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Consortium as a Way to Obtaining a Public Contract = Konsorcjum jako sposób na uzyskanie zamówienia publicznego

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CONSORTIUM AS A WAY TO OBTAINING A PUBLIC CONTRACT / Konsorcjum jako sposób na uzyskanie zamówienia publicznego

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STRESZCZENIE

Przedsiębiorca pragnący uzyskać zamówienie publiczne, musi spełnić wszystkie wymogi stawiane przez zamawiającego. Dotyczą one zarówno warunków technicznych, które są niezbędne do wykonania zobowiązania, jak i potencjału ekonomicznego czy posiadania odpowiedniej struktury organizacyjnej. Często przedsiębiorcy spełniają tylko część stawianych wymogów. Dlatego dla uzyskania zamówienia muszą połączyć swoje potencjały, ponieważ tylko w takim przypadku mają szansę na wygranie przetargu. Jest to możliwe, dzięki stworzeniu konsorcjum, które wystąpi jako jeden podmiot starający się o zamówienie publiczne. Celem artykułu jest próba ukazania, jak współpraca przedsiębiorców w ramach konsorcjum, służy uzyskaniu zamówienia publicznego. Analizie poddano dokumentację przetargową, z której nie wynika szczegółowo, jakimi zasobami dysponują poszczególni konsorcjanci. Pozwala natomiast na ogólne wnioski, że każdorazowo celem stworzenia konsorcjum było uzyskanie zamówienia publicznego. Dalsze badania postępowań w sprawie zamówień publicznych, w których wygrały konsorcja, w szczególności o inne przedmioty zamówienia, pozwolą na bardziej szczegółowe wnioski.

SŁOWA KLUCZOWE: PRZEDSIĘBIORCA, ZAMÓWIENIE PUBLICZNE, KONSORCJUM

JEL CLASSIFICATION: L24

ABSTRACT

An entrepreneur wishing to obtain a public contract has to meet all the requirements imposed by the contracting authority. The requirements concern both the technical conditions that are necessary to fulfil the commitment as well as the economic potential or having the appropriate organizational structure. Often entrepreneurs meet only some of the requirements. Therefore, to get the order, they have to combine their potentials because just in that case they have a chance to win a tender. This is possible thanks to the creation of a consortium that will act as a single entity applying for public procurement. The aim of the article is to try to show how cooperation between entrepreneurs within a consortium serves to obtain a public contract. The tender dossier was analyzed, which does not indicate in detail what resources are available to individual consortia. On the other hand, it allows general conclusions that each time the purpose of creating a consortium was to obtain a public contract. Further examination of the public procurement proceeding in which consortia won, in particular the other items of the contract, will allow for more detailed proposals.

KEY WORDS: ENTREPRENEUR, PUBLIC CONTRACT, CONSORTIUM, COOPERATION, PURCHASER, CONDITION

1. INTRODUCTION

Expenditure of public funds must be subject to special rules that ensure the best use of public funds from the point of view of the public interest. Therefore, the entities designated under Article 3 of the

Act of 29th January 2004 Public Procurement Law (Dz. U. z 2015 r. poz. 2164) are obliged to award contracts by the principles set out in this legal act. Knowledge of the number of public contracts awarded can be obtained from the information provided by the Public Procurement Office. From 1st January 2014 till 31st March 2017,

440049 (Biuletyny Informacyjne Urzędu Zamówień Publicznych 2014-04.2017) notices were published in the Public Procurement Bulletin and the EU Official Journal. Obtaining a public contract from an entrepreneur is subject to statutory restrictions such as, for example, limitations on the ability to make changes to a contract during its term, but is also beneficial to the contractor. As a result of the execution of a public contract, public funds are used. Their disbursements must follow the principles of Art.44 of the Act of 27 August 2009 on public finances (Dz. U. z 2013 r. poz. 885).

“Public expenditures should be made:

- 1) in a purposeful and frugal manner, with the following principles:
 - A) obtain the best effects from the given expenditure,
 - B) optimum selection of methods and means to achieve the objectives;
- 2) in a way that enables timely performance of tasks;
- 3) in amounts and dates resulting from previously incurred liabilities.”

