

Bid rigging in public procurement market according to the decisions of the President of the Office of Competition and Consumer Protection

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Abstract:

Aim: In the practice of awarding public contracts, sometimes the behavior of market actors, instead of competing with other entities, are aimed at illegal cooperation, including bid rigging. The above shows that healthy competition is not possible without efficient market control. In public procurement market this control is, primarily, carried out by public procurement entities: the President of the Public Procurement Office (Prezes UZP) and the National Appeal Chamber (KIO), and furthermore by President of the Office of Competition (Prezes UOKiK) and Consumer Protection and the Court of Competition and Consumer Protection (SOKiK). The interesting issue is how the activities of the President of Office of Competition and Consumer Protection targeted to contend with bid rigging affects on the activities of President of the Public Procurement Office (Prezes UZP) or the National Appeal Chamber (KIO).

Design / Research methods: analysis and comparison decisions/ judgment issued by the President of the Public Procurement Office, National Appeal Chamber, the President of the Office of Competition and Consumer Protection and the Court of Competition and Consumer Protection.

Conclusions: The analysis has shown that the existence of specificities in the activities of the decision-making bodies and the judgments examined. However, in keeping with the specificity of the forms and objectives of control, these entities should cooperate, to a greater extent than before. Expanding the scope of cooperation would make it possible to better contend with bid rigging without changing the competition protection model. The introduction of institutionalized instruments for cooperation between the authorities seems to be valuable in terms of system solutions.

Value of the article: The main value of the article is the comparison of selectively selected decisions and judgments representative of the problem under consideration and their comparative analysis in order to achieve the research objectives. The article deals with issues relevant to both public procurement practitioners and the state bodies dealing with procurement matters.

Keywords: bid rigging, public procurement market, judicial review of bid rigging.
JEL: K21, K22

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1. Introduction

Competition, being a component of the freedom of establishment – though not explicitly mentioned in the Constitution of the Republic of Poland – forms one of the fundamental pillars of the concept of market economy. Paradoxically, undisturbed market competition is impossible without regulatory measures introduced by economic administration. This conclusion can be phrased as “a general obligation of the legislative authorities to issue relevant legislation aimed at creating or, potentially, protecting, the existing competition mechanisms” (Strzyczkowski 2011: 113). Currently, legislation creating such protective measures is dispersed among many acts of law, including the *Act on Fair Trading* of April 16, 1993 (consolidated text: Dz.U. [Journal of Laws] of 2003, No. 153, item 1502 as amended; hereinafter AFT), *Competition and Consumer Protection Act* (consolidated text: Dz.U. [Journal of Laws] of 2015, item 184, as amended; hereinafter CCPA), or the *Public Procurement Law Act* (consolidated text: Dz.U. [Journal of Laws] of 2013, item 907 as amended; hereinafter PPLA) (cf. Olszewski 2012: 239)¹.

To protect the system of competition, legislation must be supplemented by executive interventions, involving, among other things, the control of compliance with adopted laws. In public procurement market this control is, primarily, carried out by public procurement entities: the President of the Public Procurement Office and the National Appeal Chamber, and furthermore by the President of the Office of Competition and Consumer Protection and the Court of Competition and Consumer Protection. For these bodies, one of the common spheres of competition protection within the public procurement market is contend with bid rigging.

This article sets out to answer the question on the effectiveness of the nature and level of cooperation between heterogenic bodies – with respect to subjects involved in particular contracts – in terms of protection of the professed market values. In consequence, it is necessary to present the experiences of administrative authorities, with special emphasis on the President of the Office of Competition and Consumer Protection (UOKiK), related to combating prohibited cooperation on the public procurement market. Furthermore, it is necessary to attempt a description of features specific to competition, analyse case law exploring differences in assessing premises for contract termination, and to present the decisions of the President of the Office of Competition and Consumer Protection (hereinafter also: UOKiK President) that have been repealed on appeal by

¹ The author classifies PPLA as a piece of legislation that lays down supra-sectoral guarantees for fair competition.

the Competition and Consumer Protection Tribunal (i.e. the 17th Division of the Regional Court in Warsaw, hereinafter: SOKiK).

