if they: are competing for a contract; remain in matrimony, consanguinity or affinity in direct line or consanguinity or affinity in indirect line up to the second degree, or is related due to adoption, legal custody or guardianship with economic operator, his legal deputy or members of managing or supervisory bodies of economic operators competing for a contract; during the three years prior to the date of the start of the contract award procedure they remained in a relationship of employment or service with the economic operator or were members of managing or supervisory bodies of economic operators competing for a contract; remain in such legal or actual relationship with the economic operator, which may raise justified doubts as to their impartiality.

11. Persons performing actions in connection with a contract award procedure shall provide a written statement, under the pain of penal liability for making false statements, about the absence or existence of the mentioned circumstances. Furthermore, actions in connection with the contract award procedure undertaken by a person subject to exclusion after they became aware of these circumstances shall be repeated, except for the opening of tenders and other factual actions having no influence on the outcome of the procedure

12. The competences of the Office of Competition and Consumer Protection are regulated in the Act of 16 February 2007 on competition and consumer protection⁴ which does not cover corruption offences. (See point III).

3. Collusion

13. The process of rivalry during the tendering procedure can be distorted due to collusion. Therefore, apart from the Act on Public Procurement the issue is regulated by the Act on competition and consumer protection. Its Art. 6.1.7 prohibits agreements which have as their object or effect elimination, restriction or any other infringement of competition in the relevant market, *inter alia*, agreements consisting in collusion between undertakings entering a tender, or by those undertakings and the undertaking being the tender organiser, of the terms and conditions of bids to be proposed, particularly as regards the scope of works and the price.

14. Furthermore, bid-ridding is enumerated among the most serious and detrimental anticompetitive practices, reckoned as *hardcore cartels*, and it is excluded from the *de minimis* doctrine. As fraudulent tendering may cause enormous harm to the economy, it is of a great importance to combat this kind of pathologies. Through bid-rigging practices, the price paid by public administration for goods or services is artificially raised, forcing the public sector to pay above market rates. Antitrust protection of tender proceedings against illicit agreements aims at protecting the regularity of the economy in a free market economy. Simultaneously, in the case of public procurement it contributes to the improvement of public property management.

15. Under the Polish law, tender conspiracies are also criminal offences. According to the article 305 of the Criminal Code the person who, in order to gain material benefits, thwarts or impedes a public tender or concludes an agreement to the detriment to the owner of property or a person or an institution on whose behalf the tender is made, is liable to a punishment of imprisonment for up to 3 years.

16. While collusion can occur in almost any industry, it is more likely to occur in some of its branches than in others. Particularly, it is likely to be encountered in the engineering and construction industry, where firms compete for significant contracts. The problem is inherent in sectors where there are few sellers. The fewer the number of sellers, the easier it is for them to get together and agree on prices, bids, customers, or market share. Collusion may also occur when the number of firms is fairly large, but there is a small group of major sellers and the rest are marginal sellers who control only a small part of the market. The probability of conspiracy increases if other products cannot easily be substituted for the product in question or if there are restrictive specifications for the product being procured. The more homogenous a product is, the easier it is for competing firms to reach agreement on a common price structure. It is much harder to agree on other forms of competition, such as design, features, quality, or

⁴ Act of 16 February 2007 on competition and consumer protection, Journal of Law of 2007 No 50, item 331 (Dziennik Ustaw z 2007r. Nr 50, poz. 331).

service. Bid rigging is more likely to occur on markets, where the competitors know each other well through social connections, trade associations or business contacts.

17. While some market features prompt collusions, paradoxically procurement regulations also may facilitate collusive arrangements. Pursuant to art. 26.3 of APP the awarding entity shall call on economic operators, who did not submit required declarations or documents, or the economic operators who did not submit plenipotentiaries, or the economic operators who submitted declarations or documents, that contain errors or those who submitted defective plenipotentiaries, to supplement the documents in a defined time limit unless, despite the supplement, the tender of the economic operator is rejected or the cancellation of the procedure is necessary (...).⁵ The law allows complementing the documents after the opening of the offers. Economic operators take advantage of this provision. It happens that they deliberately submit an incomplete bid, but then after the opening of the offers and analysis of the bids of competitors, they assess their own position and depending on the situation, they complete documents or not. Three enterprises from Silesia used this provision, so that the company whose offer was the most expensive could win. The basis for the UOKIK operations was a request submitted by Parexbud Multitrade Company. It accused three enterprises – Impex Trade, “Fornit” Furniture Factory and L&L – of concluding an illegal agreement while submitting bids in the tender. The enterprises bid for a public procurement contract for the delivery and assembly of the equipment of the buildings on the border crossing in Dorohusk.

18. The proceedings showed that the participants of the collusion had agreed the conditions of their bids – including the prices. Moreover, they agreed to undertake common actions consisting in a deliberate failure to remove formal defects in the submitted documents. During the antitrust proceedings UOKIK also found out that the three enterprises had had mutual business relations and had exchanged information on a regular basis (Decision No. RKT-22/2007).