Therefore, a public unit can not, as is clear from the provisions, deliberately cause a delay in the payment of a public contractor. This regulation is important for entrepreneurs applying for a public contract. Timely receipt of payment for the service or goods delivered, in the case of frequent delays in payments between entrepreneurs, is beneficial. An entrepreneur wishing to obtain a public contract must meet all the requirements imposed by the contracting authority. They concern both the technical conditions that are necessary to fulfil the commitment and the economic potential, the appropriate organisational structure or experience in performing the type of contract. An entity that can not meet the required requirements to obtain a public contract must be able to cooperate with one or more entrepreneurs.

The article aims is to try to show how cooperation between entrepreneurs within a consortium serves to obtain a public contract. The research method adopted in this article was an analysis of literature, legal regulations in force and documentation of tenders published between January 2015 and March 2017 by the Central Examination Board, whose subject matter was printing and which won the consortium.

2. CONCEPT OF CONSORTIUM

Increasing competition between entrepreneurs and too little technical or financial potential to meet them causes organizations to collaborate on a variety of level. Nowak

emphasises that “the interaction of companies in the process of creating goods and services is becoming more and more popular. It brings measurable benefits to all who participate in it, mainly by focusing on those functions that perform best and where they have a strong competitive position that is being strengthened by the ever deeper specialisation of the business” (Nowak, 2012: 685).

Just as collaboration and cooperation are beneficial for today’s business. “Taking action mutually compatible and complementary and having a positive impact on their impact on the achievement of business objectives.” (Lichtarski, 1992:13).

One of the forms of joint action of companies to achieve their stated goal is a consortium. This concept is differently defined. According to M. Romanowska, “a consortium is a specific form of an alliance consisting of combining the resources and skills of more than two companies to accomplish a common goal in the form of a joint venture of several participants or without the appointment of a separate economic unit” (Romanowska, 1997: 92).

W. Kieżun, on the other hand, points out that “a consortium is a company of firms that have a fixed period of time to carry out a large-scale joint operation. One of the members of the consortium plays the managerial role, and all actions are carried out on a common account”. (Kieżun, 1997:102).

There is no doubt that the realisation of a common goal is the basis for creating a consortium. Entities in the consortium are separate entities that retain the economic and legal meaning of the sole proprietors of their assets (Michalak, 2007: 33).

The interaction of participants within the consortium is assumed to be temporary in nature. According to Kisielnicki J. “Consortium is a link created to achieve a specific goal. It is not fundamentally related to the new organisation because it is a capital relationship, while the consortium’s companies are independent in carrying out their activities unrelated to the consortium’s purpose. Once the target is reached, the consortium divides profits and ceases to exist or is transformed into another type of union.” (Kisielnicki, 2008: 28).

Supernat J. explicitly states that the consortium is “a temporary union of two or more large (often multinational) organisations (corporations, banks, etc.) formed to jointly seek for a specific contract (highway construction, power plants, dams, etc.) Or in the case of banks

- to finance an extremely expensive project.” (Supernat, 1998: 64).

“A consortium is a specific organisational form of collaboration between several organizations to implement a joint project. It is, like other forms of project organization, temporary in nature, functioning during the implementation of the project, and after its completion is liquidated”. (Trocki, 2012: 352).

Only a few consortium definitions are presented to indicate its relevance to the entity applying for a public contract. In conclusion, each consortium is created to achieve a specific purpose, the entities forming them retain their independence - they may, without the intervention of the consortium, carry out their activities unrelated to the functioning of the consortium and remain the owners of their assets.

3. CONSORTIUM IN PUBLIC PROCUREMENT

“Public procurement is one of the important issues in the functioning of the modern state of law, where the authorities of that state are obliged to act on the basis and in the law. It is also important in the Polish legal system that public contracts are inextricably linked to public spending that is governed by legal rules.” (Nowicki, 2013: 16).

Entities obliged to apply the provisions of the Public Procurement Law must specify in detail what they want to order and what conditions must be met by the trader in order to obtain a public contract. Terms of participation in the proceedings constitute certain subjective qualities of the contractor, whose existence depends on the participation of the contractor in the procurement procedure. Limiting the risk of choosing a contractor unable to perform a public contract or for which, due to the subjective situation, the probability of performance of the contract is probable.” (Jędrzejewski, 2011: 35).

An enterprise which wishing to obtain a public contract is not always able to meet the conditions stated by the contracting authority in the public procurement notice itself. In order to meet all the criteria, one has to find the entity with which he will join the public procurement procedure.

