



# CHANGES IN THE COMPOSITION OF A CONSORTIUM

# AGENDA

What is a consortium?

Changes to the consortium

Changes during the award  
phase

Changes during the  
execution phase

# WHAT IS A CONSORTIUM?

Article 2.1 Directive 2014/24/EU:

‘economic operator’ means any natural or legal person or public entity **or group of such persons and/or entities, including any temporary association of undertakings**, which offers the execution of works and/or a work, the supply of products or the provision of services on the market

→ Consortium acts as candidate or tenderer

Preamble 15 & Article 19.2&3 Directive 2014/24/EU:

It should be clarified that groups of economic operators, including where they have come together in the form of a temporary association, may participate in award procedures **without it being necessary for them to take on a specific legal form**. To the extent this is necessary, for instance where joint and several liability is required, a specific form may be required when such groups are awarded the contract.

# CHANGES TO THE CONSORTIUM

The legal form of a temporary association of undertakings ('joint venture') is determined by national law.

But, in general:

- joint and several liability of the members
- or, in case of separate legal form ('integrated association'), no limitation of liability

Thus:

- changes = changes to the composition (member leaves/joins, association is dissolved, ...)
- in case of limited liability structures ('companies') changes = change of control → not in focus today

# CHANGES DURING THE AWARD PHASE

Changes prior to tender submission <> changes after tender submission (2-phased procedures: changes to the candidate).

In Belgium, usually regulated in the tender specifications → prior consent from the contracting authority for 2 main reasons:

- does the changed consortium still meet all tender requirements (e.g. selection criteria, technical requirements etc.)
- does the change impact the fair competition between the candidates / tenderers?

In general, the key question is the possible negative impact on free competition, e.g. changes to consortia in PPP projects after preferred bidder(s) was (were) appointed

## CHANGES DURING THE AWARD PHASE (2)

CJEU 24 May 2016, C-396/14, MT Højgaard and Züblin

Question: does the principle of equal treatment of economic operators preclude a contracting entity from allowing an economic operator (member of a consortium of 2 undertakings that was pre-selected in a negotiated procedure and had already submitted a 1<sup>st</sup> offer) to continue to take part in the award procedure as a 'stand-alone' tenderer following the dissolution of the consortium due to the bankruptcy of the other member?

Short answer: no

Long answer: next slides

## CHANGES DURING THE AWARD PHASE (3)

CJEU 24 May 2016, C-396/14, MT Højgaard and Züblin

In absence of EU (and Danish) rules on the composition of bidding consortia:

36. *'the question of whether a contracting entity may allow such an alteration must be **examined with regard to the general principles of EU law**, in particular the principle of equal treatment and the duty of transparency that flows from it, and the objectives of that law in relation to public procurement'*

38. *'The principle of equal treatment of tenderers, the aim of which is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure, **requires that all tenderers must be afforded equality of opportunity when formulating their tenders**, and therefore implies that the tenders of all competitors must be subject to the same conditions ...'* → only selected undertakings can submit an offer

41 *'the rules on qualitative selection may be qualified [JD: modified?] in order to ensure, in a negotiated procedure, adequate competition ...'*

42 *'the contracting entity considered that there should be at least four candidates in order to ensure such competition'* → CJEU gives quite some importance to this specific fact

## CHANGES DURING THE AWARD PHASE (4)

CJEU 24 May 2016, C-396/14, MT Højgaard and Züblin

43. *'If, however, an economic operator is to continue to participate in the negotiated procedure in its own name, following the dissolution of the group of which it formed part and which had been pre-selected by the contracting entity, **that continued participation must take place in conditions which do not infringe the principle of equal treatment of the tenderers as a whole**'*

44. *'In that regard, a contracting entity is not in breach of that principle where it permits one of two economic operators, who formed part of a group of undertakings that had, as such, been invited to submit tenders by that contracting entity, to take the place of that group following the group's dissolution, and to take part, in its own name, in the negotiated procedure for the award of a public contract, **provided that it is established, first, that that economic operator by itself meets the requirements laid down by the contracting entity and, second, that the continuation of its participation in that procedure does not mean that the other tenderers are placed at a competitive disadvantage**'* → competition law aspect: surviving member took over key personnel of bankrupt partner → CJEU it is for the referring court to determine whether this operator thereby acquired a competitive advantage at the expense of the other tenderers



# CHANGES DURING THE AWARD PHASE (5)

CJEU, 23 November 2003, C-57/01, Makedoniko Metro:

‘Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts **does not preclude national rules which prohibit a change in the composition of a group consortium taking part in a procedure for the award of a public works contract or a public works concession which occurs after submission of tenders**’

61. *‘Rules about [the composition of consortia] are thus a matter for the Member States’* → in Belgium, legal doctrine treats both cases (before and after submission of the (final) tender) on the same basis

## CHANGES DURING THE AWARD PHASE (6)

Position of A. Sanchez-Graells, *Public procurement and the EU competition rules*, Oxford, Hart, 2<sup>nd</sup> edition, 2015, 339:

Member States should **depart from formal criteria** based on rigid interpretations of the principle of equal treatment in designing their domestic provisions on bidding consortia—such as rules regulating their composition, their modification, etc.