19. Similarly, in other decision issued by the UOKIK President, the bidders taking part in the public tender for street cleaning in Poznan concluded an illegal agreement, which affected the course and the result of the tender. They agreed on price conditions of the offers and intentionally failed to submit required documents. Examining the case, the President found that companies, which submitted the most attractive offers, did not complete the formal documentation deficiencies, thus enabling the enterprise with the most expensive offer to win the contract.

20. Joint bidding may enhance competition in the public procurement process thanks to the synergies arising from bidding consortia that enable companies to combine resources and remove barriers to entry. However, it might also be used as a cover for collusive tendering.

21. Art. 23 of APP allowing joint bidding may also facilitate conspiracies. Bidding consortia are a good solution when bidding is costly or if a minimum size of business is necessary to carry out the contract. In these circumstances, joint bidding is a way to enable smaller firms to participate in larger tenders, from which they would otherwise be excluded. However, a bidding consortium should not be

⁵ Article 26.3 of the APP : *“The awarding entity shall call on economic operators who did not submit declarations or documents, referred to in Article 25 paragraph 1, or the economic operators who did not submit plenipotentiaries, or the economic operators who submitted declarations or documents referred to in Article 25 paragraph 1, that contain errors or those who submitted defective plenipotentiaries to supplement the documents in a defined time limit unless, despite the supplement, the tender of the economic operator is rejected or the cancellation of the procedure is necessary. The declarations or documents, submitted on request of the awarding entity, shall confirm that the economic operator satisfies the conditions for participation in the award procedure and shall confirm the fulfillment by supplies, services or works of conditions specified by the awarding entity, not later than on the day when the time limit for submission of the requests to participate in the contract award procedure expires.”*

allowed if each firm in the consortium has the economic, financial and technical capacities to carry out the contract on its own. Therefore, in order to maintain a high level of competition on the market, it should be considered to limit joint bids and sub-contracting in cases when consortia may lead to competition restriction.

22. The Polish CA raised doubts as to the joint bidding in July 2009 when the President of the Office initiated antitrust proceeding to determine whether two businesses operating in Bialystok that prepared a joint bid in order to increase their chances of winning the tender had entered into an illicit agreement. UOKIK questioned the conditions on which the enterprises entered into the tender for the removal of municipal waste. The information possessed by UOKIK indicates that in this case, the business collaboration could lead to restriction of competition and market sharing (the proceeding is pending). The Office does not oppose the right of businesses to form bidding consortia. However, this co-operation must result from either the inability to effectively make a bid by a single trader (e.g. very large volume of orders, lack of some of the required equipment), or the significant benefits it can bring to consumers (e.g. lower prices resulting from the increased efficiency of the undertaking, additional cost savings or technological progress). Otherwise, co-operation where entrepreneurs able to compete individually exclude competition among themselves by agreeing to a joint bid, may be found contradictory to the law of competition.

4. Fighting Collusion and Corruption

23. One of the main objectives stipulated in the *Competition policy for 2008-2010* is better detection of anticompetitive practices and in particular better elimination of prohibited practices on the local markets, since such irregularities, although hardly noticeable from the perspective of the entire economy, are very detrimental for consumers. Collusive tendering is very damaging to local markets and it is difficult to gather convincing evidence that will be accepted by the court and proving that the tender process was distorted by an illegal agreement. Therefore, UOKIK's Branch Offices carefully monitor both the unusual behaviour of firms operating on local markets, which may be the result of the conclusion of collusion, as well as local procurement processes.

24. Most of the bid rigging cases reviewed by UOKIK regarded providing services to public institutions, e.g. cleaning services, supply of foods, and delivery of equipments and occurred on the national market. The problem of corruption has not been involved. As mentioned above, the Office of Competition and Consumer Protection has limited competences as for prosecuting criminal offences, including bribery. Pursuant to article 304 paragraph 2 of the Criminal Procedure Code state or local government institutions which in connection with their activities have been informed of an offence prosecuted *ex officio*, shall be obligated to immediately inform the state prosecutor or the Police thereof.⁶ Following this provision the President of UOKIK is responsible to report crimes encountered while conducting proceedings.

25. Measures, which could aid the fight with collusions in public procurement, should involve a more restrictive approach towards infringements. High fines are an effective tool when it comes to discouraging other companies from participating in such profitable undertakings as bid-rigging.

26. If an enterprise fulfils conditions indispensable to obtain leniency (i.e. has been the first, amongst the participants of the agreement, to provide the President of the Office with information concerning the existence of a forbidden agreement, is fully co-operating with the President of the Office, has ceased

⁶ In addition they are obligated to take steps not amenable to delay, until the arrival of the officials of an agency authorised to prosecute such offences, or until that agency issues a suitable ruling in order to prevent the effacing of traces and evidence of the offence.

participating in the agreement and was not the initiator of the agreement and did not induce other undertakings to participate in the agreement) the fact of its engagement in bribery or corruption would not affect granting the immunity or reduction of fine. Hence, undertakings can avoid fine, but on the other hand, individuals will be legally responsible for the crime (bribery, corruption) committed.