“Among the reasons for the joint application of public procurement contractors are often the need to adjust to its size, complexity and increased risk. Of course, it is not necessary for the contracting authority to do anything for this purpose. In particular, it is not necessary to al-

low this possibility in terms of reference of the contract.” (Niczyporuk, 2013:100).

The form of joint application for a public contract is the creation by two or more consortium entrepreneurs. In order to obtain a public contract, consortia are formed by different types of enterprise. Diversification refers to the legal form of entrepreneurs – natural persons, legal entities; To the size of a business – SMEs but also large companies; Forms of ownership – private companies as well as state-owned enterprises, or places of business-Polish, foreign and mixed-company.

There are no restrictions here. Essence is the fulfillment as a consortium of terms envisaged in the public procurement notice, and as a result contracts for the execution of this contract. The law does not provide for a consortium as a separate legal entity, nor does it indicate what elements are to be included in the contract under which it is to arise. The public procurement law does not explicitly use the term “consortium”. Article 23 (1) provides for the possibility of joint application for a public contract. In practice, public procurement under this concept is understood to be a consortium as a contractor. Competencies, tasks facing the consortium members are either complementary or substitutive. In the first case, each entity will carry out part of the contract in which it specialises. For example, in the case of an IT contract, one of the members of the consortium will provide the equipment, the second will deal with its installation, the third will train the contracting staff, and the fourth will provide service and post-warranty service. In the case of complementarity between several members, the consortium will perform the same task, for example, the delivery of computers, since none of them would be able to deliver the total quantity of equipment subject to the contract in the time required by the contracting authority (Raczkiewicz, 2009: 63).

The rules of co-operation within the consortium of entrepreneurs determine themselves, and the provisions do not impose any obligation on them. “The consortium does not have to have a designated organisational structure (organ), nor does it have to have own assets separated from the assets of its participants. It is also not subject to any registration obligation, and the only document proving the existence of a consortium is the agreement of the consortium participants. This lack of formalism for joint procurement is a very important element that allows SMEs to increase their chances of applying for a public contract”. (Jerka, 2012: 17)

Formalization of the principles of cooperation of entrepreneurs in the form of documents is not only a result of their will but also of the provisions of the Public Procurement Law. When ordering a bid submitted by a consortium, the contracting authority may, before the conclusion of a public procurement contract, request the delivery of an agreement regulating the cooperation between consortia (Article 23 (4) of the PPL).

Despite the lack of regulation of the content of the consortium agreement in the legislation, the most important issues related to co-operation in the performance of public procurement should be included. It should specify the rules for the participation of the consortium as well as the costs of performance of the contract. Also relevant will be issues related to the timely execution of individual stages of the order or delivery of materials necessary for the performance of the subject matter of the contract, if this is due to the specificity of the contract. Contractors forming a consortium shall bear joint and several liability towards the contracting authority for the execution of a public contract, which results directly from the provisions of Article 141 of the Public Procurement Law. That is why entrepreneurs operating within a consortium should set out in detail the principles of their cooperation so as not to be exposed to the consequences of failure to perform or to delay the performance of the contract. Usually, contractual penalties are imposed on the contractor, who over-runs the contract for the duration of the contract. Termination of the contract due to the contractor's fault gives rise to liability for damages on his part. The duration of the consortium agreement cannot be shorter than the duration of the contract for a public contract. Consorts in the contract generally indicates the consortium leader. In the procedure for awarding a public contract, the contracting authority, if the contractor is seeking a contract together, is seeking a proxy. A plenipotentiary is usually the leader of a consortium whose task is to represent the consortium members in the proceedings and the conclusion of a public procurement contract. A power of attorney is most often given in a consortium agreement, in which the duties of all its members, including the leader, are indicated.

The consortium generally must meet the conditions for participation in the proceedings. However, before the amendment of the Public Procurement Law, which entered into force on 28th July, 2016, there were occasions where the condition, such as the competence or authority to conduct a particular occupational activity, was met by only one consortium. The amendment of July 2016 introduced paragraphs 5 and 6 of article 23 of the Public

Procurement Law. At present, the contracting authority may indicate the conditions for participation in the procedure to be fulfilled by the contractor acting as a consortium. Identification by the contracting authority of these requirements must be of an objective nature and relate to: the competence or powers to pursue a specific occupational activity, as provided for by separate provisions; Economic or financial standing; Technical or professional capacity (art.22 (1b of the PC)). The contracting authority may indicate these conditions only if justified by the nature of the contract and proportionally, e.g. requiring the borrower to have a creditworthiness for a specified amount and, in the case of a consortium, for each consortium to have that capability order but lower.

