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Public procurement and mechanisms of competition. Example of bidding consortium

The article is based on the statutory research results as part of the research task entitled *Mechanisms of competition in the 21st century*, carried out by the author in 2017 in the College of Business Administration of SGH Warsaw School of Economics, under the direction of prof. dr hab. Jerzy Pietrewicz. The article is a continuation of the author's research of the recent years devoted to the influence of formal institutions, namely legal regulations, on competitiveness of construction companies.

In the contemporary global world, according to Aquiliano and Chase [1991], increasing competitiveness of national economies should take place with the use of mechanisms of fair competition strengthened by law, which provide harmonious development and economic strength of national economies [Adamkiewicz-Drwiłło, 2010]. Moreover, fair competition in the reference literature is analysed in relation to theoretical models of pure or perfect competition [Adamkiewicz-Drwiłło, 2010; Malarewicz-Jakubów, 2013]. However, on the grounds of the EU and national public procurement law, contracting authorities are obliged to prepare and carry out the procedure for awarding public contracts in a way that ensures fair competition and

equal treatment of contractors. Fair competition is a general principle of public procurement, which has its source in the Treaty on the Functioning of the European Union (hereinafter TFEU).

Moreover, in Member States of the European Union (hereinafter EU), the general principles of acquisition of goods necessary for the functioning of the state, improvement of an overall economic welfare or the growth of competitiveness of the economy are determined by the regulations on public procurement [Zawiślińska, 2011]. On the other hand, public procurement is a contract for pecuniary interest concluded between a contracting authority and an economic operator, the subject of which are services, deliveries and construction works (Art. 2, section 13 of the Public Procurement Law of January 29, 2004, hereinafter PPL). It is worth noting that public procurement, carried out by individual countries and their units, represent a significant amount of the budget spending, which according to the report of the European Commission for the EU-28 in 2015 was 13.1% of the Gross Domestic Product. In turn, the public procurement market in the EU in 2015 achieved the level of EUR 2.015,3 billion for EU-28 [European Commission, 2016]. According to the President of the Public Procurement Office, in 2016, the value of the public procurement mar-

ket in Poland amounted to PLN 107.4 billion, which is approx. 5.8 per mil of the GDP [PPO, 2017].

Additionally, a well-functioning mechanism of competition is critical to the economic development of Poland [Śliwińska, 2013]. A significant issue, due to the value and importance of the Polish public procurement market for the competitiveness of the Polish national economy, is to examine market mechanisms of competition that function in the process of awarding public contracts in the context of bidding consortia applying for the award public contracts, which in the light of Article 4(5) of the Act of February 16, 2007 on competition and consumer protection (hereinafter ACCP) may be classified as bidding agreements (collusions) [Godlewska, 2017]. The objective of the article is to prove, based on the case study (n=10) conducted by the author, that the participation of bidding consortia in public procurement procedures for construction works strengthens the market competition mechanisms in public procurement and increases effectiveness of public procurement.

Mechanisms of competition in public procurement

The public procurement market is characterised by a high bargaining power of buyers (i.e. contracting authorities obliged to apply the PPL), of which there are relatively few, i.e. 35,116 units [PPO, 2017] compared to the number of potential contractors to public procurement for construction services, deliveries or works. Mechanisms of competition in public procurement have undergone major changes over the last few years. Until October 18, 2014, the sole criterion for assessing contractors' bids in the vast majority of procedures for awarding public contracts was the criterion of the lowest price, which resulted in fierce price competition among contractors, accompanied

by low quality and low innovation of the solutions proposed by the contractors in their bids. As a result of the amendment to the PPL in 2014, the legislator imposed on the contracting authorities the obligation to take into account also the qualitative criteria of bid evaluation, such as for example innovative, environmental, functional aspects, technical parameters and life cycle cost of the product/service. What is more, the price criterion of evaluation after the amendment of the PPL cannot, in principle, constitute more than 60% (Art. 91(2a) of the PPL). It should be noted that in 2016, only in 2% of the proceedings below the EU thresholds for construction works, 8% for services and 17% for deliveries, the contracting authorities used price as the only criterion of bid evaluation [PPO, 2017]. These solutions caused that in public procurement, apart from price competition, a non-price competition could also appear, where the main way of competing is differentiation of products and services in response to the qualitative criteria of bid evaluation applied by contracting authorities. However, it should be noted that, for example, the General Directorate for National Roads and Motorways (the largest Polish contracting authority when it comes to construction work, hereinafter referred to as GDDKiA), already in 2013 introduced qualitative criteria to some proceedings regarding construction works, such as the time of execution or warranty period. Even so, finally still the price decided on awarding a given public contract for construction work, as most of the contractors provided maximum warranty periods and possibly shortest times of execution of the construction works.