2. The dual nature of bid rigging control on the market of public contracts

Economic changes brought about by the systemic transformation have been accompanied by legislative developments, resulting in a number of acts, including the Public Procurement Law Act of 10 June 1994 (Dz.U. [Journal of Laws] of 1994, No. 76, item 344 as amended), that initiated the national process of creating systemic mechanisms governing public spending, harmonising Polish law with the EU standards, including procurement directives, the major objective of which was to make tenders competitive (Kieres 2008:13). The position of competition as an independent value stems from the basic assumption that underpin economics, pursuant to which not only does market competition cause the decrease of prices of goods and services, but also contributes to the increased innovativeness or promotion of non-price related qualities of offered goods, thereby generating benefits for the public procurement system. However, competition and correct management of public spending² is at risk because of certain actions by market players, including prohibited forms of cooperation. Not only national, but also supranational authorities find it necessary to combat tender collusion (European Commission 2014).

Although Polish public procurement regulations, unlike in the German system, are collected in one act, tools aimed at protecting competitions, combating collusions, are dispersed over numerous regulations³. At the same time, the scopes of specific regulations intermingle. As a result, competition on the Polish public procurement market is protected in a two-fold manner. Firstly, it is regulated directly by PPLA, and exercised by the internal subject: the organiser of the tender procedure, and external authorities: the President of the Public Procurement Office (hereinafter UZP President), National Appeal Tribunal (hereinafter KIO) and common courts. The second tier

² The value of the public procurement market in 2013 amounted to PLN 143.2 bn (Report by the President of the Public Procurement Office on the functioning of the public procurement system in 2013, Warsaw 2014: 26–27).

³ In Germany the situation is different, since the basic act of law in the public procurement system is the Act on Preventing Restrictions to Competition (Ger.: *Gesetz gegen Wettbewerbsbeschränkungen*, GWB for short) of July 15, 2005. German legal system is characterised by higher intensity of competition protection tools in one piece of legislation, but, on the other hand, regulations related to procurement are dispersed.

of protection stems from CCPA and AFC, the compliance with which is ensured by the UOKiK President and the Competition and Consumer Protection Tribunal.

The Contracting Party – as responsible for planning and conducting a public procurement procedure – must not only exercise due diligence to ensure its actions comply with rules and laws (including the fundamental principle of protection of fair competition and fair treatment), but also guarantee fair assessment of contractors' actions. Numerous provisions oblige the contracting party to eliminate unfair contractors, including the ones who have concluded an agreement infringing the law (cf. Różowicz, 2015a: 52–55). Contracting Parties are controlled by the President of the Public Procurement Office (cf. Różowicz 2014a: 243–258) and, within legal protection measures – by the National Appeal Tribunal and common courts (cf. Różowicz 2014b). The protection of competition in this context refers to competition in the context of specific tender proceedings, carried out to satisfy the needs of the contracting party, and – in a broader perspective – collective needs (cf. Szydło 2014: 153; Stober 2004: 227–228).

Both the measures undertaken by the President of UOKiK and their judiciary control aim at protecting broadly construed competition. Pursuant to the principle of legality, actions of the President of UOKiK are based on a legislative framework intended to protect competition against any shortcomings. The law (including the ban on bid rigging) is applied on the premise of protecting public interest and not individual interest of an individual or a group (cf. the judgement of the Anti-Monopoly Tribunal of November 19, 2001, file ref. no. XVII AMA 2/01). The UOKiK protects competition as a market mechanism favouring entrepreneurship, consumer interests and preventing abuse of market power. Anti-monopoly legislation introduces, *inter alia*, a ban on agreements that aim at or result in eliminating, restricting or otherwise infringing competition on the relevant market, involving in particular the agreement between entrepreneurs participating in a tender, or between such entrepreneurs and the entrepreneurs organising the tender, conditions of submitted bids, in particular the scope of works or the price (Article 6 CCPA). Bid rigging cases are subject to more than one legal regime, and as a result actions detrimental to competition may be controlled by various entities. Therefore, since pursuant to Article 29 CCPA the President of UOKiK is the central government authority specialised in the matters of competition protection, the KIO case law and the decisions of the contracting parties should build on the experiences of this authority.

