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Bid Collusion in Public Procurement Law

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Abstract: Unlawful agreements restricting competition, also known as bid rigging, is one of the acts of unfair competition specified by antitrust law. Its occurrence is associated with many unwelcome market practices, which is why it is considered to be a highly undesirable phenomenon and eliminated from economic turnover. In the field of public procurement, the phenomenon of bid rigging is particularly harmful because it leads to the inefficient management of public funds. For this reason, the legislator has included rules that prevent bid collusion in public procurement law institutions, assisting the contracting authority in protecting the competitiveness of the procedure. This paper focuses on a comparative analysis of the model of bid collusion, regulated under the Act on Competition and Consumer Protection with the provisions of Public Procurement Law. The act distinguishes bid collusion as a prerequisite for the subjective exclusion of contractors and the rejection of bids submitted under conditions of an act of unfair competition. However, under the provisions of Public Procurement Law, the definition of bid collusion derived from antitrust law has been modified, which has measurable consequences for the application of these provisions by contracting authorities and judicial authorities.

Keywords: bid collusion, unlawful agreement, public procurement law, act of unfair competition, competition protection

1. Introduction

Public procurement is an instrument for the management of public funds in order to optimally meet collective needs (Pokrzywniak et al., 2006). Due to the scale involved (the market for public procurement reached 7.04% of GDP in 2021 (President of the Office for Public Procurement 2022)), and also the often specialist nature of the work ordered, which can be carried out by a limited group of economic entities, the procurement system is particularly exposed to activity of an anti-competitive nature. For this reason, the legislator has surrounded it with multi-stage protection, which lies within the competencies of numerous institutions, including: the common courts, the European Union Justice Tribunal, the President of the Office for Competition and Consumer Protection, the President of the Office for Public Procurement, as well as the contracting authorities themselves. The subject of

this paper are provisions related to bid collusion from the perspective of the subjective qualification of contractors as well as bid evaluation activities under the Act of 11th September 2021 – Public Procurement Law (Journal of Laws 2022, pos. 1710 with later amendments – hereinafter PPL or Public Procurement Law).

Art. 16 point 1 of the PPL states that the principles of fair competition and equal treatment of contractors take a central place in the public procurement system. The contracting authority, as the host of the proceedings, is obliged to apply such principles at all stages of the preparation and implementation of procurement, as well as monitor actions undertaken by contractors in this respect. Only a tender conducted in this way can be considered to be correctly contracted (Gawrońska-Baran 2023).

In addition, the new PPL introduced the principle of economic efficiency (article 17 paragraph 1 of the PPL), which obliges the contracting authorities to aim to achieve the best possible quality of supplies, services and building works within the funds they can allocate, as well as to achieve the best possible effects of the procurement, including social, environmental and economic effects, in relation to the expenses incurred. Here it should be highlighted that the legislator did not direct the aim of procurement only towards obtaining the best bid in a strictly monetary sense, but that economic efficiency can also be obtained by achieving results motivated by social or environmental needs (Dzierżanowski, 2021).

The above principles, which determine the direction of activities of contracting authorities, should be considered alongside the motivations of entities participating in the proceedings in the role of contractors, as from the perspective of economic balance, they constitute respectively the demand side and supply side of the public procurement market (Rokicki, 2022, p. 2). The interest that drives contractors taking part in procurement proceedings is being permitted to execute the subject of the procurement thanks to their success in the tender, and thus obtaining the highest possible remuneration. In a situation with proper competition, their bids must however take into account the situation on the market due to the pressure exerted by the presence of other bidders, whose motivation is also the possibility to execute the procurement. The balance achieved in this way is beneficial for the contracting authority, which has the possibility to obtain the best price for the subject of the procurement. However, this situation is disturbed if contractors, from the position of bidders, enter into cooperation leading to distortion of the supply side, the consequence of which is inflated prices. This is detrimental for contracting authorities in that they are unable to achieve economic efficiency in spending public funds, thus worsening the situation of taxpayers in general, the beneficiaries of which are dishonest contractors (Zawłocka-Turno, 2012, p. 45). Meanwhile, if the relevant prerequisites are updated, as discussed later in this paper, the contracting authorities are obliged to eliminate such irregularities from their procedures.