It is worth adding that in the struggle for public contracts the contractors cannot support themselves with the instruments of competition such as promotion, advertising or marketing. Due to the nature of public procurement, during the

procedure for awarding a public contract communication between the contracting authority and contractors is not allowed. Moreover, the contractors who participated in the preparation of the proceedings in question are excluded from applying for its further award [Art. 17(1) of the PPL].

Mechanisms of competition in public procurement should affect the growth of efficiency as well as innovation of public procurement. Public contracts in the European Union, according to point 90 and 92 of the preamble and Article 67(4) of Directive 2014/24/EU (hereinafter “classic directive”) should be awarded based on objective criteria that ensure compliance with the provisions of transparency, non-discrimination and equal treatment in the conditions of effective and fair competition among the contractors applying for the award of a public contract. Moreover, Member States should provide support to contracting institutions and contractors in order to increase efficiency of public procurement by increasing the legal certainty and professionalisation of practices in terms of public procurement (point 121 of the preamble to the classic directive).

Additionally, the concept of fair competition, as referred to in Article 7 of the PPL, is interpreted on the basis of the PPL under the provisions of the Act of April 16, 1993 on counteracting unfair competition (hereinafter UCA – Unfair Competition Act) [Granecki, 2014]. In accordance with Article 3(1) of the UCA, the act of unfair competition is the activity contrary to the law or good practices which threatens or infringes the interest of another entrepreneur. So, fair competition between economic operators is undertaking activities within a given procedure, which are compliant with law and good practices and do not infringe or threaten the interests of other economic operators, who also apply for the award of a public contract. Furthermore, according to Article 3(2)

of the UCA, the acts of unfair competition are for example: infringement of the business secrecy, inducing to dissolve or to not execute the agreement, slandering or dishonest praise, impeding access to the market. Based on Article 89(1)(3) of the PPL, the contracting authority is required to reject the tender submitted by economic operator(s), if its submission is an act of unfair competition within the meaning of the provisions of the UCA. It is worth noting that the principle of fair competition and equal treatment of economic operators is most often violated principle of public procurement [Granecki, 2014], which is confirmed by numerous case-law (see judgements of the National Chamber of Appeals KIO 2744/15, KIO 1261/16; Regional Court in Częstochowa VII Ka 200/16).

It should be emphasised that the infringement of an efficiently functioning mechanism of competition in public procurement by actions to prevent, limit or distort competition is punishable and subject to numerous sanctions, as referred to, among others, in the TFEU, ACCP or UCA.

Institution of bidding consortium in public procurement

A bidding consortium is a form of joint competition for a public contract by companies (Article 23(1) of the PPL). A bidding consortium can be formed by companies from the SMEs, SMEs and large companies, or between large companies only [Godlewska, 2017]. The institution of a bidding consortium enables micro, small and medium-sized enterprises that do not meet the award criteria on their own (Article 22(1b) of the PPL) to participate in a given procedure by joining their human resources, organizational or technical potentials. Additionally, within the consortium, both the potentials of consortium partners should be joined as well as the economic risks associated with

the performance of the contract should be distributed.

The agreement concluded by the consortium members usually before submitting a joint bid in the light of Art. 4(5) ACCP, may qualify as an agreement concluded between entrepreneurs which should each time be evaluated by the contracting authorities under Article 6(1)(7) of the ACCP. Tender agreements (collusions) the aim or result of which is the elimination, restriction or any other infringement of competition on a relevant market, involving making arrangements concerning the conditions of the submitted bids between companies taking part in a tender, in particular concerning the scope of the works or prices, are prohibited (Article 6(1)(7) of the ACCP). Tender collusions, due to anti-competitive objective, constitute one of the most serious infringements of the competition law, which has measurable economic and financial consequences for the entire economy [Sieradzka, 2015a; Materna, 2015]. Nevertheless, agreements, including bidding consortia, which contribute to the technical or economic progress or do not make it possible to companies to eliminate competition on a relevant market (Article 8(1)(1-4) of the ACCP) are not qualified as prohibited and are excluded from Article 6(1)(7) of the ACCP. Moreover, the cooperation within the consortium may allow for a more efficient performance of the contract [Sieradzka, 2015b].