3. Bid rigging on the Polish public procurement market

Substantially, cases of bid rigging may be classified into two major categories: vertical and horizontal bid rigging. For the purpose of this paper, agreements between contractors are of key importance, and they fall into the latter category. These agreements are concluded between entities functioning at the same level of business transactions – competitors operating together on the supply side of the market. Bid rigging involves participants' resignation from competing in favour of collaborating when submitting bids. In every case, bid rigging leads to at least partial determination of the content of bids or tender strategy by independent contractors, with the aim of restricting competition to the detriment of the contracting party. "Bid rigging deprives buyers and taxpayers of cash, contributes to the decrease of the level of public trust with respect to competitive practices, weakens benefits arising of the competitive nature of the market" (OECD 2009: 1).

The analysis of the President of UOKIK's decisions delineates several fundamental mechanisms used by contractors concluding a prohibited agreement, namely: a rotational mechanism of bidding, submitting courtesy bids or submitting and withdrawing bids (Różowicz 2015b: ³⁹⁻⁴³). However, this is not an exhaustive list of prohibited forms of cooperation (Zmowy 2013).

3.1 Submitting and withdrawing bids as a basic model of bid rigging

The most common mechanism on the Polish market is the submission and withdrawal of bids, involving submitting courtesy bids and bid restriction. Under this mechanism, bidders agree on the content of their bids and differentiate between them so as to ensure that they rank first after being open. Once this stage is reached, the most favourable bid is withdrawn or steps are taken to ensure its elimination, aiming at ensuring that the least favourable of the bids submitted by colluding parties is selected.

To illustrate this method of unfair collaboration, let us discuss an example. We will assume that three bidders: A, B and C submit their bids in the tender, and the first two of them are in collusion. Contractors A and B would like to get the highest price possible for their performance, but they do not know the bid that will be submitted by contractor C. By cooperating together, A and B can minimise negative consequences of the choice between the need to present the best bid

possible to maximise their chances of being awarded the contract and the willingness to maximise profit. At the same time, by way of prohibited cooperation, bidders decrease the effectiveness of the tender tools A and B offer two different prices: a lower bid with incomplete documentation, which means that the bidder must be called to complete the bid under Article 26(3) PPLA, and a higher price in a complete bid, increasing bidders' chances to control the tender. If the bid by bidder C is higher than the highest bid of colluding contractors, the colluding contractor who submitted the lower bid will not supplement the documentation, making bidder B win. (The use of the mechanism of submitting and withdrawing bids was confirmed, *inter alia*, in the decision of the President of UOKiK of October 9, 2005, file ref. No. RPZ-28/2005). The decision of the President of UOKiK of December 31, 2012 (file ref. no. RWR-31/2012) points out that the investigation confirmed that at least two entrepreneurs running bakeries agreed their bids in at least six tenders for the delivery of, *inter alia*, bread and flour to detention, educational and healthcare facilities. If the bids by the parties to an anti-competition agreement took the first two places in a tender, the winner – having obtained information on the results – notified the contracting parties of its withdrawal from the contract quoting very general grounds for its resignation, e.g. economic, organisational or personal circumstances. In this way, an agreement was signed with the second colluding bidder, whose offer was more expensive.

The mechanism of tender-related collusions has been noticed also in KIO case law, where it is understood in the same way (cf. the KIO judgement of May 25, 2010, file ref. no. KIO/UZP 867/10; the KIO judgement of May 7, 2014, file ref. no. KIO 813/14). KIO's practice in this respect should be viewed positively. At the same time it must be emphasized that the positions of KIO and the President of UOKiK are not always the same. The discrepancies are visible, for instance, in a case that was examined by the two authorities. In the decision of September 6, 2011 (file ref. no. RKT-25/2011), the President of UOKiK found that contractors have rigged bids in at least 19 public procurement procedures. In its judgement of February 23, 2010 (file ref. no. KIO/UZP 1941/09) KIO, assessing contractors' conduct in one of these procedures, KIO found no premises of unfair cooperation. The difference between these conclusions may result from the broader approach adopted by the President of UOKiK who assessed a higher number of contractors' behaviours and from limited time KIO had to examine the case.⁴

