



Joint bidding under competition rules

New section on joint bidding in the revised Horizontal Guidelines

In June, the European Commission (EC) adopted the new Horizontal Block Exemption Regulations and Guidelines to horizontal co-operation agreements. The guidelines incorporate one new section on joint bidding.

What do the new Guidelines say?

CoAs a starting point, the Guidelines distinguish between joint bidding and bid rigging. The latter refers to agreements which aim to distort competition in public procurement procedures, pre-determining the tenderer to win, while creating the impression that the procedure is competitive. Bid rigging is a cartel and one of the most serious restrictions of competition. Joint bidding refers to a situation where two or more undertakings cooperate to submit a joint bid. The Guidelines identify a number of situations in which bidding consortia may be allowed or justified.

On the one hand, if the parties cannot individually participate in the tender and, therefore, are not competitors for the project performance, cooperation does not constitute a restriction of competition. A good example of this would be a joint bidding agreement where two parties supply different products or services that are necessary to present an offer for the whole contract. However, the EC explicitly states that where parties are not able to bid for the whole contract, but to bid for one lot, they must be considered competitors. The EC also clarifies that the mere theoretical possibility of carrying out the project individually does not make the parties competitors; it is necessary to assess “whether each party is realistically capable of completing the contract on its own, taking into account the specific circumstances of the case”.

On the other hand, if the parties are capable of bidding individually and are, therefore, competitors, joint bidding might restrict competition. However, such joint bidding agreements between competitors may be justified under competition rules. As a general rule, cooperation may be justified if the joint bid allows the parties to submit a more competitive offer - in terms of price and/or quality - than the offers they could have submitted on their own, and the benefits for the parties and consumers outweigh the restrictions of competition. For example, where two competitors could individually bid for a lot, but only jointly could present an offer for the whole contract and realistically win the tender, joint bidding would be justified.

Finally, the Guidelines state that only the information strictly necessary for the formulation of the bid and the performance of the contract should be shared between the members of the consortium.
oferta y la ejecución del contrato.

Our comments

We welcome these guidelines and believe they will facilitate collaboration, but it remains to be seen how the courts will interpret them. On the basis of the previous guidelines, our courts allow joint bidding where it is indispensable for the performance of the contract. However, some recent judgments have deviated from this position and justified cooperation on the grounds of economic reasonableness, a stance that appears to be more in line with these new Guidelines.