The contracting authority may also specify the conditions for the performance of the contract by contractors jointly applying for the contract, other than for individual contractors, if justified by the nature of the contract and proportionate (art. 23 (6) PPL). Where the terms of reference of the consortium are specified in the specifications of the essential terms of the contract, they shall be obliged to enter into the relevant provisions in the consortium agreement.

These additional requirements that the contracting entity may specify for the consortium do not jeopardize the substance of the consortium in public procurement. Still, consortia are uniting their potentials, and the provisions of paragraphs 5 and 6 of Article 23 of the PPL are unique. The contracting authorities must indicate that there are objective reasons for introducing these requirements into the terms of reference of the contract. It can be predicted that separate terms for consortia will be introduced in the so-sensitive orders, such as the construction of highways, and for most of the entrepreneurs involved in the proceedings will not matter.

4. CONSORTIUM SELECTED AS PROCUREMENT CONTRACTOR OF THE CENTRAL EXAMINATION COMMISSION

The documentation for the tenders announced from January 2015 to March 2017 by the Central Examination Board, which was printed and won the consortium, was analyzed.

Bidding procedures were characterized by very high requirements put forward by CKE to potential contractors. The necessity of having the technical, economic, financial and organizational potential indicated in the procurement notice by the contractor has led to the fact that

one entrepreneur did not have such large resources, so contracts were awarded to consortia.

In 2015 the consortium consisting of: Military Cartographic Enterprise LLC Warsaw-leader, Printing House POZKAL LLC Limited Partnership Inowrocław, Graphical Works of Toruń ZAPOLEX LLC won the tender for printing and distribution of examination materials for the general examinations in 2016: Middle school exam, secondary school certificate, central entrance exam, external examination.

The nature of the order required, in particular, to specify which entities can apply for the order. Except as required by law, the contractor should have experience in printing services. Only those entities which, during the last three years before the deadline for submission of tenders, were allowed to tender, and if their period of operation was shorter – during that period they performed:

- A) at least one or two print services (preparation for printing, printing, preparation for shipping) with total printing value of not less than PLN 10 million gross (and if the value in the contract is expressed in foreign currency - equivalent of PLN 10 million gross at the average exchange rate of the National Bank of Poland at the date of contract performance).
- B) at least one distribution service for at least 7 000 consignments delivered to addresses within a single distribution day within a specified hourly interval. This requirement was supposed to ensure the correct performance of the service but at the same time, it could have been difficult to meet by a single entity.

Apart from experience, the contracting authority also required the tenderer to have a suitable financial standing. The contractor must have a financial means or a credit capacity of not less than PLN 10 million. None of the consortiums themselves were able to meet the requirements set by the contracting authority, so the merger of the resources held within the consortium allowed him to submit an offer in the proceeding and obtain an order.

In 2016 another consortium won the tender announced by the Central Examination Board.

It was created by: Częstochowa Printing Company LLC-leader, Hungarian Banknote Printing Shareholding Company Budapest Hungary, DIPA Diósgyori Papirgyártó Zrt. Miskolc Hungary.

The object of the order was to make posters of certificates of the results of the gymnasium exam, the diploma of the certificate confirming the professional qualifica-

tions / certificates confirming the qualifications in the profession, the maturity certificates, on the paper with a watermark of special chemical composition that makes it impossible to remove prints and distribute them to the 8 Regional Examination Boards.

Apart from the indicated activities, the contractor had to be prepared to extend the subject of the order because the contracting authority reserved the possibility of using the option of extending the subject of the order with additional copies of the preprints in the case of demand going beyond the basic order. This extension could only take place after the delivery of the basic supplies. In the case of this contract, Central Examination Board also required the contractor to have experience in duly executed services.

They were:

- A) at least two services or supplies for the production of materials by means of an autoclave printing technology, with a value for each service rendered or delivery of not less than PLN 700,000 gross,
- B) at least two paper delivery services or supplies with a multi-tiered watermark with a value for each service or delivery not less than PLN 700,000 gross.