⁴ Pursuant to Article 189(1) PPLA, KIO examines an appeal within 15 days from the date of its receipt by the President of KIO. In Polish law, deadlines laid down for KIO to examine an appeal, issue a judgement and draft the statement of reasons have the nature of instructions. In practice, KIO makes efforts to ensure this deadline is kept. The average

3.2 Bid rigging and the concept of single economic unit

The CCPA and PPL regulations do not prohibit all forms of cooperation between bidders. The President of UOKiK, following the single economic unit concept developed in the EU case law and adopted by Polish courts, cannot take measures stipulated by CCPA if the entities' operations are not independent. To conclude that there is a "single economic unit" in a procedure, there must be capital or actual relations within a capital group that deprive its subsidiaries of the actual freedom to determine their own actions on the market (Materna 2009: 130–133, 154–155). However, neither legal literature nor case law have developed a clear and exhaustive definition of a capital group. The fast-paced changes to our business reality are one of the reasons why it has been so difficult. As argued by the Court of Justice of the European Union (hereinafter: CJEU) in its judgements of May, 19 2009 in the case C-538/07 *Assitur Srl v. Camera di Commercio, Industria, Artigianato e Agricoltura di Milano* and of March 3, 2005 in the case C-21/03 and C-34/03 *Fabricom SA v. Belgia*, capital groups may take various forms and set different goals. In consequence, the concept of a capital group is not dependent on the existence of a specific legal form or the occurrence of certain normative relationships between specific entities. Pursuant to the definition in Article 4(14) CCPA, a capital group means all entrepreneurs that are directly or indirectly controlled by one entrepreneur including the controlling entrepreneur himself. In consequence, a capital group can be defined as "a set of two or more legally independent business entities, permanently affiliated by means of capital, personal, strategic, contractual, organisational or market relationships, where one enterprise acts as a dominant (parent) entity controlling the remaining subsidiaries or affiliates and which may pursue common business goals arising of the connections between them" (Grabiec 2011: 41–42). In practice, in the context of the public procurement market it has been assumed, among other things, that "spouses, as natural persons running business similar in kind at one address and having statutory joint marital property, are connected by the bonds typical of a capital group" (KIO judgement of June 26, 2014, file ref. No. KIO 1181/14).

Irrespectively of adopting the single economic unit concept, it is necessary to emphasize that entities belonging to one capital group may submit separate bids in the same tender. This

waiting time to have an appeal examined at the Court's sitting is 8 days, while judgements in cases instituted by the appeals are issued in 16 days (Report of the President of the Public Procurement Office on the functioning of the public procurement system in 2013 [in Polish], Warsaw 2014:7).

opportunity allows them to manipulate the result of the tender to the detriment of the purchaser. It is a consequence of the fact that close mutual relationships between such enterprises facilitate a broad exchange of information on prices or other terms and conditions of their respective bids. For this purpose, the impact of the said concept has been limited in the public procurement system. “Informator Urzędu Zamówień Publicznych”, an publication of the Public Procurement Office, explains that Article 24(2)(5) of PPLA is “a manifestation of legislator’s intent to protect the correct course of the proceedings whenever bids or applications for participation are submitted by entrepreneurs that constitute one economic entity” (Starzyk 2013: 38) It must be emphasized that the sole fact of belonging to one capital group does not exclude a contractor *ex lege* from the proceedings, but results in contracting party’s obligation to explain this issue. If a contractor submits a list of entities belonging to the same capital group, it is requested by the ordering party to provide explanations on the relationships referred to in Article 24(2)(5) PPLA in order to determine whether the conditions for excluding a contractor have been met (Różowicz 2014c).

Given the different treatment of cooperation between entities within capital groups in the context of CCPA and PPLA, it is not possible to develop a uniform position in this respect. However, there are no obstacles for players on the public procurement market to rely auxiliarily on legal literature in the field of competition protection, e.g. when assessing whether a specific organisational structure can be classified as a capital group.