Prohibited agreements restricting competition are colloquially known by the term *bid rigging*. They are one of the more frequent undesirable features of public procurement, however due to their multifaceted nature they are not easy for contracting authorities to detect and eliminate. The discretion with which contractors surround such agreements, as well as the multiplicity of forms that it can take, make it necessary for the contracting authority to evaluate every case carefully.

The Organisation for Economic Cooperation and Development, in its *Guidelines on combatting bid collusion* (Organisation for Economic Cooperation and Development, 2009), identifies the four most common forms of cooperation between contactors:

1) cover bidding – submitting a bid that cannot be accepted due to an inflated price, or that does not fulfil the specific conditions of the procurement, in order to create the illusion of competitiveness of the winning bid;
2) bid suppression – withdrawing one or several contractors during the proceedings so that the bid they had agreed upon together won. In exchange for withdrawing from one tender, collaborating contractors can switch positions in the next one.
3) bid rotation – a group of contractors submitting bids in subsequent proceedings in such a way that every tender is won by the contractor agreed upon among them.

4) market allocation – an agreement entered into by contractors who are competitors on the market in a specific sector. The collaborators divide themselves, e.g. by group of clients or geographical area within which they operate so that the bids they submit do not compete with one another in specific proceedings.

The manifestation of any of the models described above should become the subject of investigation on the part of the contracting authority. However, it should be underlined that an analysis of the whole situation related to the proceedings is required, as despite certain manifestations of a prohibited agreement, any suspicions may not be confirmed.

The obligation to comprehensively monitor the activities of contractors is a significant burden for the contracting authorities. This effort is however justifiable in relation to the threat generated by bid collusion. Research indicates that as a result of prohibited agreements, the costs incurred by the contracting authorities are inflated by around 20% (Copabianco, 2012). Such agreements are therefore an affront to the interests of society as a whole as they lead to the unfavourable expenditure of public funds due to a reduction in the competitiveness of bids, while at the same time creating the illusion of competitiveness, which can lead to long-term inefficient awarding of procurement tenders by the contracting authorities (Wojtczak, 2010, pp. 68-77).

2. Bid Collusion – Characterisation and Typification

In the free market economy, bid collusion is as such an unlimited phenomenon in terms of its form, the circle of entities it can encompass, and also the sector it can involve. In formulating the currently applicable legal definition, the Polish legislator adopted a partially casuistic model. According to art. 6 paragraph 1 of the Act of 16th February 2007 on competition and consumer protection (Ustawa, 2007 – hereinafter ACACP or the Antitrust Act), the term bid collusion is used to define those agreements whose purpose or effect is to eliminate, limit or violate in another way competition on the market in question. The legislator then listed detailed cases of such agreements, including: directly or indirectly setting prices and other conditions for the purchase or sale of goods; limiting or controlling production or sales as well as technical advancement or investment; dividing up sales and purchase markets; use in similar agreements with third parties of burdensome or inconsistent contract terms creating varied conditions of competition for these people; making the conclusion of a contract dependent on the other party accepting or fulfilling other conditions that have no actual or indirect connection with the subject of the agreement; limiting access to the market or eliminating from the market entrepreneurs not covered by the agreement; and agreement between entrepreneurs participating in a tender, or between these entrepreneurs and the entrepreneur organising the tender, as to the conditions of the submitted bids, in particular to the scope of work or price.

The above definition was accepted in its current form by the Act of 15th December 2000 on competition and consumer protection (Ustawa, 2000) and is formulated analogically to the definition contained in article 101 of the Treaty on the Functioning of the European Union (Traktat o funkcjonowaniu Unii Europejskiej, 2004), (hereinafter TFEU), which prohibits *any agreements between enterprises, the purpose or effect of which is preventing, restricting or disrupting competition within the internal market*, and then lists a catalogue of specific forms that such agreements can take.

Many acts refer to the definition in article 6 of the ACACP, including the Act of the 16th April 1993 on combatting unfair competition (Ustawa, 1993) (hereinafter CUC), which in article 15c lists bid collusion in the understanding of article 6 of the ACACP and article 101 of the TFEU as one of the acts of unfair competition. In addition, the literature indicates the said definition as appropriate for qualifying prohibited agreements as fulfilling the conditions for the crime of disrupting a public tender, penalised in article 305 of the Act of 6th June 1997 of the Criminal Code (Sieradzka, 2016, p. 1; Ustawa, 1997).

