

**Intergovernmental Group of Experts on Competition Law and Policy**

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**Roundtable on**

**“Competition Policy and Public Procurement”**

**Written contribution by**

**Poland**

The views expressed are those of the author and do not necessarily reflect the views of UNCTAD.

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12th Session, 9 to 11 July 2011, Geneva, Switzerland**

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"Competition policy and public procurement"**

**Written contribution by the Office of Competition and Consumer Protection**

**I. Introduction**

In Poland more than 100 billion zloty annually is spent on goods and services purchased through the public procurement process. A fundamental mechanism for ensuring proper use of public funds is competition between suppliers, which facilitates acquisition of goods or services at the possibly lowest price. One of the priorities as regards the spending of public funds should therefore be to ensure that the bidding process is as competitive as possible. A fundamental threat to this process is posed by bid rigging. This illegal form of co-ordination between firms can adversely affect the proper conduct of the tender process. For instance, firms may agree their bids in advance, deciding which company will submit the lowest bid. Alternatively, they may agree not to bid or to rotate their bids by number or value of contracts. The competitiveness of a tender can also be reduced by its improper structuring, which can allow undertakings to obtain an "implicit" agreement with regard to their market behaviour without the need to negotiate openly.

Against this background, it seems indispensable to reinforce the state's actions aimed at minimizing the risk of bid rigging. Such actions, combined with other initiatives such as advocacy, should significantly increase the effectiveness of public spending. Attempts should be undertaken to ensure that the entities organizing a tender know how to maximize the competitiveness of a tender, as well as what behaviour on the part of undertakings might indicate bid rigging.

**II. Legal framework**

The Act of 29 January 2004 *Public Procurement Law* specifies the procedures for awarding public contracts, which are designed to protect fair competition and stimulate the free market, whereas bid rigging is explicitly indicated as a type of collusion restricting competition in the *Act of 16 February 2007 on competition and consumer protection*. Article 6.1.7 thereof sets forth that agreements, which have as their object or effect elimination, restriction or any other infringement of competition in the relevant market, inter alia, those 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 are prohibited. Bid-ridding is

enumerated among the most serious and detrimental anticompetitive practices, reckoned as hardcore cartels. It is excluded from the *de minimis* doctrine.

Furthermore, under Article 305 of the Act of 6 June 1997 – the Penal Code, bid rigging in a public tender is a crime that is subject to an imprisonment period of up to three years. If collusive conduct constitutes a criminal violation, the President of UOKiK conducts proceedings against corporate cartel participants. Independently, the public prosecutor initiates criminal proceedings against individuals. Since only one category of cartels is criminalized by the Polish law, it suggests that the legislator considers cartels affecting public institutions to deserve much severe punishments.

### **III. Experience of UOKiK**

Most of the bid rigging cases reviewed by UOKiK regarded providing services to public institutions, e.g. cleaning services, supply of foods, delivery of equipments by rather small companies operating on local markets. Since 2003 we issued 12 decisions. Bid rigging is more likely to occur on markets, where the competitors know each other well through social connections, trade associations or business contacts. In almost half of detected infringements family relations were involved.

Due to limited number of collusions exposed, the Office decided to implement new instruments which will increase the effectiveness of detection.

### **IV. Fighting bid rigging as a priority - current and future actions for improvement**

One of the main objectives stipulated in the *Competition policy for 2010-2013*<sup>1</sup> is to fight bid rigging more effectively. With that in mind, UOKiK's aim is to develop mechanisms for systematic elimination of bid rigging during tender procedures.

The entity that is directly threatened by the effects of bid rigging and which is also in possession of significant means for preventing such practices is the organizer of the tender. The organizer can make it difficult for collusion to take place by properly organizing the tender, and can also analyse the behaviour of the tender's participants and, should suspicions arise, can inform the relevant authorities, competition authorities in particular, that potential or actual improprieties have been observed.

We are considering designing guidelines aimed at informing tender organizers about potential threats to the competition process. In particular, those guidelines could be especially useful for smaller administrative entities that organize their tenders less often and outside of the central system, and for this reason are less experienced in this area than large, centralized entities. Presenting such entities with a report describing behaviour that may indicate that an agreement restricting competition has

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<sup>1</sup> *Competition Policy* is a government document whose purpose is to indicate the most important issues concerning the development of competition in the national economy in the coming years.

been reached between participants in a tender, and presenting the economic mechanisms that make it possible to maximize competition within the framework of a given tender can lead to an increase in bid rigging detection rates and higher effectiveness of public spending.

Another objective is to strengthen cooperation between entities responsible for supervising tenders – the Public Procurement Office (UZP) and the competition authority having at its disposal practical and theoretical knowledge concerning competition restricting behaviour and the means for counteracting it.