3.3 Establishment of an illegal consortium

Apart from creating capital groups, business entities may also cooperate by forming consortia. However, this form of cooperation may result in the breach of the CCPA and PPLA provisions. A consortium is one of the forms of cooperation falling within the scope of an agreement referred to in Article 6 CCPA. In consequence, if the establishment of a tender consortium results in the restriction of competition, it forms a prohibited agreement restricting competition. Polish law does not include any legal definition of a consortium. In legal literature on public procurement law it has been assumed that a consortium is an *entity created by way of an agreement by entities conducting business activity* with the aim to submit a common bid and, once the contract has been awarded to them, its joint performance (Daszkiewicz 2015). A consortium does not need to have any specified organisational structure or its own assets separated from the

assets of its members. In literature it has been argued that a consortium agreement is treated as an enriched (atypical) civil law partnership agreement (Stecki 1997: 140–146). According to L. Stecki, the opinion that a consortium and a civil law partnership share a number of common qualities is supported by the fact that a consortium, just like a civil law partnership involves a specific commonness of interests and legal-economic risks of its members. Both institutions require its members to cooperate in order to achieve a specified economic goal. The assessment of the consortium's legality should be always based on the reasons for which the consortium was established. However, to determine this issue in a specific case can be very difficult. European Commission's guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union may be of help in this analysis. It provides that: "commercialisation agreement is normally not likely to create competition concerns if it is objectively necessary to allow one party to enter a market it could not have entered individually or with a more limited number of parties than the ones effectively taking part in the co-operation (...)" (European Commission, 2010). The compliance with the legal framework stipulated for the consortium seems to be the criterion common for the competition protection law and the public procurement law. A contractor will be eliminated from the procurement procedure on the grounds of Article 89(1)(3) PPLA, since its bid is an unfair competition practice in the meaning of AFT (Article 3(1)). So far only one decision of the President of UOKiK, referring to a consortium established for the purpose of tender proceedings, has been repealed by SOKiK. In the decision of December 31, 2012 (file ref. No. RLU-38/2012), the President of UOKiK found the establishment of consortia for the purposes of a tender procedure involving a contract for the collection of waste in Białystok a prohibited agreement restricting competition. The authority did not agree with the rationale for the establishment of the consortium presented by its members. The entrepreneurs pointed to technical limitations that were to prevent them from bidding for the contract independently. The President of UOKiK found that the necessary cooperation between M. and A., which was to be the consequence of such limitations, in fact did not take place. Consequently, the President of UOKiK presented the view that the establishment of the consortium was anti-competitive, while its purpose was to maintain the existing market share disregarding competitive mechanisms.

Meanwhile, in its judgement of March 10, 2015 (file ref. No. XVII AmA 73/13) SOKiK arrived at a different conclusion finding and stated that: "*in the opinion of the court, claimants' actions involving a conclusion of an agreement for the purpose of presenting a common bid in a*

tender do not infringe the provision [article 6(1)(7) CCPA – author’s note]”. The adjudicating panel of SOKiK found that the contractors had proven that they had not been able, without incurring loss, to perform the contract. Contractors argued that by acting jointly they would improve their effectiveness, while the conditions of their joint offer were more favourable to the contracting party than the conditions they could present in separate bids (cf. Article 8(1) CCPA). As M. Sieradzka is right to emphasize, the “anticompetitive nature of a consortium [in this case – author’s note] excludes the existence of an economic rationale for a common bid. In such a case, the exclusion of competition between contractors submitting a common bid is compensated, in a way, by the benefits for the customers of the consortium” (Sieradzka 2015). In consequence, no agreement restricting competition took place. In this respect, the difference of opinion between the President of UOKiK and SOKiK boils down to a different interpretation of facts and does not involve a difference in the interpretation of law, and as such will not be analysed further.

