

# ICA publishes draft public statement regarding joint bidding by competitors

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### Introduction

The Israeli Competition Authority (ICA) recently published a draft public statement for comment regarding the submission of joint bids by competitors in tenders. The draft proposes an interpretation of the Competition Law that may significantly affect the business activities of entities operating in Israeli tender markets.

The ICA's draft public statement significantly limits the ability to conduct self-assessment for joint bidding. This may, in turn, result in significantly increasing the need to obtain prior approval to joint bidding. The ICA's draft public statement also lists the primary considerations that will guide the competition commissioner when examining requests to exempt joint bidding. These considerations can also be implemented by the parties when performing a self-assessment in cases where the block exemption applies.

### Joint bidding

Tenders are particularly sensitive from a competition law standpoint. In the framework of one competitive process (the tender), the winner secures the full demand of a product or service for a prolonged period. In these circumstances, competitors' incentives to reduce competition between them are significantly increased, thus making a tender process susceptible to harm to competition. The bigger the scope of the tender and the longer the term, the greater the risk of disruption to the competitive process. On the other hand, cooperation between competitors to submit a joint bid often increases competition in the tender by enabling parties to share risk, combine their expertise and compete more effectively in the tender.

### Highlights of draft public statement

The starting point for the competitive analysis of a submission of joint bids by competitors is that such cooperation is a restrictive arrangement. As such, its legality relies on meeting the thresholds of a relevant block exemption or obtaining a preliminary approval from the competition commissioner. In order to determine whether a given cooperation warrants prior approval, the following must be answered:

- Is the cooperation carried out between competitors?
- If so, is it possible to apply one or several block exemptions?

The answers that the draft public statement provides to both questions significantly reduce parties' discretion to self-assess the legality of their contemplated cooperation and will likely channel them to seek prior approval.

#### ***When will the cooperation be considered a 'cooperation carried out between competitors'?***

The draft adopts a broad definition of the term 'competitors'. According to the draft, submission of a joint bid will be considered a cooperation carried out between competitors if it meets one of the following conditions:

- the cooperation is between parties that meet the qualification conditions for the tender or can meet them by investing reasonable resources and the parties have activities which are related (even indirectly) to the area of activity which is the subject of the tender; or
- the cooperation is between parties that compete in the area of activity which is the subject of the tender activity, even if they do not or cannot meet the qualification condition for the tender.

The draft clarifies that the parties' classification as 'competitors' should be examined with respect to the time

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before the joint bid is contemplated, when each party has the complete discretion to decide to independently participate in the tender. A party's decision not to participate in the tender due to an agreement with another party does not render the parties as non-competitors. The draft also clarifies that cooperation between competitors in the pre-qualification stage of a tender will also be deemed a restrictive arrangement which warrants an exemption.

### ***Must parties obtain prior approval for the submission of joint bids?***

The draft adopts a strict approach in this regard. According to the draft, in general, the block exemption for joint ventures cannot be applied to the submission of joint bids on tenders for the supply of a product or service – since this would be considered a joint marketing of a product or service, which is excluded from the block exemption. Nonetheless, the joint bidding arrangement may be subject to the *de minimis* block exemption, although this exemption is subject to low market shares threshold.

The draft public statement does not preclude the applicability of the block exemption for joint ventures on submission of joint bids in tenders for acquisition of an asset or service. In such cases, the block exemption may apply only for cases where the joint purchasing is not inherently connected with joint marketing by the parties after the tender is concluded (eg, a tender for the procurement of a power station would require the parties of the joint bid to cooperate on the marketing of the electricity generated by the station after the tender is won. In such cases, the joint ventures block exemption may not apply).

Lastly, for cases where prior approval is required, the draft states that the competition commissioner will consider:

- the effective number of competitors in the tender considering the nature of the tender (some tenders would require a lower minimal number of bidders to alleviate concern of harm to competition);
- the identity of the joint bidders, including with regard to:
  - their participation in similar tenders in the past;
  - whether they expressed clear intention to submit an independent bid; and
  - whether they have unique characteristics which will give them an advantage over other bidders;
- how the contemplated joint bid will affect the parties' incentives to compete outside of the tender. The commissioner will also consider whether the joint bid will create a platform for the parties to interact in a manner liable to reduce competition between them or to enable the flow of information between them. In that context, the commissioner will consider:
  - the significance of the tender in relation to the parties' overall areas of activity;
  - the level of competition outside the tender;
  - the parties' respective market shares;
  - the competitive proximity between them; and
  - the existence of contractual mechanisms aimed at preventing disclosure of competitively sensitive information between them; and
- the business rational of the joint bid. As with any other restrictive arrangement, the joint bid must not be aimed at preventing or reducing competition (it must not be a 'naked' arrangement) and it must not include restrictions which are unnecessary to fulfil its objectives. As such, the joint bid must have a legitimate business purpose, which cannot be obtained by less restrictive measures.

### **Comment**

The draft public statement reflects the competition commissioner's suspicious view of joint bidding by competitors. Prior to this publication, there was some ambiguity regarding the applicability of the block exemption for joint ventures on joint bidding by competitors. It is evident that under the commissioner's draft public statement, many such joint bids will be subject to the commissioner's prior approval.

The ICA received comments from the public and is currently reviewing them. Some of the more challenging aspects of the public statement, which are liable to inflate the number of exemptions reviewed by the ICA and potentially cause a possible impediment to tender processes, will likely be reconsidered and more practical guidance will be issued. Foreign entities that consider participating in bids in Israel as part of a group should be aware that they may need to obtain the competition commissioner's prior approval.

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