The Public Procurement Office is a governmental administrative authority whose tasks include supervision of the public procurement system, in particular analyzing the functioning of the public procurement system in Poland and spreading knowledge concerning public tenders. The UZP also possesses comprehensive expertise involving the functioning of the public tendering system in Poland and other countries. UOKiK, in turn, has a great deal of experience regarding the functioning of competition restricting agreements, as well as ways to expose them and to limit incentives leading to their creation.

The strengthening of cooperation between these institutions dedicated to working out solutions to prevent bid rigging is expected to increase the effectiveness of the public procurement system. In particular, cooperation between the agencies should include:

- Exchange of information on legal and institutional solutions that will ensure the most competitive formula for the organization of tenders;
- Exchange of information on behaviour justifying suspicions of competition restricting practices;
- Providing entities that organize tenders with information on methods for combating bid rigging.

Currently meetings between UOKiK and UZP are taking place to discuss the strategy and methodology for future joined actions. It was agreed to carry out trainings for tender organizers. Moreover, it was decided to include in the invitation to a tender a warning regarding the sanctions for bid rigging.

Our another action to pursue, stipulated in the *Competition Policy* is the analysis of solutions functioning in Poland concerning the organization of tenders with regard to counteracting anticompetitive agreements

The framework within which tenders take place can have a major influence on the competitiveness of the tendering process. The conditions under which bidders are allowed to participate, the size of the tender, the type of the bidding mechanism used, the level of confidentiality regarding the offers and the identities of the bidders, the possibility to cooperate within the framework of a tender, as well as a series of other factors influence the intensity of the rivalry between the undertakings who are seeking to win the contract. Proper selection of a tender's parameters can minimize the risk of anticompetitive coordination of behaviour among the participants. It would also seem appropriate to apply the

conclusions drawn from the extensive theoretical and empirical literature concerning the organization of the tendering process in practice in Poland. Analysis of current solutions and implementation of the best practices in this respect, i.e. those maximizing competition between bidders, may yield significant savings for entities purchasing goods and services via tenders.

In terms of advocacy, educating business entities on a large scale, e.g. through publications, workshops and seminars intended for entrepreneurs is of a significant importance to us. For example, we issued a publication "Bid-rigging". It describes in detail what kind of behaviour is considered collusive tendering, how it can be recognized, why it is illegal, what sanctions can be imposed, etc. To better present the problem each description is illustrated on a practical example. Currently we are thinking about updating the publication and re-drafting it to make it even more practical.

Local governments is another group of players that is included in our educational activities. Municipalities face competition law in several different ways, for instance they often breach the law, when playing a double role, on the one hand as utility services providers (directly or via their affiliates) and on the other hand as local law legislators who limit the access to the market for local companies or impose oppressive terms which such companies must fulfill in order to carry out local economic activity. Insufficient knowledge of competition law works also the other way around – local governments fall victim of tender collusions. Thus, adequate education of these market participants is of a crucial importance. Therefore, from June until September 2009 UOKIK organized 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. Taking into consideration the success of the trainings, subsequent editions on local markets are foreseen. Moreover, we are planning to held a conference devoted to the topic in October this year.

## **V. Challenges**

The market of public procurement requires an in-dept analysis and detailed monitoring by competition authorities. Careful observation of the market is vital because of its susceptibility to various violations such as bid rigging conspiracies, which is one of the most dangerous infringements of the antimonopoly law. Such practices are, at the same time, the most difficult to detect and to prove. In order to improve the fight with collusive tendering it is very important to enter into contacts with public procurement officials and raise their awareness about detection and how to organise tenders less prone to bid-rigging.

Except for low awareness on bid rigging, there are problems of another nature. It is a challenge how to handle cases of bidding by firms under the same economic unity. The single economic unit theory is

not *expressis verbis* mentioned in the Polish competition protection legislation. Nevertheless, *prima facie*, it appears that UOKiK would not qualify the above mentioned practices as prohibited agreements pursuant to the provisions of the Act of 16 February 2007 on competition and consumer protection. However, UOKiK has never dealt with a similar case and the possibility to assess the compliance of these practices with the provisions on anticompetitive agreements cannot be excluded.

The problematic issue is also the fact that immunity (full or partial) granted to a corporate informant has no bearing on the individual's possible criminal liability. For instance, the Penal Code provides that a person may be prohibited from holding a specific position, performing a specific profession or conducting a specific economic activity as penalty for bid rigging.

Moreover, after the first half of 2013 the amendment of the Act on maintaining cleanness and order in municipalities will be in force. From then on, a service provider will be selected by the commune, not local residents. By way of tender they will select undertakings dealing with waste disposal. Since the rules for waste collection in Poland are changing, observations of the correctness of tenders on local markets will have to be closely monitored by UOKiK .