However, one of the claims included in the rationale to the SOKiK judgement should be challenged. The judgement provides that: “only the agreements that are concluded by entrepreneurs participating in a tender separately should be considered banned in the meaning of the act”. To adopt a view that a group of entities acting as a consortium cannot infringe the ban on prohibited agreements as only single entrepreneurs bidding separately may infringe this ban may lead to the violation of the principle of equal treatment of contractors, which follows from a broader constitutional principle of equality. To adopt the view presented by SOKiK would mean that consortium members openly infringing the law would go away with impunity, while contractors acting on the basis of a secret collusion would be liable to face negative consequences of their unfair practices. Secrecy of an agreement and presenting independent bids are not constitutive elements of bid rigging, though the bid rigging parties substantially strive to keep such agreements secret in order to evade their negative consequences. An open establishment of illegal cooperation and the submission of one bid does not mean that the activities cease to be illegal. Moreover, the definition included in Article 6 CCPA does not offer any premises to conclude that a collusion (agreement) can take place only when two bids are being submitted. A prohibited agreement is to result in the elimination, restriction or infringement of competition or must aim at obtaining such effects, while its form, as such, is not determined by the act. In view of the legal definition and legal literature on the topic, it cannot be concluded that bid rigging takes place only when several bids are submitted in a tender. Even the submission of one offer that would classify as a prohibited

agreement infringes the provisions of CCPA. For instance, one could quote the mechanism of bid suppression, which involves an agreement where parties decide that one or more entities interested in the tender would not submit their bid. This method is often combined with other measures aimed at attaining a broader goal of market share division.

If one adopted this view, an agreement resulting in the submission of one, overestimated bid by a consortium where its members would be able to submit single bids, would not be considered prohibited. Going one step further, one should conclude that it would be acceptable for two competitors on a duopolist market to form a consortium and submit one joint unfavourable bid. Even in such an extreme situation, the contracting party would be unable to reject the bids by unfair contractors. Furthermore, if no circumstances referred to in Article 93(1)(4) PPL took place, the contracting party would be obliged to award the order to such a consortium. Taking the foregoing into account, it seems that SOKiK's opinion should not be supported, while the consortium members participating in the tender should cooperate in the scope and form that would not infringe the competition protection law.

4. Conclusion

The existence of restrictions to competition calls for state intervention aimed at removing them and restoring undisturbed market mechanisms. The principle of competition protection guarantees the effective and healthy functioning of the mechanisms of market economy. As M.A. Waligórski claims, the limits of intervention “result from objective premises for the organisation of the social process of management” (Waligórski 2001: 49). The public law intervention framework applicable to the cooperation of market entities are, as it seems, compliant with the rule of proportionality and the balance between private and public interests. Legislation allows for a broad scope of cooperation possibilities, banning only the cooperation that would aim at distorting competition for the sole purpose of increasing economic profits of the business partners concerned.

However, the protection of competition requires that its guardians be equipped with relevant legal tools. The reasoning presented above has shown that both public procurement market players and the President of UOKiK and SOKiK have at their disposal mechanisms enabling them to prevent bid rigging. The specificity of the control procedures and partially different rules

governing the cooperation bans prevent the full exchange of knowledge and experiences between these bodies. However, subject to the maintenance of the specificity of forms and purposes of control, these authorities should collaborate to a broader extent than so far. The President of UOKiK has noted this issue (UOKiK 2014). There is no need for the cooperation to be fully institutionalized. The soft forms of assistance seems also to be very useful.

In the author's opinion, when it comes to systemic solutions, it would be advisable to introduce a communication tool between the contracting parties and the antimonopoly authority referred to in the "Competition policy for 2014–2018", supplemented by communication tools available to KIO. To extend the competencies of the competition protection authority authorising it to issue opinions in appeal procedures before KIO and common courts would provide these bodies with specialist knowledge. However, the opinions should not be binding for the authorities settling appeals. This tool would allow for holding contractors liable both at the stage of a tender and in proceedings before the President of UOKiK. Moreover, it would possibly decrease the number of discrepancies in case law. However, considering the economics of tender proceedings and the proceedings before KIO, UOKiK would need to verify cases and issue opinions expediently. The proposed solution includes also the obligation of the contracting parties to notify UOKiK whenever they suspect bid rigging. This proposal requires a cautious approach, since to ensure full effectiveness of this solution it would be necessary to introduce liability of the contracting party or its employees for failure to perform this duty. Given the nature of the tender procedure whose fundamental aim is to purchase goods and services, and not to prevent unfair market practices, additional tasks should rather be "good practices" and should not put the contracting parties at risk of becoming liable as a result of contractors' unfair conduct. What is more, this solution seems to unnecessarily formalise operations, as despite the lack of such an obligation contracting parties often notify the President of UOKiK of suspected cases of collusion (cf. the decision of the President of UOKiK of July 21, 2005, file ref. no. RPZ-20/2005; the decision of the President of UOKiK of October 4, 2010, file ref. no. RWR-24/2010).