The PPL also contains references to the ACACP in the context of combatting bid collusion, however, on its basis there are considerable modifications in relation to the as it were 'model' definition described

above. For reasons of functionality, the legislator limited both the subjective and objective scope of prohibited agreements as identified by public procurement law, which is of momentous importance both from the perspective of the application of these provisions by the contracting authorities, as well as by the appeal bodies and the judiciary.

3. Bid Collusion in Public Procurement Law

Protecting the competitiveness of public procurement is of particular importance for the correct implementation of public tasks, as unfavourable management of public property leads to losses for society in general (Wojtczak, 2010, pp. 68-77). Bid collusion is a highly undesirable phenomenon, which is why the contracting authority has the obligation to react to signs of such activity according to the competences granted to them by public procurement law. Combatting antitrust agreements can be undertaken through the subjective qualification of the contractors, as well as in the evaluation of the bids they submit.

It must be emphasised that the definition of bid collusion in article 6 of the ACACP occupies an important place in the construction of PPL provisions, however, the aim of this paper was to highlight the definition model for this phenomenon, which is specific to public procurement law, as well as its practical implications.

3.1. Bid Collusion as a Prerequisite for Mandatory Exclusion of Contractors

Subjective qualification is an instrument for eliminating contractors that due to their subjective characteristics would not be suitable for executing procurement orders. It should be underlined that the aim of this regulation is not to 'punish' contractors, but only to ensure their reliability in order to evaluate if they are able to execute the procurement order correctly in accordance with the laws and principles of competition. The contracting authority is obliged to verify participating contractors from the perspective of undesirable features that are prerequisites for mandatory and facultative exclusion (respectively articles 108 and 109 of the PPL). In the case of facultative reasons, the legislator left the contracting authority with room for manoeuvre in decisions on excluding contractors that take into account the particular circumstances of specific proceedings (Dzierżanowski, 2021). The occurrence of one of the grounds for mandatory exclusion does not leave the contracting authority with this choice. The contractor must be excluded in order to protect the correctness of the proceedings.

Article 108 paragraph 1 point 5 of the PPL lists bid collusion as one of the grounds for the mandatory exclusion of contractors. Analogically to article 57 paragraph 4 letter d of the Directive of the European Parliament and Commission 2014/24/UE of the 26th February 2014 on public procurement, repealing directive 2004/18/WE (Dyrektywa, 2014) (hereinafter 'classic directive'), the Polish legislator accepted that this prerequisite is updated "if the contracting authority can determine on the basis of reliable indications, that the contractor entered into an agreement with other contractors with the purpose of disrupting competition", and then characterises a particular case of a prohibited agreement that occurs if contractors "belonging to the same capital group, in the understanding of the Act of 16th February 2007 on competition and consumer protection, submitted separate bids, partial bids or applications for participation in the proceedings, unless they demonstrate that they prepared these bids or applications independently of one another."

Particular attention should be paid to the fact that the direct reference to the ACACP in this provision only appears in order to explain the term *capital group*, but not in the case of an *agreement that aims to disrupt competition*. As was mentioned earlier, in other acts the legislator refers on many occasions to the definition in article 6 of the ACACP, therefore giving priority to linguistic interpretation, it is not possible to consider the lack of its application in PPL provisions as incidental. This is of monumental importance for the application of provisions eliminating antitrust behaviour from public procurement,

as a new meaning of the term appears that already has a legal definition which spreads across many other legal acts, and around which a considerable body of doctrine and jurisprudence has developed. In NAC (National Appeals Chamber) rulings, there is frequent reference to the ACACP definition determining the legitimacy of excluding contractors in relation to article 108 paragraph 1 point 5 of the PPL (e.g. KIO 2051/22, KIO 201/22, KIO 3745/21). This practice should not be evaluated *a priori* as negative, as the scope of the meaning of bid collusion on the basis of the PPL fits within the broader scope of the ACACP definition, however it is key to take into account the considerable narrowing of this term in the case of the subjective qualification of contractors.

A comparative analysis of both the above provisions distinguishes two planes on which modifications occur of the scope of meaning of prohibited agreements on the basis of the PPL.