In this context, it should be noted that under the PPL, the legislator did not foresee any investigation procedure which would clarify whether the joint bid submitted by economic operators as a bidding consortium does not affect the mechanisms of competition in public procurement.

Attempt to evaluate the impact of a bidding consortium on mechanisms of market competition

On the market of public procurement for construction works, which in 2016 was worth PLN 36.52 billion [PPO, 2017], there is a network model functioning which may be illustrated by a pyramid [Płóciennik, 2011]. The basis of the pyramid are micro and small enterprises, which function as further subcontractors due to limited human resources, technical and organizational potential. In the middle, there are medium-sized enterprises, being subcontractors or consortia members, if they have unique specialist competences. At the top of the pyramid, there are large enterprises, mostly belonging to the European construction groups, such as Vinci, Acciona, Ferrovial, Strabag, Skanska, Mota Engil and Bouygues, who take the role of general contractors. Such networks are created to perform a specific public contract for construction works.

Against this background, the bidding consortia formed between competing enterprises in public procurement for construction works, in the opinion of the author based on related literature [Brandenburger, Nalebuff, 1996; Bengtsson et al., 2003; Eriksson, 2008] – can be a form of a formal coopetition. The coopetition within a bidding consortium is a strategic relation joining competition with, for example, subcontractors or suppliers of building materials, with the cooperation involving the combination of human resources, technical, organizational or financial potentials of the consortium members, to jointly perform the public contract. The coopetition within a bidding consortium enables the contractors to achieve, for example, economies of scale in purchasing construction materials or in using construction equipment, and results in lowering transaction costs.

Nevertheless, in the light of the reasoning of the judgement of the Court of Appeal in Warsaw of June 8, 2016, Ref. No. VI ACa 651/15, the formation of a bidding consortium by contractors will

be an infringement of the competition law, if the consortium members would be able to file the bid on their own with a real chance of winning the tender, but they did not do it (in the absence of an exemption under Article 8(8)(1)(1-4) of the ACCP). In order to prove that the participation of bidding consortia in the procedures of public procurement for construction works strengthens the mechanisms of market competition and increases the efficiency of public procurement, a case study on $n=10$ randomly selected bidding consortia was conducted. The consortia drawn to the analysis were formed taking into account the following conditions: i) by entrepreneurs competing with each other; ii) at least one consortium member was a company listed on the Warsaw Stock Exchange WIG-Construction; iii) in the years 2014-2017 the General Directorate for National Roads and Motorways (GDDKiA) awarded such a consortium with at least one public contract for construction works. Moreover, the drawn consortia were formed by the companies having a large share in the market and a high economic, financial, technical and organizational capacity. Each consortium was examined in terms of the following premises that may indicate a breach of competition law identified in the judgement of the Court of Appeal in Warsaw of 08/06/2016: i) possibility to participate in the tender by the consortium members on their own; ii) award criteria presented by the contracting authority in a given procedure; iii) chances of winning a given tender by the consortium members individually; iv) possibility to perform a given contract individually or with the participation of subcontractors; v) joining of potentials of the consortium members in order to jointly execute the awarded contract.