The extended scope of cooperation would facilitate the efforts to prevent bid rigging without any need to depart from the dualist system of competition protection which currently is inter-complementary and creates a transparent and coherent model. Double control measures resulting from an exceedingly broad scope of duties imposed on the public procurement sector with

respect to competition protection would result, *sensu largo*, in the repetition of tasks, potentially leading to two adverse effects (cf. Szustakiewicz 2013: 39–42):

- the “inflation of control” which renders post-control findings as unimportant, trivial, trifle,
- self-protective actions by the controlled entities. Controlled entities operate not in order to reasonably attain the goals for the purpose of which they were established, but to evade potential charges by auditors. Control should not result in fear about taking reasonable measures by controlled entities” (Panasiuk 2013: 60).

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Zmowy przetargowe na rynku zamówień publicznych w świetle decyzji Prezesa UOKiK

Streszczenie:

Cel: w praktyce udzielania zamówień publicznych, niekiedy zachowania podmiotów działających na rynku, zamiast być zorientowane na konkurowanie z innymi podmiotami, nakierowane są na nielegalną współpracę, w tym poprzez zawieranie zmów przetargowych. Powyższe ukazuje, że zdrowa konkurencja nie jest możliwa bez sprawnie działającej kontroli nad rynkami. W obszarze zamówień publicznych kontrolę tę sprawują przede wszystkim podmioty zamówień publicznych: Prezes Urzędu Zamówień Publicznych (Prezes UZP) i Krajowa Izba Odwoławcza (KIO) a ponadto także Prezes Urzędu Ochrony Konkurencji i Konsumentów (Prezes UOKiK) oraz Sąd Ochrony Konkurencji i Konsumentów (SOKiK). W świetle powyższego interesującym zagadnieniem jest sposób w jaki działania Prezesa UOKiK nakierowane na zwalczanie zmów przetargowych, wpływają na działalność Prezesa Urzędu Zamówień Publicznych (Prezes UZP) lub Krajowej Izby Odwoławczej (KIO).

Metoda badawcza: analiza i porównanie decyzji i orzeczeń wydanych przez Prezesa UZP, KIO, Prezesa UOKiK oraz SOKiK.

Wnioski: poczynione w opracowaniu analizy wykazały, że istnienie swoistości w działaniach organów wydających decyzje i orzeczenia poddane badaniu. Jednakże z zachowaniem swoistości form i celów kontroli podmioty te powinny współpracować, w szerszym zakresie niż dotychczas. Poszerzenie zakresu współpracy umożliwiłoby lepsze zwalczanie zmów przetargowych bez konieczności odchodzenia od dualistycznego modelu ochrony konkurencji. W zakresie rozwiązań systemowych cenne wydaje się wprowadzenie zinstytucjonalizowanych instrumentów współpracy organów.

Wartość artykułu: podstawową wartością artykułu jest porównanie selektywnie wybranych decyzji i orzeczeń reprezentatywnych dla badanego zagadnienia oraz poddanie ich analizie porównawczej, w celu osiągnięcia celów badawczych. Artykuł porusza zagadnienia istotne zarówno dla praktyków zamówień publicznych jak i dla organów państwa zajmujących się materią zmów przetargowych.

Słowa kluczowe: zminy przetargowe, rynek zamówień publicznych, kontrola sądowa zmów przetargowych.
JEL: K21, K22