

# TENDERERS' RESPONSE TO CPBs: JOINT BIDDING AND BIDS FROM RELATED TENDERERS

*Grith Skovgaard Ølykke, Ph.D., Commercial Law Consultant, Principal, Poul  
Schmith/Kammeradvokaten*



# CENTRALISATION OF PROCUREMENT: INCENTIVES FOR ECONOMIC OPERATORS

CPB allows contracting authorities to:

Aggregate volume → Lower price  
Lower cost of procurement



Framework agreements:

- Higher total value
- Higher predicted contract value
- Wider range of goods/services
- More complex goods/services

Economic operators could respond by:

**Increase chance  
of qualifying**

- Collaborate, e.g. in consortia

**Increase chance  
of winning**

- Qualify with multiple applications
- Reserve multiple spaces on framework

# CONSORTIA

## Article 19(2) of Directive 2014/24:

“Groups of economic operators, including temporary associations, may participate in procurement procedures.”

## Article 57 of Directive 2014/24:

”4. Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:

[...]

(d) where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;”

## Article 101 TFEU

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, [...] which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;  
[...]

(c) share markets or sources of supply;  
[...]

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

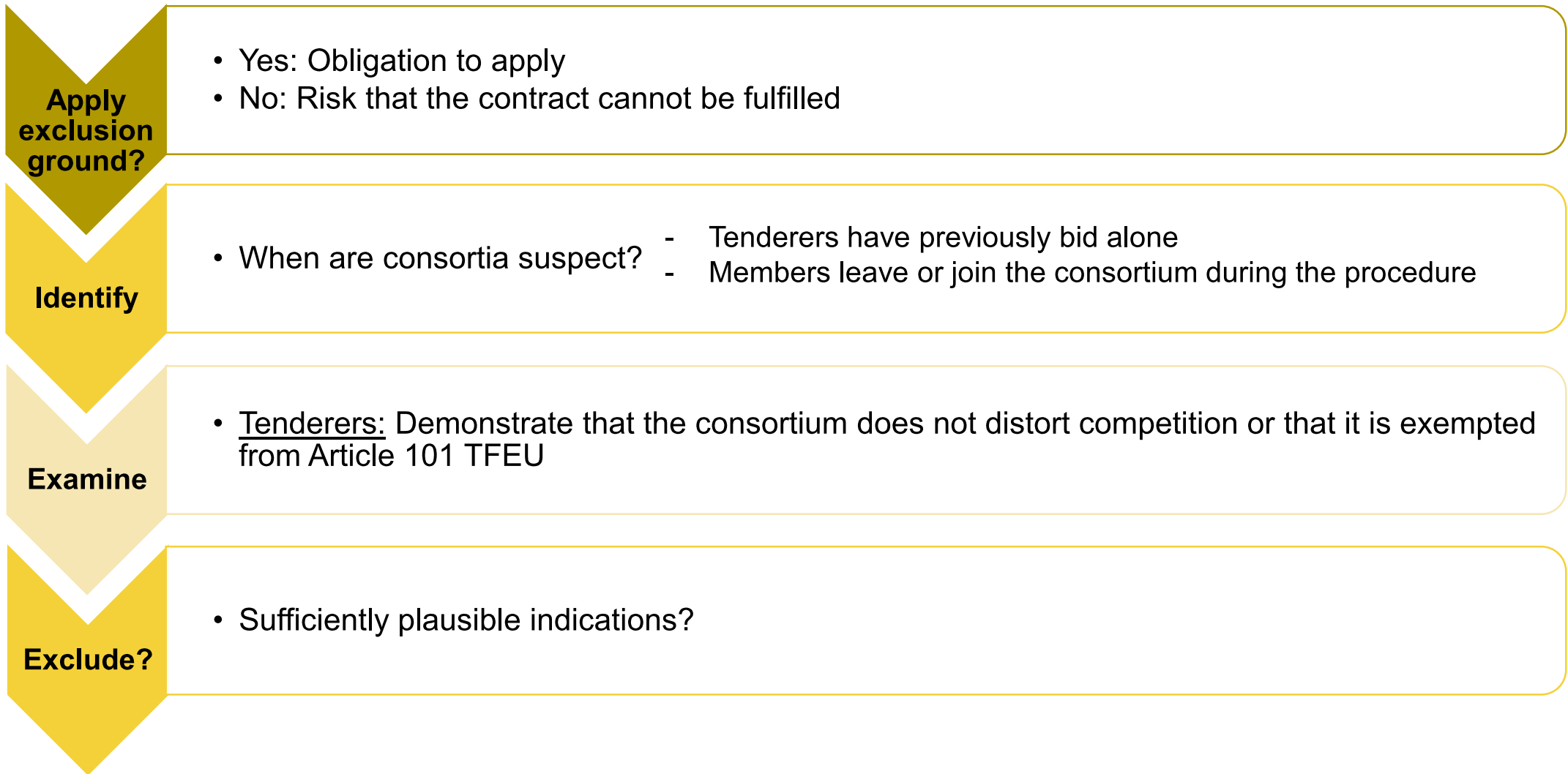
## Draft Guidelines on Horizontal Agreements 2022:

