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COMPETITION COMMITTEE**

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**Working Party No. 3 on Co-operation and Enforcement**

**PUBLIC PROCUREMENT/BID RIGGING ISSUES**

**-- Slovak Republic --**

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*The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 15 June 2010.*

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1. Agreement between undertakings involving signs of collusive behaviour as a result of which undertakings coordinate their behaviour, especially in the process of public procurement is prohibited pursuant to the article 4, par. 3, letter f) of the Act No. 136/2001 Coll. on Protection of Competition.

2. In the Slovak Republic the procedure of public procurement is governed by the Act No. 25/2006 Coll. on Public Procurement. If it is proved that the bidder participated in public procurement collusion he/she can not take part in public procurement for three years following the final decision confirming the existence of agreement restricting competition. For this purpose the Office for Public Procurement (hereinafter only "OPP") is obliged to publish at its website information on undertakings included in collusion in public procurement and it is also obliged to delete these undertakings from the list of undertakings which OPP compulsorily keeps pursuant to the Act on Public Procurement.

3. Bid rigging is also the criminal act pursuant to the article 250 of the Criminal Code (criminal act of abuse of a participation in the competition) and also the criminal act pursuant to the article 267 of the Criminal Code (criminal act of machinations in public procurement and auction) for which the transgressor may be sentenced from one up to five years imprisonment.

4. The Antimonopoly Office of the Slovak Republic (hereinafter only "the Office") receives information on possible anticompetitive conduct of undertakings within the process of public procurement very rarely. With the aim to reveal this harmful conduct the Office has addressed the procurers already in 2005 in order to motivate them to monitor the suspicious conduct of procurers. For this purpose the Office issued the publication Indications of anticompetitive conduct of undertakings within public procurement which is available at its website. The Office escalated its activity in fight against bid rigging at the beginning of this year when it launched the large campaign against collusion among bidders. The Office issued the publication Cartel agreement in public procurement comprising the following issues:

- why is bid rigging harmful and why it is necessary to intervene against it,
- what are the basic forms and patterns of bid rigging,
- characteristics of markets in which the bidders are more likely to conclude agreements,
- description of individual signals (indications) which may indicate the coordinated practice of bidders,
- instruction for bidders on how to prepare tenders which would lower the risk of collusion,
- options of enforcement of Certificate of Independent Bid Determination (hereinafter only "CIBD") in the Slovak Republic,
- mutual cooperation of the Office, surveillance institutions and procurers in revealing bid rigging.

5. This publication is available at the website of the Office.

#### **1. Certificate of Independent Bid Determination**

6. Within above mentioned publication the Office states advantages of CIBD and possibilities to apply it in tenders; thereby it tries to appeal to procurers and to motivate them to apply this institute. At the same time the Office prepared for procurers examples of possible wording of CIBD to help them to apply it.

7. After consultations on possible application of CIBD under current legislation conditions with gestor of public procurement in Slovakia, OPP, the Office sees the possibility to apply it only on voluntary basis. It depends on a procurer whether it will require the bidders to sign CIBD as a precondition for participation. Consequences of false CIBD differ according to the form of CIBD chosen by procurer. However, mechanism of responsibility for submitting false CIBD is different and separated from mechanism of responsibility for anticompetitive conduct, i.e. from sanction mechanism for collusion in public procurement pursuant to the Act on Protection of Competition.

8. The Office gives procurers choice to apply CIBD in two forms, namely public-law institute – statutory declaration or private-law institute – contract on independent bid determination. Irrespective of the form signature of CIBD is precondition of participation in given tender and procurer requires a bidder to submit it within its bid and procurer informs on this requirement already in notification on announcement of method of public procurement.

9. In statutory declaration on independent bid determination bidders honestly declare that they prepared their bid by themselves, independently from competitors and did not coordinate with any other competitors – bidders in given public procurement. At the same time a bidder states the list of competitors, which it contacted in the matter of given tender and describes the basis of their communication, exchange of information. Signature of false CIBD would cause that a bidder will be disqualified from ongoing tender due to submitting untrue or incomplete information pursuant to the Act on Public Procurement. Stating untrue data in statutory declaration constitutes also an offence for which fine in the amount from 99 to 169 EUR may be imposed. Offences are delicts grounded in culpability, so it is not possible to sanction objectively legal person – an undertaking, but only the one who acted on behalf of an undertaking in signing CIBD and of course, his/her intention has to be proved (similarly as in criminal acts). However, the Act on Offences states that “According to this act the person who acted or should have acted on behalf of legal person, or if it is action grounded in order the person who gave order to act is responsible for breaching an obligation imposed on legal person”. In case of caused harm exceeding 226 EUR confirmation of untrue information in CIBD could mean also responsibility for criminal act of fraud, where the term of imprisonment may be up to two years. Also in this case it is necessary to deal with individual responsibility of natural person for signing false CIBD, since in our legal order criminal-law responsibility of legal persons absents and CIBD is signed by statutory body of a bidder.

