

Application of Article 10 of the Law on Protection of Competition to Certain Forms of Cooperation Between Undertakings in Public Procurement Procedures

The entry into force of the Law on Public Procurement (“Official Gazette of the Republic of Serbia”, No. 91/2019) does not lead to a change in the Commission’s position on the application of Article 10 of the Law on Protection of Competition (“Official Gazette of the Republic of Serbia”, Nos. 51/2009 and 95/2013) to certain forms of cooperation between undertakings in public procurement procedures.

The Commission for Protection of Competition hereby informs undertakings of its position as to the application of Article 10 of the Law on Protection of Competition to consortia agreements in public procurement procedures. The aforementioned term includes joint bids and subcontractor bids. The Law on Public Procurement (“Official Gazette of the Republic of Serbia”, No. 91/2019) envisages joint bids in Article 135 and subcontractor bids in Article 131, including forms of cooperation between undertakings in public procurement procedures.

Consortia agreements in public procurement procedures shall not be considered restrictive as referred to in Article 10(1) of the Law on Protection of Competition, where such agreements are concluded between undertakings:

1. that are not competitors within the meaning of the Law on Protection of Competition, or
2. that are considered affiliated undertakings within the meaning of the provisions of Article 5 of the Law on Protection of Competition, or
3. that are competitors within the meaning of the Law on Protection of Competition, but provided that:
 - (1) none of the parties to the agreement could independently participate in the public procurement procedure under the conditions laid down in the invitation to tender;
 - (2) none of the parties to the agreement could participate in the public procurement procedure by presenting a separate joint bid;
 - (3) the exchange of business-sensitive information between competitors is limited to the public procurement procedure concerned and only relates to information considered necessary for preparing the bid and potentially implementing the agreement that may be awarded in the public procurement procedure;
 - (4) the agreement does not contain any non-compete provisions that restrict or prevent competition between the parties to the agreement in other public procurement procedures, whether they participate independently, as members of a group of bidders, or as members of a subcontractor group.

Also, consortia agreements in public procurement procedures shall not be considered restrictive as referred to in Article 10(1) of the Law on Protection of Competition, where one of the parties to the agreement can present an independent bid and other undertakings join to acquire necessary references and know-how. A sine qua non in this context is that the said parties to the agreement, namely those who join the agreement, cannot participate in the public procurement procedure by presenting a joint bid.

Consortia agreements in public procurement procedures that do not meet the conditions listed above are restrictive agreements within the meaning of Article 10(1) of the Law on Protection of Competition, while the parties to the said agreements no longer can file a request for individual exemption from the prohibition under Article 12 of the Law on Protection of Competition. The individual exemption of a restrictive agreement from prohibition shall be approved subject to meeting the cumulative conditions referred to in Article 11 of the Law on Protection of Competition.