The analysis shows (Table 1 and 2) that all bidding consortia, to which GDDKiA awarded public contracts for construction

works in the years 2014-2017, indicated in their bids that they would perform a given contract with the participation of subcontractors. So, a bidding consortium was established between general contractors and their networks. Except for a single procedure, the award criteria presented by GDDKiA to the contractors were possible to be independently met by at least one consortium member. The conditions for the participation were lower than the value and scope of the subject of the contract for which the consortium competed. With the exception of one case, consortium members would be able to independently win and perform the contract obtained by the consortium, if not for the fact that they have obtained other contracts with a similar delivery date, which were secured with multimillion bid securities at the stage of submission of tenders. Moreover, the qualitative criteria of evaluation in the analysed procedures did not affect the choice of the best offer. The selection of the offer submitted by the consortium was based on the lowest price. The analysis of the chances to win the tender procedure shows that in the case of formation of a consortium, the chance to win a given procedure was much higher due to the possibility to distribute the risks associated with the implementation of the public contract between the consortium members, which could have an impact on lower transaction costs and resulted in the possibility to propose a lower price than competitors. In 5 out of 10 analysed consortia, the real combination of potentials of the consortium members, however, did not happen. The combination of potentials occurred only at the stage of filing a tender bid, in which the consortium members declared the joint execution of the works and engagement of each of the consortium members in 50% each or in 15 and 85%.

After signing the contract with the contracting authority, consortium mem-

Table 1 Analysis of compliance of bidding consortia with competition law

No.	Consortium members	Possibility to participate independently	Award criteria	Chances to win the tender	Possibility to perform independently	Combination of potentials
1	Budimex S.A. – leader and Strabag Sp. z o.o. – partner	highly probable	lower than the value and scope of the contract	low probability	highly probable	Current report No. 72/2014 of 29/08/2014 – Budimex – 50% and Strabag – 50% Report No. 77/2014 of 30/09/2014 Budimex – 99% and Strabag 1%
2	Budimex S.A. – partner and Strabag Sp. z o.o. – leader	highly probable	lower than the value and scope of the contract	low probability	highly probable	Current report No. 73/2014 of 01/09/2014 – Budimex – 50% and Strabag – 50% Current report No. 81/2014 of 03/10/2014 Budimex – 1% and Strabag – 99%
3	Budimex S.A. – leader and Strabag Sp. z o.o. – partner	unlikely due to a large scale of the tender and proportionally high conditions	high due to the scope of the subject of the contract.	high probability	unlikely due to a short delivery time, only 14 months from the date of award of the contract	Current report No. 75/2014 of 16/09/2014 – Budimex – 50% and Strabag – 50%
4	Mirbud S.A. – leader and PBDiM „ERBEDIM” (Sp. z o.o.) – partner	highly probable	lower than the value and scope of the contract	low probability	highly probable	Report No. 50/2014 of 19/12/2014 Mirbud – leader – 99% ERBEDIM – partner – 1%
5	Mirbud S.A. leader and PBDiM Kobyłarnia S.A. partner	highly probable	lower than the value and scope of the contract	low probability	highly probable	Confidential Report No. 37/2016 of 14/10/2016
6	PORR Polska Infrastructure S.A. – leader and Unibep S.A. – partner	highly probable	lower than the value and scope of the contract	low probability	highly probable	Report No. 6/2016 of 17/02/2016 PORR – 71.1% and Unibep – 28.9%
7	PUT INTERCOR Sp. z o.o. – leader and TRAKCJA PRKiI S.A. – partner	highly probable	lower than the value and scope of the contract	low probability	highly probable	Report No. 14/2016 of 24/05/2016 INTERCOR – 100% and TRAKCJA – 0%

8	PUT INTERCOR Sp. z o.o. – partner and TRAKCJA PRKiI S.A. – leader	highly probable	lower than the value and scope of the contract	low probability	highly probable	Report No. 43/2015 of 12/10/2015 INTERCOR – 15% and TRAKCJA – 85% Report No. 14/2016 of 24/05/2016 INTERCOR – 0% and TRAKCJA – 100%
9	Mirbud S.A. – partner and PBDiM Kobylarnia S.A. – leader	highly probable	lower than the value and scope of the contract	low probability	highly probable	Report No. 24/2015 of 12/10/2015 Mirbud – 54% and Kobylarnia – 46%
10	PBK Sp. z o.o. from Łomża – Leader, UNIBEP S.A. – partner, BPA Sp. z o.o. –partner, PNOL Sp. z o.o. – partner	highly probable	lower than the value and scope of the contract	low probability	highly probable	Report No. 48/2017 of 28/08/2017 UNIBEP S.A. approx. 90%

Source: own elaboration based on tender bids.