5. Advocacy

27. Increasing the effectiveness of the UOKiK activities is one of the priorities of the government strategy 'Competition Policy for years 2008-2010' implemented by the Office. We recognise that making the wider public (i.e. other institutions, line ministries, businesses, consumers) aware of our mission and goals, and winning their support and legitimacy for our ideas and initiatives will be crucial to achieve this goal. That is why while carrying out education and information actions on a large scale, e.g. through publications, workshops and seminars intended for e.g. entrepreneurs, we pay great attention to conveying our ideas in the most compelling and accessible ways.

28. We also try to reach the local authorities for which we have recently carried out a series of workshops on competition law. Local governments, particularly municipalities, face competition law in several different ways. On the one hand they often breach the law, when playing a double role of utility services providers (directly or via their affiliates) and also of local law legislators who limit the access to the market for local companies or impose oppressive terms which such companies must fulfil in order to carry out local economic activity. On the other hand because of insufficient knowledge of competition law works local governments fall victim of anticompetitive practices of businesses, namely tender collusions. Thus, adequate education of these market participants is of a crucial importance. Therefore, from June until September 2009 UOKiK organised a series of events promoting competition law on the local markets. Ten widely attended training sessions for representatives of local authorities were convened in different cities in Poland. Additionally, the Office published a leaflet describing the most popular practices of local authorities that might raise competition law concerns.

29. According to the results of a survey carried out in 2009, only 69% of the biggest businesses (with 250 employees or more) are aware that bid-rigging is illegal (88% in 2006). Therefore, UOKiK published a brochure (*Bid-rigging*)⁷ describing in detail what kind of behaviour is considered collusive tendering, why it is illegal, what sanctions can be imposed, what are the basic types of bid-rigging and reminding about the leniency programme. To better present the problem each description is illustrated with a short case-study. The brochure also gives examples of factors suggesting that collusive tendering may be taking place, e.g. the same errors in bids submitted by different companies.



⁷ http://www.uokik.gov.pl/pl/informacja_i_educacja/publikacje/ochrona_konkurencji/#pytanie28.

30. Furthermore, in order to increase efficiency of law enforcement and restore competition it is of utmost importance for UOKiK to co-operate with other public authorities. The Office influences the state of competition on the market by participating in the legislative process. Each year we provide opinion on ca. 2 thousand draft legal acts as part of inter-ministerial consultations, taking into consideration their impact on competition.

31. In 2009 UOKiK presented its opinion on the draft amendment to the Act on Public Procurement. The Office pointed out that the proposed provisions could worsen the efficiency of the procedures for awarding public contracts. Namely, the President of the Office was a strong opponent of a change in the open tendering procedure that would enable the awarding entity (after having placed the contract notice in the Public Procurement Bulletin and in the Official Publications of the European Communities) to directly contact the economic operators, that it is aware of, and inform them about the tender commencement. According to the legislators this provision was designed to enhance the competitiveness of the procedures for procurement by opening it to small businesses. However, it was stressed by the Office that such a provision could have quite the opposite effect – it could facilitate corruption and give an opportunity to distort competition. The Office argued that the provision would entail the awarding entity to have a database of small businesses (including data of their financial and technological resources) in order to be able to send them information on the procurement. Consequently, there was a risk that tender contracts would be prepared for a particular small entrepreneur. Due to the above mentioned reasons the proposed provision was opposed by UOKiK.

32. Another amendment to the APP contested by the President of the Office referred to the repeal of the Act's article setting forth that the awarding entity shall retain the deposit together with interest, if in response to the call the economic operator, did not submit declarations or required documents, unless it proved that it was due to reasons not laying on his part. The draft Act stated that that the provision was excessively rigorous for the contractors and that its objective could be achieved in a less severe way. It was also indicated that the provision was being repealed in order to eliminate or at least lessen the risk of collusion. UOKiK was of the opposite opinion arguing that there is an alternative way to achieve the same goal. It was stressed that reducing the financial burden imposed on the contractors should not be a priority when it comes to protection against unfair competition. Moreover, in the light of this provision, the establishment of the rule of law without the sanction could lead not only to the lack of its effective implementation, but also to the distortion of the substance of the tender. All of the UOKiK's remarks were taken into account and reflected in the final version of the amended Act on Public Procurement.

6. Conclusion

33. The market of public procurement which accounts for 8.6 % GDP in Poland requires an in-depth analysis and observation by all involved institutions. Taking into account its susceptibility to manipulation, the difficulties in detecting violations such as collusive tendering and their negative impact on the economy, it is vital to carefully monitor the ongoing processes. The role of competition authority is crucial when it comes to adopting and enforcing effective measures to combat bid-rigging and increasing public awareness of the benefits of competition. Also appropriate sanctions and UOKiK's strict approach to fining enterprises for competition infringements aim at deterring collusive behaviour.⁸ While promoting competition culture UOKiK not only aims at educating all market participants but also actively takes part in the legislative process and closely co-operates with other institutions.

⁸ http://www.uokik.gov.pl/en/press_office/press_releases/art143.html *Guidelines on setting fines for competition-restricting practices.*