The first of these is the limitation of the subjective scope, which results from the aim itself of provisions relating to the qualification of contractors. Article 108 paragraph 1 point 5 of the PPL is directed against horizontal collusion – *between contractors* (Jaworska et al., 2022). Excluded from this provision is qualification of vertical collusion (between contractors and the contracting authority), which is a natural consequence of assigning the obligation of uncovering bid collusion to the contracting authority. It would be pointless to expect of them an objective and impartial evaluation of agreements to which they would themselves be a party. Collusion in article 6 of the ACACP does not allow for such limitations. It can occur between an unlimited group of entities, irrespective of the level at which they operate in the economy (Hauser et al., 2018, p. 689). The only limitation to the subjective scope would appear to be technical aspects resulting from the colluding parties dividing up the market in question, by which they commit an act of unfair competition.

Two narrowing conditions should be highlighted with regard to subjective limitations. Firstly, PPL provisions only concern public tenders, and thus bid collusion as a prerequisite for excluding contractors cannot take place in a private tender (which is permissible according to the ACACP definition (Hauser et al., 2018, p. 689)). In addition, according to the NAC ruling of 23rd June 2023 (KIO 1457/22), it is not permitted to take a decision to exclude a contractor on the basis of events that have taken place in other proceedings in which it was not found that the contractors had entered into a prohibited agreement. Therefore, in conducting subjective qualification, it is necessary to assess the behaviours of contractors solely and exclusively in relation to the proceedings in question. This is because the aim of this provision is not to detect all antitrust agreements that may be participated in by the entity taking part in the tender, but rather an evaluation of the entity's activity in relation to the ongoing proceedings. Naturally, it is undesirable for a public procurement order to be executed by an entity that has already undertaken activity that is harmful to competition, however, excluding the entity due to its activity outside specific proceedings is a matter for other institutions responsible for competition protection law.

Secondly, article 6 of the ACACP indicates both the antitrust purpose of activities as well as their effect. The use by the legislator of the connector *or* means that the prerequisites for antitrust purpose and effect are alternative in nature. As noted by E. Stefańska: *"*Prohibition of agreements based on purpose refers to agreements that are characterised by a sufficiently high degree of harmfulness for competition, which means that it is not then necessary to demonstrate their antitrust effects. (...) However, agreements that are prohibited based on effect are those which by their character do not allow it to be concluded with a high degree of probability as to their antitrust nature*"* (cf. Stefańska, 2022, p. 510). In the case of such agreements, the mere effect of eliminating, restricting or violating competition speaks for the occurrence of collusion. To demonstrate such circumstances, the purpose for which the entities acted is irrelevant, therefore analysis of their volitional sphere does not have to be performed by a controlling body.

The situation is different in terms of public procurement law. In each case, the contracting authority must determine above all the purpose for which the colluding contractors acted. This is due to the linguistic interpretation of article 108 paragraph 1 point 5 of the PPL, the content of which omits the

effect prerequisite, distinguishing only the antitrust purpose of a prohibited agreement. Therefore, excluding a contractor is only possible on the basis of credible premise that reveal the contractor's intention to cause an effect in the form of restricting competition. In the case of such an agreement, its abusive nature should be clear enough that it is irrelevant whether the effect assumed by its participants occurs. It is crucial to assess both the volition and awareness with which the contractors undertook activity aimed at restricting competition. For this reason also, unconscious participation cannot be considered to fulfil the prerequisite for exclusion, as lack of knowledge makes it impossible to assign a contractor with intentional activity.

To sum up, a negative assessment should be made of the practice of equating the meaning of the term *prohibited agreement restricting competition* in article 6 of the ACACP and in article 108 paragraph 1 point 5 of the PPL. Bid collusion as a prerequisite for excluding a contractor is a term that is considerably narrower in comparison to the definition set by the ACACP, as its hypothesis covers a less extensive subjective scope (exclusively horizontal collusion) and also objective scope (it concerns only public tenders, and colluders must be conscious of the antitrust purpose of their activities). Such a structure of PPL provisions relating to the exclusion of contractors is the result of their purpose, namely the protection of specific proceedings for procurement of a public nature, and not the entirety of the market, which is the object of the ACACP regulations. Article 108 paragraph 1 point 5 of the PPL is directed against collusion of a higher and more evident degree of harmfulness, and also excludes the possibility of unconscious participation in such collusion.

3.1.1. Form

As mentioned in earlier points, the definition of bid collusion, whether on the basis of the Monopoly Act or other acts, must be broad enough in scope to facilitate all forms that the collusion may take in given proceedings. The possibility for collusion to be concluded in any form is an aspect for which there is a common interpretation both in the provisions of the ACACP and the PPL. The wording, place and time remain irrelevant, as does the formal authorisation to represent the people who concluded the agreement (Jaworska et al., 2022).