bers changed the scope of their engagement, as a result of which the entire contract was performed only by one consortium member. The lack of potential combination occurred when the consortium members won at least two different tasks (sections of different lengths) for the construction of a given national road, expressway or motorway. In such a situation, consortium members shared the execution of tasks and there was no cooperation. In these cases, it is difficult to conclude that the consortium was a formalised form of co-competition due to the cooperation limited only to the stage of obtaining the contract. Despite the fact that the potential between consortium members was not always combined, the contracting authorities obtained tangible benefits from the formation of consortia by the general contractors, who would not submit their tender bid in a given procedure individually, for example, due to excessive transaction costs associated with an individual application for the award of the public contract for construction works on the part of contractors, compared to

the chances to win a given procedure, or too high risk of a possible cumulation of awarded contracts with similar delivery dates with tender securities.

It should be emphasised that price competition on the market of public procurement for construction works has been very high. In eight analysed cases, GD-DKiA received six or more offers in one proceeding. Moreover, the difference between the price of the bid of the selected consortium and the maximum price proposed by another contractor in 5 out of 10 analysed cases was above 30%. Thus, each time, the contracting authority was able to save from several to over hundred million zloty with the quality parameters being met by the best offer to a maximum, at the same time.

Conclusion

With a large number of bidding consortia taking part in a given procurement for construction works, the contracting authority received a much larger number of bids, which were also much different in terms of price of the selected bid and

Table 2 Analysis of mechanisms of competition in public procurement

Procedure	Price in the bid of consortium (selected) PLN gross	Maximum price PLN gross	Numbers of bids submitted	Number of consortia	Tender security	Quality criteria	Participation of subcontractors in the consortium bid
No. 1 – Continuation of the project and construction of motorway A-1 Stryków - “Tuszyn” junction – Task III	327,041,625	415,666,200	6	3	yes	Price – 100%	yes
No. 2 – Continuation of the project and construction of motorway A1 Stryków - “Tuszyn” junction – Task I	339,623,175	405,115,528	6	2	yes	Price – 100%	yes
No. 3 – Continuation of construction of motorway A4 in the section Rzeszów (junction Wschodni) – Jarosław (Wierzbna junction)	719,503,995	876,771,516	2	2	yes	Price – 100%	yes
No. 4 – Design and construction of expressway S-3 Nowa Sól – Legnica (A5), Task II	447,999,000	512,233,390	6	4	yes	Time of execution and warranty without influence on the choice	yes
No. 5 – Construction of Bolków bypass on national road No. 3 and 5	73,451,216	140,718,150	14	7	yes	Time of execution and warranty without influence on the choice	yes
No. 6 – Expansion of national road No. 8 Warszawa – Białystok	404,469,276	464,141,436	8	6	yes	Time of execution and warranty without influence on the choice	yes
No. 7 – Design and construction of expressway S-5 in the section from “Aleksandrowo” junction (with the junction) to the “Tryszczyn” junction (with the junction)	369,000,000	491,442,750	11	6	yes	Time of execution and warranty without influence on the choice	yes
No. 8 – Design and construction of expressway S-5 in the section from “Szubin” junction (with the junction) to “Jaroszewo” junction (with the junction)	351,971,806	483,589,451	9	5	yes	Time of execution and warranty without influence on the choice	yes

No. 9 – Design and construction of expressway S-5 in the section from “Jaroszewo” junction (without the junction) to the borders of the voivodship	421,818,666	676,429,282	12	6	yes	Time of execution and warranty without influence on the choice	yes
No. 10 – Design and expansion of national road No. 63 in the section: Wygoda – Zambrów	33,457,298	47,697,531	2	1	yes	Time of execution and warranty without influence on the choice	yes

Source: own research based on case study n = 10.

the maximum price (with the same maximum quality parameters), compared to the procedures for the award of the public contract for services or deliveries where the bidding consortia are not formed to such an extent as in the case of construction works. In 2016, in over 40% of all procedures for the award of public contract for services or deliveries, the contracting authority received only one bid.

To compare, in more than 36% of all procedures for construction works in 2016, the contracting authority received five or more bids [OPP, 2017]. Additionally, it should be emphasised that the participation of bidding consortia in the procedures for the award of public contracts for construction works strengthens the mechanisms of market competition and increases the efficiency of public procurements.

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