The entity submitting the offer was obliged not only to demonstrate experience in performance specified in the terms and conditions of the tender. The contracting authority also required the contractor to employ persons with experience in performing these services. Therefore, the contractor had to have at least two people, one of whom was involved in the process of making an autograph and the other took part in the process of producing a paper with a multi-toned watermark, with a circulation of not less than 100,000 units for each of them.

Also, it was necessary to combine the potentials of several entities. The Polish entity was unable to obtain a contract because only two printers in Poland had machines which could print the subject of the order. The requirement of the contractor to employ persons with experience in the execution of similar contracts has also caused the need to merge entities in order to obtain a public contract.

By the end of March 2017, two consortiums won two print auctions. Consortium concluded by: Military Cartographic Enterprise LLC Warsaw-leader, Printing House POZKAL LLC Limited Partnership Inowrocław, Graphical Works of Toruń ZAPOLEX LLC.

The subject of the order was the printing and distribution of examination materials for the general exam-

inations in 2017: the test, the middle school exam, the matriculation exam, the central entrance exam, the extramural exam. The terms and conditions for bidders in this proceeding concerned both service experience and financial standing. The Contractor was required to have a financial or credit capacity of not less than PLN 10 million, and if the financial means or creditworthiness was expressed in foreign currency - the equivalent of PLN Gross 10,000,000, according to the average exchange rate of the National Bank of Poland as at the date of issue.

The ordering party required the tenderer to:

- A) at least one print service (preparation for printing, printing, preparation for shipping) with a total printing value of not less than PLN 10,000,000 (in case the value in the contract is expressed in foreign currency – the equivalent of 10,000,000 Gross PLN at the average exchange rate of the National Bank of Poland at the date of contract performance);
- B) at least one distribution service to at least 6,000 recipients delivered to those recipients within a single distribution day within a specified time interval not exceeding 3 hours in total, with acknowledgement of receipt by the addresses.

Another consortium that won the tender in 2017 was Czerny Marian Private Company “Greg” Gliwice – leader and GREG PRINT LLC Gliwice.

The subject of the order was the printing and distribution of examination materials for the professional exam in June-July 2017. As in the previous tenders mentioned, the contracting authority also specified the specific conditions that the contractor had to fulfil. They were: financial situation and experience. The contractor must have a financial means or a credit capacity of not less than PLN 3,000,000. Experience required at least one service:

- A) in the scope of printing (preparation for printing, printing) with a printing value of less than PLN Gross 2,000,000;
- B) one distribution service to at least 3,000 recipients delivered to those recipients within a single distribution day within a specified interval not exceeding 3 hours in total, with acknowledgement of receipt by the addresses.

The Central Examination Board has announced tenders for a special type of printing. The subject matter of the order was the result of legal regulations, such as the design of the matriculation certificates, which required special care, as well as the protection of the data, from being read by unauthorized persons such as exam pa-

pers. The subject of the order has justified the imposition of specific conditions on each occasion. Self-fulfillment by the entrepreneur would be difficult, therefore they acted as a consortium.

The tender dossier was analyzed, which does not indicate in detail what resources are available to individual consortia. On the other hand, it allows general conclusions that each time the purpose of creating a consortium was to obtain a public contract. Further examination of the public procurement proceeding in which consortia won, in particular the other items of the contract, will allow for more detailed proposals.

5. SUMMATION

An entrepreneur wishing to obtain a public contract must plan in detail the way he or she operates in the proceedings and at the same time draw up plans for the performance of the contract in the event of a win. The analysis of the tender notice gives the entrepreneur an answer to the question whether he can fulfil all the requirements and, consequently, perform the order, or whether he needs another entity to work with him when performing the contract.

The combination of individual potential entities makes it possible to obtain a public contract in proceedings. The examples presented by the consortiums created for the tenders announced by the Central Examination Board indicate that the cooperation allows increasing their market opportunities. The subject of cooperation can be found not only in Poland but also in other countries. Just willingness to cooperate and the true potential is essential. If there were no possibility of connecting potentials, in many cases one trader would not get a public contract. It would also not be advantageous for the ordering party as it would lead to the monopolization of the public procurement market by several entities. One of the principles of public procurement is the principle of free competition, which, thanks to the possibility of creating consortia, is fully realised.

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