It is true that all the definitions discussed here contain an indication of the particular forms that a prohibited agreement can take (article 6 of the ACACP and article 101 of the TFEU contain open catalogues, while article 108 paragraph 1 point 5 of the PPL specifies collusion committed within one capital group). However, these lists are casuistic in nature and helpful in identifying the most obvious cases of collusion. As indicated in the NAC: *the identification of an agreement between a contractor and other contractors requires it to be determined in every case, on the basis of the circumstances accompanying analysis of the entirety of the events and actions that occur, and in such a way as to lead to the conclusion that in the course of typical, normal activities assessed through the lens of logic, the principles of life experience and statistical probability, certain events would not have a chance of occurring were it not for a prohibited agreement* (KIO 2213/17). The contracting authority must on every occasion assess the behaviour of the contractors taking into consideration the circumstances of the proceedings, and not base their decision exclusively on models proposed by the legislator or jurisprudence.

3.2. Bid Collusion as a Prerequisite for Rejecting a Bid

The procedure related to detecting bid collusion depends on the stage at which a prohibited agreement comes to light. In multi-stage proceedings, the subjective qualification stage takes place before the submitting of bids. If the contracting authority determines at this point on the basis of credible indications that an antitrust agreement has been concluded between contractors, it must exclude them from the proceedings according to article 108 paragraph 1 point 5 of the PPL, as discussed above.

However, if collusion comes to light after bids have been submitted, the contractor is still subject to exclusion according to the same provision, but their bid is rejected on the basis of article 226 paragraph 1 point 2 letter a. This provision obliges the rejection of all contractor bids subject to exclusion on the basis of any premise (Granecki and Granecka, 2021). It can therefore be said that in this case, rejection of a bid is of a consequential nature in relation to the actualisation of any of the premise for the mandatory exclusion of contractors.

However, it should be noted that in the catalogue of mandatory grounds for rejecting bids there is also an independent basis for rejection – due to submitting a bid under *conditions of an act of unfair competition in the understanding of the Act on combatting unfair competition* (article 226 paragraph 1 point 7 of the PPL). This is a reference to the CUC, which defines an act of unfair competition as *activity contrary to the law or good practice if it threatens or violates the interests of another entrepreneur or a client.* However, in article 15c the CUC specifies acts that violate the prohibition on practices restricting competition, to which it includes antitrust agreements in the understanding of article 6 of the ACACP. Therefore, the prerequisite for rejection of bids included in article 226 paragraph 1 point 7 of the PPL indirectly refers to the definition of bid collusion in its unmodified form from the Antitrust Act.

According to the position expressed in some of the literature (e.g. Jaworska et al., 2022; Sieradzka, 2022), the prerequisites for excluding contractors (article 108 paragraph 1 point 5 of the PPL) and rejecting bids (article 226 paragraph 1 point 7 of the PPL) due to the occurrence of bid collusion should be interpreted identically – according to the definition in article 6 of the ACACP. However, by accepting this interpretation, it would seem to be pointless to specify bid collusion as an act of unfair competition as a prerequisite for rejecting a bid if, at the same time, it constitutes a mandatory prerequisite for exclusion from proceedings, the fulfilment of which is associated with a further effect i.e. the subjective exclusion of the contractor, and in consequence, the rejection of their bid on the basis of article 226 paragraph 1 point 2 letter a (exclusion of a contractor), and not article 226 paragraph 1 point 7 (submitting a bid under conditions of an act of unfair competition). This would lead to the conclusion that submitting a bid under conditions of bid collusion automatically results in exclusion of the contractor from the proceedings, and the rejection of their bid is a subsequent action. This means that referring to the catalogue of acts of unfair competition should be carried out with the exclusion of article 15c of the CUC, as in the case of the occurrence of bid collusion it will never be applied – otherwise, two parallel legal norms will arise that require different rules of behaviour for an analogous factual situation.