Rules on bidding consortia should adopt a pro-competitive orientation and, consequently, should **foster participation of consortia to the maximum possible extent permitted by competition law**.

**Modifications of a group of contractors should be allowed** under national public procurement rules **if they are not material, in the sense that the modified composition or internal rules of the consortium have not altered the contracting authority's decision to qualify the group or to allow it to proceed to any of the stages of the procurement process already conducted**.

It is submitted that this flexibility should go as far as to allow for the substitution of a consortium with one of its (leading) members, as long as it can prove that it still fulfils all the relevant requirements set by the tender specifications and documents.

# CHANGES DURING THE AWARD PHASE (7)

General Court 29 October 2015, T-199/14, Vanbreda Risk&benefits

Changing the consortium is no solution for regulating an irregular tender, e.g. when a member is (willingly) non-compliant with essential tender requirements

- Contract for insurance services, Tender specifications required, in case of a consortium, that all members should have " joint responsibility [...] in executing the contract"
- 2 bidders (Vanbreda and a consortium led by broker Marsh) → AIG, member of the Marsh consortium, refused on principle to jointly undertake liability → Vanbreda claimed this allowed Marsh to offer a lower price & GC agrees:

98. *'Therefore, even if the total price of the successful tender has actually not changed for the Commission, **the conditions negotiated between the broker sole contractor and the rest of the insurance companies have undoubtedly been changed**'*

## CHANGES DURING THE AWARD PHASE (8)

Some Belgian case law:

- Belgian Council of State, 15 September 2016: member of consortium is allowed to proceed with the submission of a BAFO after refusal of its consortium partner to do so, even if this is done in the name of a newly formed consortium with a different company → case-specific considerations, amongst which:
  - the fact that there was only one other tenderer and that competition would be seriously impacted if the changed consortium was prevented from submitting a BAFO
  - 3 of the 4 key consortium members remained the same (designer, contractor and operator) and only the developer changed

## CHANGES DURING THE AWARD PHASE (9)

Some Belgian case law:

- Belgian Council of State, 3 July 2012: in 2-phased procedures, corporate restructuring can entail that a tender is submitted by another undertaking than the one who was selected, e.g. mergers or demergers) → criterion = legal succession (in part or in general)

# CHANGES DURING THE EXECUTION PHASE

Article 72.1 (d) Directive 2014/24/EU

Contracts may be modified without a new procurement procedure if a new contractor replaces the one to which the contracting authority had initially awarded the contract as a consequence of:

- an unequivocal review clause or option (see Article 72.1 (a))
- **universal or partial succession into the position of the initial contractor, following corporate restructuring**, including takeover, merger, acquisition or insolvency, of another economic operator that **fulfils the criteria for qualitative selection** initially established provided that this does **not entail other substantial modifications** to the contract and is **not aimed at circumventing the application of the Directive**
- the fact that the contracting authority itself assumes the main contractor's obligations towards its subcontractors (where this possibility is provided for under national legislation, e.g. not in Belgium)

# CHANGES DURING THE EXECUTION PHASE (2)

CJEU 19 June 2008, C-454/06, Presstext Nachrichtenagentur GmbH

40. *'As a rule, **the substitution of a new contractual partner for the one to which the contracting authority had initially awarded the contract must be regarded as constituting a change to one of the essential terms** of the public contract in question, unless that substitution was provided for in the terms of the initial contract, such as, by way of example, provision for sub-contracting'*

43. *'However, some of the specific characteristics of the transfer of the activity in question permit the conclusion that such amendments, made in a situation such as that at issue in the main proceedings, do not constitute a change to an essential term of the contract'*

44. *'According to the information in the case-file, **APA-OTS is a wholly-owned subsidiary of APA, APA has the power to instruct APA-OTS in the conduct and management of its business and the two companies are bound by a contract under which profit and loss are transferred to and assumed by APA.** The case-file also shows that a person authorised to represent APA assured the contracting authority that, following the transfer of the OTS services, **APA was jointly and severally liable with APA-OTS** and that there would be no change in the overall performance experienced'*

