



COLLUSION IN PUBLIC PROCUREMENT

Public procurement **collusion** consists in the manipulation of bids by competitors, based on illegal agreements, with the objective of distorting competition in award procedures.

These practices allow “pre-determined” competitors to enter into contracts with contracting entities, under the deliberate illusion that the respective public procedures took place in a strictly competitive manner.

According to the European Commission, it is above all in essential economic sectors, such as construction, information technology or health, that collusion is more frequent.

Collusion between economic operators is **prohibited** by Article 101 of the Treaty on the Functioning of the European Union (TFEU). And, as a result of Euro-community directives, the existence of sufficiently plausible evidence of collusion became, expressly, a reason to exclude an economic operator from a public procurement procedure.

Specifically, in Portugal, article 70 of the Public Contracts Code (CCP) provides that the existence of strong indications of acts, agreements, practices or information likely to distort the competition rules is a **cause for exclusion from the proposals**.

Furthermore, the exclusion of any proposals on such grounds, as well as the existence of evidence of practices restricting competition, even if they did not give rise to the exclusion of the proposal, must always be communicated to the Competition Authority.

On this subject, the European Commission released its (non-binding) Guidelines, through Communication No. 2021/C 91/01, of 18 March, which we explore here, namely with regard to what is relevant to competing economic operators.

- **Collusion Arrangements**

The collusion can, for example, take the form of:

- a) Prior agreement on the content of the operators' proposals (in particular, the price);
- b) Failure to submit a proposal;
- c) Market allocation based on geographic area, contracting authority or subject matter of the tender;
- d) Establishment of switching mechanisms for a set of procedures.

However, it is extremely difficult for the contracting authorities to detect these cases of collusion in public procurement immediately. Collusion agreements are generally informal and secret.

- **Evidence of collusion**

According to European Commission guidelines, **plausible indications of collusion** should be considered, for example:

- a) The fact that the bidder has already entered into a subcontracting contract with another bidder, or has pre-ordered material necessary to execute the public contract in question before the evaluation of the bids is completed;
- b) The overall market behavior of competitors that participate in tender procedures, for example, never submitting proposals in the same procedure, or only submitting proposals in certain regions, or alternating among themselves in participating in these procedures;
- c) The text of different proposals, for example, with spelling errors or repeated wordings, or comments that have been mistakenly kept in the proposal text and that indicate collusion between competitors;
- d) Offered prices, for example, offering higher prices than other similar tenders or too high or low prices;
- e) Administrative details, for example, proposals submitted by the same commercial representative.

Indeed, these possible signs must also be attended to by the **competitors** themselves, seeking to avoid situations that fall within these alerted cases, or with a view to ensuring that all other competitors comply with the legal requirements applicable to public procurement procedures and the respective proposals.

- **Submission of proposals by companies of the same group**

In certain public procurement procedures, different proposals may possibly be presented by economic operators with some type of domain or group relationship between them.

These cases may raise particular doubts with the contracting authority, in the sense that the proposals submitted by competitors of the same business group, for example, can be coordinated, that is, not autonomous or independent from each other.

However, according to the jurisprudence of the Court of Justice of the European Union (CJEU), contracting authorities must refrain from making generalized assumptions that could lead to an (undesirable) automatic exclusion of such tenders.

The economic operators concerned must therefore be able to clarify and prove that their proposals are independent and do not prejudice transparency or distort competition in the ongoing procedure.

- **Temporary exclusion of competitors**

Any decisions to exclude competitors, for a certain period of time, preventing them from participating in public procurement procedures, for reasons of collusion, only concern the economic operator that has acted in collusion, not covering other economic operators with any type of affiliation or relationship (parent companies, other companies in the same group or subsidiaries of excluded companies) that, for example, have not participated in the procurement procedures in question ●

Article written in accordance with the legislation in force on 9 July 2021.

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