Obviously, this view cannot stand in the face of systemic interpretation directives, as the assumption that a rational legislator led to internal contradictions between regulations is unacceptable. The key to resolving this issue are the considerations in the preceding subsection on the characteristics of the prerequisite for excluding contractors from article 108 paragraph 1 point 5 of the PPL. In formulating this prerequisite, the legislator narrowed the applicable definition in the Antitrust Act by referring only to the antitrust purpose of a prohibited agreement, the exclusion of other entities apart from the contractor from participating in the agreement, as well as excluding the possibility of committing this act unconsciously. Meanwhile, the prerequisite for rejecting a bid contained in article 226 paragraph 1 point 7 of the PPL refers to the definition of bid collusion in article 6 of the ACACP, on which scope it does not impose any limitations. This leads to the conclusion that this prerequisite for rejecting a bid refers to bid collusion in a broader understanding than that assumed by the prerequisite for excluding contractors. It therefore covers concluded agreements irrespective of the intentionality and concluded with any entities that could have an influence on violating fair competition in the proceedings (not only contractors).

Therefore, the defining models of bid collusion described in article 108 paragraph 1 point 5 and article 226 paragraph 1 point 7 of the PPL are not identical, as in the case of the prerequisite for excluding contractors there is a narrower subjective and objective scope, and an associated evidential process directed toward the antitrust purpose of the activity. In addition, actualisation of the prerequisite in article 108 paragraph 1 point 5 leads to more severe sanctions for the contractor in the form of subjective exclusion from the proceedings.

This conclusion can have measurable consequences in practice, as it allows for a certain 'gradation' of bid collusion and the sanctions for participating in such collusion. It is therefore possible to imagine a situation in which bid collusion occurs that is not the basis for excluding a contractor from the proceedings as it was committed e.g. unintentionally. It will be impossible to determine the contractor's antitrust purpose, and therefore this case may find itself outside the provisions of article 108 paragraph 1 point 5 of the PPL. Nevertheless, the contracting authority, which is obliged at every stage of the proceedings to abide by the principles of fair competition, cannot allow a procurement order to be executed by a contractor whose actions have had an antitrust effect. It would seem to be justified in this case for the proceedings host to make use of the possibility to reject the bid itself as it was submitted under conditions of an act of unfair competition (article 226 paragraph 1 point 7 of the PPL), without subjective disqualification of the contractor themselves, which could lead to an unintentional disruption of competition.

4. Evidential Rigour in NAC and Supreme Court Rulings

Due to the multiplicity of forms that bid collusion can take, as well as the secrecy that as a rule its parties attempt to maintain around it, such collusion is a difficult phenomenon to prove. The rulings of the NAC and the common courts attempt to counteract this by lowering the requirements as to the evidential rigour applicable in procurement proceedings.

Depending on the individual case, the ruling bodies adopt a varying level of rigour in terms of proving prohibited agreements. The provisions of article 108 paragraph 1 point 5 of the PPL do not oblige the contracting authority to prove the existence of collusion, but only to determine the occurrence of collusion on the basis of credible premises, *especially circumstantial evidence* - as can be read in the justification of the draft act (Uzasadnienie, 2019).

There is a well-established line of jurisprudence in the Supreme Court (SN III SK 6/06) and the National Chamber of Appeal (incl. KIO 3745/21, KIO 296/22) that advocates the admission of circumstantial evidence. The requirement to provide direct evidence would in practice significantly complicate or make it impossible to qualify the behaviour of contractors as bid collusion, as material that can constitute such type of evidence only exists in very few cases. Colluding parties seldom formalise their agreements e.g. in the form of contracts, and also avoid the creation of incriminating material. As a result, the contracting authority cannot be required to present such evidence, as they would be unable to effectively protect the competitiveness of proceedings.

There are also rulings of the Chamber that limit the use of circumstantial evidence. In the ruling of 15th March 2022, the NAC ruled that *the more tolerant burden of proof regarding bid collusion allowed for by the doctrine cannot be based on so-called circumstantial evidence, all the more so when the party alleging collusion does not demonstrate that such an agreement between contractors limits access to procurement orders for other contractors, or interferes with the contracting authority conducting competitive proceedings* (KIO 279/22). However, in another ruling the NAC implemented a certain 'gradation' to the weighting of circumstantial evidence, and also excluded the resolving of ambiguities to the detriment of contractors: *it is not appropriate nor acceptable to consider that uncertainties as to the existence of a prohibited agreement should be resolved to the detriment of contractors with respect to whom such uncertainties exist, and also, the presumption of the existence of such an agreement cannot be assumed on the basis of circumstantial evidence and accompanying circumstances. On the contrary – such circumstantial evidence must be substantial enough that in light of the principles of logic, life experience and statistical regularities, the conclusion will become obvious in a specific actual situation that a particular set of events would not have taken place if there was not a specific agreement between the entities* (KIO 2213/17).