## CHANGES DURING THE EXECUTION PHASE (3)

CJEU 19 June 2008, C-454/06, Presstext Nachrichtenagentur GmbH

45. *‘Such an arrangement is, in essence, **an internal reorganisation** of the contractual partner, which does not modify in any fundamental manner the terms of the initial contract’*

47. *‘**If the shares in APA-OTS were transferred to a third party** during the currency of the contract at issue in the main proceedings, this **would no longer be an internal reorganisation** of the initial contractual partner, but an actual change of contractual partner, which would, as a rule, be an amendment to an essential term of the contract’*



## CHANGES DURING THE EXECUTION PHASE (3)

CJEU 19 June 2008, C-454/06, Presstext Nachrichtenagentur GmbH

### **Quid in case of change of control rather than transfer of contract?**

51. *'Public contracts are regularly awarded to legal persons. If a legal person is established as a public company listed on a stock exchange, it follows from its very nature that the composition of its shareholders is liable to change at any time. As a rule, such a situation does not affect the validity of the award of a public contract to such a company. The situation may be otherwise in exceptional cases, such as when there are practices intended to circumvent Community rules governing public contracts'*

52. *'Similar considerations apply in the case of public contracts awarded to legal persons established not as publicly-listed companies but as limited liability registered cooperatives, as in the main proceedings. **Any changes to the composition of the shareholders in such a cooperative will not, as a rule, result in a material contractual amendment'***

# CHANGES DURING THE EXECUTION PHASE (4)

CJEU 3 February 2022, C-461/20, Advania Sverige AB:

Transfer of 4 framework agreements to new contractor following the insolvency of the initial contractor.

23. *‘as regards the wording of Article 72(1)(d)(ii) (...) the replacement of the contractor to whom the contracting authority initially awarded the contract is authorised only ‘as a result of a universal or partial succession of the original contractor’. It follows that that succession may involve the taking over, by the new contractor, of all or only part of the assets of the initial contractor and **may therefore involve (...) the transfer only of a public contract or of a framework agreement making up the assets of the initial contractor**’*

25. *‘The fact remains that that provision provides that such succession is subject to the condition that **the new contractor fulfils the qualitative selection criteria** initially established’ → more difficult if new contractor does not take over (part of) the business, as is the case here*

## CHANGES DURING THE EXECUTION PHASE (5)

CJEU 3 February 2022, C-461/20, Advania Sverige AB:

30. *'(...) the concept of 'insolvency', must be interpreted strictly in so far as, [Article 72.1 (d) ] sets out an exception. (...) however, that interpretation cannot render that exception ineffective. It would do so if the term 'insolvency' were limited solely to situations in which the business of the original contractor falling within the scope of the framework agreement at issue was taken over by the new contractor, at least in part, and if that term were not understood in its usual broader sense'* → insolvency does not require a transfer of activities (in part or in general), e.g. transfer of business capital ('fonds de commerce') (see conclusions Adv.-Gen. Saugmandsgaard Øe, ro. 52-56)

→ Not only bankruptcy but also protective measures, e.g. protection from creditors ('Chapter 11') falls under insolvency

# CHANGES DURING THE EXECUTION PHASE (6)

## → Impact of national (corporate&insolvency) law on application of Article 72.1 (d)

E.g., under Belgian law, the prior consent of the contracting authority is required before transferring the contract to another contractor:

- based on wording of Article 72 and the transposing Article 38/3 of the Royal Decree of 14 January 2013 (“contracts may be modified”) & fact that in prior versions of the Royal Decree this was expressly stated
- based on general contract law requiring the consent of the creditor in case of debt transfer (Articles 5:187 and following New Civil Code)
- based on the need to verify if the selection criteria are still met with (which is the contracting authority’s responsibility)

→ discussion: what if another set of regulation makes that the transfer of the contract can be imposed (automatically) on any (third) party, e.g. transfer of an insurance portfolio

## CHANGES DURING THE EXECUTION PHASE (7)

Case is made in Belgian doctrine (in parallel with quote from Sanchez-Graels above) to create more room for changes on the contractor's side as long as this (1) does not diminish the capacity (financial, technical) of the contractor and (2) does not impede on free competition rules.

The latter requires, imho, an objective reason for the change, other than purely commercial reasons.



# THANK YOU!

Jens Debièvre

[jens@debievre.eu](mailto:jens@debievre.eu)

+32 486 286 538

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**Footnote: On 26 September, the CJEU rendered a judgement in line with what was discussed in the presentation ([cases C-403/23 and 404/23](#)).**