Kluwer Competition Law Blog

Israel: Boycott of a Tender as Anticompetitive Conduct

Konstantin Voropaev (Elbert, Nazaretsky, Rakov & Co) · Thursday, May 19th, 2022

At the beginning of May 2022, the Supreme Court of Israel decided, having confirmed the position of the lower instance, that a boycott of tender construction companies should be regarded as a violation of competition law. According to the highest judicial instance of Israel, the joint decision of the competitors not to bid constitutes a restrictive arrangement among the participant of the construction business.

The plot of the case

In February 2008, the government of Israel passed a resolution approving a plan to protect apartments in the Gaza Envelope. Following this, the state authorities set up a tender among the local construction companies. This tender consisted of two-stage. In the first stage, a database of contracting companies was established, while the second stage should serve as a framework for selecting companies to carry out the construction work. At the end of the first stage, 14 companies were selected that met the threshold conditions.

After three months in the second phase, these pre-selected companies submitted a document that set forth why construction companies could not be able to commence building activities. The constructors indicated the rise in iron prices and losses it might cause to the contracting companies. Following the non-submission of bids in the second phase of the tender, it was cancelled. Subsequently, the state authorities were required to issue a new tender, which involved a delay in the work.

As a result, several companies were charged with an arrangement of the restrictive arrangement .

Legislative requirements

The Israeli competition law is based on widely recognized legal principles of free competition. The recognition of free competition as contributing to efficiency and innovation and ensuring equal opportunity to compete in the Israeli market is essential to Israeli legislation.

The term “restrictive arrangement” is defined in section 2 (a) of the Competition Law as an arrangement made between persons conducting business, whereby at least one of the parties

restricts itself in a manner that may prevent or reduce competition in business between it and the other parties to the arrangement, or part of it, or between it and a non-party to the arrangement.

According to the wording of the section, the existence of a restrictive arrangement is based on four cumulative factual elements. An arrangement (1) among the market's participants (2) with self-limitation (3) at least one of the parties of this which leads to the potential or real harm to the competition (4). The third component means a restriction on the freedom of action given by the person conducting the business. It might result from the restriction by means of prohibition from doing something or whether the restriction requires doing something in a certain way.

Section 2(b) of the Competition Law defines the grounds of absolute presumption regarding the existence of a restrictive arrangement. In case the court has ruled that the ground of Section 2(b) is met, there is no need to prove the potential harm of the restrictive arrangement in competition and awareness of the offence.

The position of the Supreme Court

The court outlined in its decision that the coordination between competitors within the procedure of tender is anticompetitive behaviour contrary to the logic of the tender. The tender is a framework for economic competition between market players, and its success is measured by the ability to select the winning bid from among various bids, according to relevant criteria. A decision to coordinate between competitors in a tender, whether in the context of participation or in the context of non-participation, is anticompetitive conduct. The severity of the consequences of this arrangement relates to the fact that it was a public tender, which had been intended to promote activity for the benefit of the public.

The arrangement that no competitor will submit a bid unless the consideration is paid to the winner for the services he/she provides is subject to the provisions of Section 2(b)(1) of the Competition Law and constitutes an illegal action. Moreover, such consent also embodies the consent to act to bear the profit that each of the competitors will generate.

This decision significantly harmed a plethora of competition aspects. Without the existence of the arrangement, each of the contracting companies would have considered its steps, and it is not inconceivable that at least some of them would have decided, for economic and other reasons, to bid in the second stage of the tender. However, the arrangement reached by the contracting companies resulted in an almost complete boycott of the tender and the cancellation of its main part.

Remarkable issues

Leaving out of account the criminal part of this case, several outcomes are quite noteworthy.

For the prospective participants of the civil turnover, the social value and significant financial resources of tender should be considered more seriously because these are under special attention of the controlling bodies.

Even more, the losing party alleged that there was no illegal intention from their side and that a boycott was just a form of protest. The court disagreed and noted that a mental element required for this kind of illegal action is an awareness of the nature of the act. In this case, it is an agreement not to approach the tender unless its terms are changed. The State emphasized that the appellants were also aware of the potential harm to competition arising from their joint agreement not to approach the tender.

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe here.

Kluwer Competition Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers are coping with increased volume & complexity of information. Kluwer Competition Law enables you to make more informed decisions, more quickly from every preferred location. Are you, as a competition lawyer, ready for the future?

Learn how **Kluwer Competition Law** can support you.

This entry was posted on Thursday, May 19th, 2022 at 5:00 pm and is filed under Anticompetitive agreements, Bid-rigging, Boycott, Israel, Tender
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.