In accordance with the doctrine, there is an obligation to investigate potential collusion in the context of the entirety of the evidence in the case. Specific events or facts that indicate the existence of collusion

cannot therefore be taken in isolation from the motives for their occurrence, wherein an antitrust purpose should be considered as a key prerequisite, as highlighted by the legislator. In addition, some rulings refer to a logical test to determine the probability of collusion occurring. Accordingly, this test should assess whether it is probable that a given state of affairs could have taken place during typical, normal activities, assessed using the lens of logic, the principles of life experience and statistical probability, if it were not for the prohibited agreement (KIO 2213/17).

Analysis of the views formulated by jurisprudence and doctrine leads to the conclusion that a contracting authority which has grounds to believe that they are dealing with a prohibited agreement that aims to disrupt competition, must analyse all the circumstances of the proceedings and the context of the cooperation between the contractors. They are not obliged to present direct evidence of collusion, however, they must indicate events that would not have taken place under conditions of free competition if it had not been for the actions of contractors aimed at disrupting such competition.

5. Conclusions

Prohibited agreements disrupting competition that are concluded between contractors constitute an act of unfair competition directed against fair competition and the equal treatment of contractors. Their occurrence does not permit the contracting authorities to realise the principles of economic efficiency in the expenditure of public funds, the consequence of which are considerable losses for society as a whole. For this reason, public procurement law requires the contracting authorities to detect and eliminate bid collusion.

There are, however, interpretive uncertainties resulting from the practice of applying the provisions of the PPL and the Antitrust Act, which refer to the term bid collusion differently. Based on EU regulations, article 6 of the ACACP normalises the general definition of a prohibited agreement that disrupts competition. Public Procurement Law also contains a reference to the above norm, however, due to the particular nature of PPL provisions, it modifies the definitional scope of bid collusion as occurring under these provisions.

In researching PPL norms, it should be noted that provisions relating to the evaluation of bids draws on antitrust law, while those relating to the subjective qualification of contractors were developed differently, narrowing both the subjective and objective scope in relation to the definition in article 6 of the ACACP. This specification may complicate the application of these norms at the identification stage of prohibited agreements, as well as their later justification before the National Appeals Chamber and the common courts.

In spite of this, the contracting authority must conduct their activities with due diligence, as well as meticulously investigate any signs of the occurrence of prohibited agreements disrupting competition, which due to continuing technological development may take on unconventional forms. It is therefore justified to put forward the *de lege ferenda* proposition for the further development of PPL provisions in order to make them more functional for the contracting authorities, but also without excessively limiting the contractors who should be assured of the viability of participation in public procurement without the need to commit acts of unfair competition.

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Zmowa przetargowa w Prawie zamówień publicznych

Streszczenie: Niedozwolone porozumienie ograniczające konkurencję, zwane też zmową przetargową, jest jednym z czynów nieuczciwej konkurencji typizowanym przez prawo antymonopolowe. Jego występowanie wiązane jest z wieloma patologiami rynku, dlatego jest zjawiskiem wysoce niepożądanym i eliminowanym z obrotu gospodarczego. Na gruncie zamówień publicznych zjawisko zmowy przetargowej jest szczególnie szkodliwe, ponieważ prowadzi do nieefektywnego gospodarowania środkami publicznymi. Z tego powodu ustawodawca włączył przesłanki wystąpienia zmowy przetargowej w instytucje prawa zamówień publicznych, służące zamawiającemu do ochrony konkurencyjności postępowania. Niniejsza publikacja skupia się na analizie porównawczej modelu porozumienia zakłócającego konkurencję, unormowanego na gruncie ustawy o ochronie konkurencji i konsumentów oraz przepisów Prawa zamówień publicznych. W drugiej z tych ustaw wyróżniona została zmowa przetargowa jako przesłanka wykluczenia podmiotowego wykonawców oraz odrzucenia ofert złożonych w warunkach czynu nieuczciwej konkurencji. Jednakże, w ramach przepisów p.z.p., definicja zmowy przetargowej obowiązująca w prawie antymonopolowym została zmodyfikowana, co ma wymierne skutki w zakresie stosowania tych norm przez zamawiających oraz organy orzecznicze.

Słowa kluczowe: zmowa przetargowa, niedozwolone porozumienie, prawo zamówień publicznych, czyn nieuczciwej konkurencji, ochrona konkurencji