10. The second alternative of CIBD is application of private-law institute – trade-law Contract on Independent Bid Determination between a procurer and a bidder. Both contractual parties declare their commitments and they sign the contract as valid and binding contract. By its content it is an agreement on measures against collusion in public procurement. Basic commitment of a bidder that it prepared its bid by itself, independently from its competitors and that it agreed on its bid with no one (this commitment is specified in detail in more contract provisions) constitutes content of the Contract on Independent Bid Determination. At the same time the contract includes sanctions, which will be applied in case of its breaching. Namely, the recourses may be as follows: (i) rejection of contract on subject of procurement before its signature or cancellation of already signed contract, (ii) forfeiture of security in favour of procurer, (iii) contractual fine, (iv) prohibition of participation of this bidder as well as all undertakings controlled directly or indirectly by this bidder in next tenders, directly or indirectly through groups, consortia, technical guarantor, etc. for minimum one to three years.

11. If procurer and bidder decide to conclude such contract, they send signal that they identify with its content and meaning and are aware of assumed recourses.

12. The Office carries discussions on CIBD with procurers and surveillance institutions nowadays. The way of proving falsity of data stated in CIBD, i.e. who is authorised/obliged to prove falsity, in what manner/form, on a basis of what evidence, seems to be application problem.

## **2. Leniency and bidder disqualification**

13. Undertaking having been participated in agreement restricting competition within public procurement is disqualified from opportunity to participate in public procurements in the Slovak Republic for three years following the final decision (i.e. decision of a court), proving its participation in collusion. It should be said that effect of such sanction is inappropriately reduced by provision of the Act on Public Procurement, which allows undertaking to prove financial and economic positions and technical and professional qualification by use of financial sources and technical capacity of other person regardless their legal relation, what enables punished undertakings to participate in tenders through other undertakings directly or indirectly controlled by it.

14. As regards criminal-law responsibility of applicant for leniency, last amendment of the Criminal Code has introduced a decriminalisation for successful leniency applicant<sup>1</sup>, thus such applicant cannot be prosecuted. The successful leniency applicant is also exempted from prohibition to participate in tenders within three years from issuing final decision in the matter.

## **3. Incentivizing officials responsible for public procurement to focus on bid-rigging**

15. In the last period the Office has intensified its activities focused on fight against bid-rigging. As it has been mentioned, it issued publication Cartel Agreements in Public Procurement with the aim to serve as guidelines for procurers and other surveillance bodies to recognize the suspicious behaviour and conduct of bidders in public procurement indicating the possible coordination among them. The publication also refers to signals which they should observe and proposes the steps they should take, if they have suspicion on possible collusion. Besides, the Office issued leaflet briefly summarizing the particular indications of bid rigging.

16. The Office has focused on increase of awareness of this serious anticompetitive practice between procurers and other institutions and tries to cooperate closely with them in its disclosure. In the last period the Office has organised many workshops on bid rigging for surveillance bodies which are authorized (beside other competencies) to control tender procedure, thus there is assumption that within their activities they may detect certain indications of bidders' coordination (OPP, Supreme Audit Office, Anti-Corruption Police Bureau, and Ministry of Finance). Besides, the Office organizes workshops for procurers and professionally qualified persons through which the procurers are obliged to realize their tenders. Within these workshops the Office focuses not only on Indications of Collusions in Public Procurement, but also on preventive activities, namely on preparation of tenders by procurers with the aim to prevent from collusion between bidders and on possibilities of CIBD application.

17. The Office tries to continue in cooperation with other institutions also through conclusion of agreements – memorandum on cooperation, in which they commit themselves to inform the Office that the given tender could have been rigged by bidders if they find it out within their activities. The Office discusses such agreements with many institutions nowadays.

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<sup>1</sup> Immunity from or reduction of fine so granted upon the leniency application.