

# Kluwer Competition Law Blog

## Croatia – Agency Rejects Bid-Rigging Complaint

Boris Andrejaš (Babiš & Partners) · Thursday, August 23rd, 2012

Public procurements significantly add to the Croatian gross domestic product. Available data for 2011 reveal that public procurement contracts accounted for roughly 10% of the Croatian GDP. At the same time, based on the number of relevant decisions of the Croatian Competition Agency (“**Agency**”) and public statements of the Agency’s officials, cartels and cartel like behaviour are the Agency’s most important enforcement priority. Also, bid-rigging has been publicly recognized as one of the most dangerous anti-competitive behaviour. It might be therefore surprising that the Agency’s practice on this issue remains rather scarce.

In such circumstances any Agency’s decision addressing the application of competition law rules in the context of public procurement procedures is welcomed by the businesses and practitioners alike. In one of its recently published decisions, the Agency strived to shed more light on the border between joint bidding process in the context to the public procurement rules and anticompetitive collusion prohibited by competition law.

The proceedings were initiated by the Central Procurement Office of the Croatian Government (“**Office**”) which acts as Croatian central purchasing body. The Office’s complaint followed the tender for procurement of certain office supplies (cartridges) for numerous public authorities.

The Agency’s decision reveals that the procurement had been divided in five categories and that the Office received 16 bids. Two bids had been submitted by bidding consortia. While joint bidding is a rather common occurrence in Croatian public and only rarely (if ever) raises competition law questions, in this particular instance one of the joint bids warranted further assessment. More specifically, the Office was concerned that the joint bid submitted by four independent economic operators represents anticompetitive collusion since it appeared that all four of the consortia members would have been able to independently participate in the tendering process. In addition, the price of the joint offer appeared to be significantly lower (up to 98%) than the price listed by the consortia members in their respective publicly available price lists. Consequently, the office submitted a complaint to the Agency alleging that the joint bid actually conceals anticompetitive collusion between the competitors.

During the proceedings that lasted for almost two years, the Agency has extensively analyzed the situation on the relevant market (in terms of competitors, pricing, etc.), as well as the requirements of the relevant tendering process. The Agency especially emphasized that the procurement organized by the Office had related to supplies necessary for numerous and geographically dispersed public authorities and that it had implied deliveries to 798 delivery points across Croatia.

Consequently, only two bidding consortia were able to submit bids for all five categories of cartridges. In addition, the price offered by the relevant bidding consortium was in Agency's opinion only insignificantly lower than the prices offered by individual bidders in the procurement process.

Consequently, the Agency concluded that there is no sufficient evidence indicating anticompetitive collusion between the members of the bidding consortium and therefore rejected Office's complaint. It appears that the Agency's conclusion was primarily based on the Agency's belief that no individual member of the bidding consortium would have been able to independently participate in the procurement for all five categories of the office supplies. The Agency's decision also reveals that this element of the assessment (i.e. ability of the members of consortium to individually participate in the tender) is the single most important element of the initial competition law assessment of the joint bids in public procurement settings. Consequently, it appears that the Agency is not likely to take further steps if the initial assessment of the case shows that there are strong factual or legal circumstances encouraging joint bidding in public tenders.

While the decision leaves certain items opened (e.g. the Agency concluded that members of the consortium were not able to individually participate in the tender despite previous contrary assessment of the Office; the decision does not reveal what specific public procurement remedies (if any) has the Office utilized; the decision fails to address or indicate other items that might be of importance for competition law analysis of the joint bids, etc.), it nevertheless sends important and positive signal to the market participants. On one hand, it reiterates that anticompetitive collusion within public procurement is illegal and will be appropriately sanctioned. On the other hand, and in our opinion more importantly, it shows that contracting authorities (such as the Office) are educated and equipped to recognize suspicious behaviour and that they are willing to cooperate with the Agency in the enforcement of competition law rules within the scope of their respective competences. Obviously, only such cooperation between the Agency and the contracting authorities, as well as their supervisory bodies, may successfully address complex issues arising in detection and persecution of anti-competitive behaviours in public procurement.

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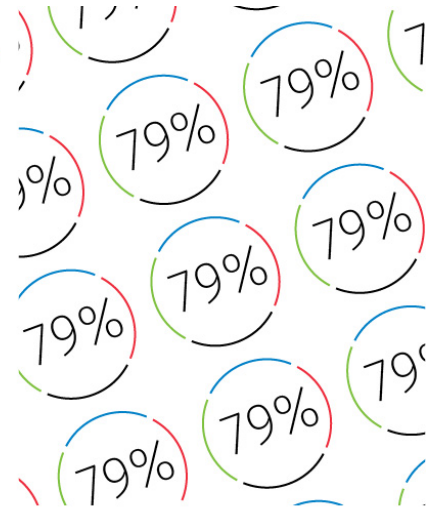
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