”391. A joint bidding consortium agreement – irrespective of its legal qualification – does not restrict competition if it allows the undertakings involved to participate in projects that they would not be able to undertake individually...

[...]

394. If it is not possible to exclude that the parties to the consortium agreement could each compete individually in the tender (or if there are more parties to a consortium agreement than necessary), the joint bid may restrict competition.”

# CONSORTIA – DUTIES OF THE CONTRACTING AUTHORITY



# CONSORTIA - CRITERIA FOR ASSESSMENT

## Does the consortium agreement distort competition?

Are the members competitors?

- Are members on the same market?
- If members are on the same market, could they tender alone?

What is the agreement about?

- Distortion of competition vs real collaboration

## May the consortium agreement be exempted acc to Article 101(3) TFEU

- improving the production or distribution of goods, or
  - promoting technical or economic progress, while
  - allowing consumers a fair share of the resulting benefit
- and not
- impose restrictions which are not indispensable
  - eliminate competition in respect of a substantial part of the products in question.

Consult NCA?



# RELATED TENDERERS

- **TEA-CEGOS** (T-376 and 383/05)  
EU:T:2006:47, upheld by Order in TEA-CEGOS (C-189/06 P) EU:C:2007:242
- **Assitur** (C-538/07) EU:C:2009:317
- **Impresa Edilux and SICEF** (C-425/14)  
EU:C:2015:721
- **Lloyd's of London** (C-144/17)  
EU:C:2018:78
- **Specializuotas transportas** (C-531/16)  
EU:C:2018:324
- **J. Sch. Omnibusunternehmen and K. Reisen** (C-416/21) EU:C:2022:689
- **BTA Baltic Insurance Company** (C-769/21)  
EU:C:2022:973

*"In this context of a single internal market and effective competition it is the concern of Community law to ensure the widest possible participation by tenderers in a call for tenders"*  
(Assitur)

*"....the principle of equal treatment ...would be infringed if related tenderers were allowed to submit coordinated or concerted tenders, that is to say, tenders that are neither autonomous nor independent, which would be likely to give them unjustified advantages in relation to the other tenderers,..."* (Specializuotas transportas)

# RELATED TENDERERS

## – DUTIES OF THE CONTRACTING AUTHORITY

### Identify

- How?
- When?

### Examine

- Tenderer: Demonstrate autonomous and independent application, tender, conduct
- Contracting authority: Demonstrate unjustified advantage in relation to other tenderers

### Exclude?

- Objective evidence (direct + indicia) of that *the links between tenderers had a bearing on the content of the tenders they submitted during the same procedure*

# RELATED TENDERERS – CRITERIA FOR ASSESSMENT

## ”Autonomous and independent”

- Decision to participate
- Content of tender
- Conduct during tender

*”...groups of undertakings can have different forms and objectives, which do not necessarily preclude controlled undertakings from enjoying a certain autonomy in the conduct of their commercial policy and their economic activities, **inter alia, in the area of their participation in the award of public contracts.** Moreover, relationships between undertakings in the same group may be governed by specific provisions, for example of a contractual nature, such as to guarantee both independence and confidentiality in the **drawing-up of tenders** to be submitted simultaneously by the undertakings in question in the same tendering procedure” (E.g. Assitur, Specializuotas transportas)*

## ”Unjustified advantage in relation to other tenderers”

- Presumption (rebuttable?)
- What if there is no other tenderers?



# TAKE AWAYS



- Increased focus on consortia?
- "New" mandatory exclusion ground – patchwork style
  - Many open issues incl. identification vs obligation to reject
  - Should related tenderers always be allowed?
- Why difference between exclusion of consortia and related tenderers?
- Does the contracting authority get the best contract?



# THANK YOU FOR YOUR ATTENTION

The pictures used in this presentation are covered by an agreement between Poul Schmith and VISDA.

This presentation and the pictures contained herein are for the recipient's internal use only and may not be distributed.