

# Joint tenders

25 May 2017  
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# Estonian (draft) law





# Joint tendering – demands from the new law

- **New Public Procurement does not give much directions:**
  - Solidary liability
  - Obligation to decide on the authorised party
  - Normally, no right to demand for foundation of a joint company
  - Right to rely on each other's qualifications
  - Contracting authority may demand that the proportion of each tenderer is published
- **What to consider when making a joint tender:**
  - No right to offer as a consortium – all legal persons are different tenderers
  - Competition law may prohibit joint tendering
    - Forbidden if possible to bid alone
  - Liability between the joint tenderers should be agreed on in advance
    - Fulfilment of the contract, damages, penalties etc.



# Estonian courts on joint tendering

- **Joint tenderers are not exactly joint** (Supreme Court 3-2-1-56-13)
  - Grounds for exclusion regarding one tenderer does not mean that the whole joint tenderer should be left out
  - The other part of the joint tenderer who was not left out, may continue as a sole tenderer
    - Raises questions about possible breaches of competition law again
- **It does not matter who gets the money from the previous procurement contract** (Circuit Court 3-16-924)
  - Joint tenderer relied on a subcontractors experience who participated in a joint tender
  - It was claimed that the subcontractor does not have the needed previous experience because the money for the works was transferred to the other joint tenderer
  - Court stated that transferring the money is unimportant as long as the subcontractor participated and can prove it

# **Lithuanian (current and new) law**







# Regulation and case law in Lithuania (1)

- Contracting authority **should calculate joint capacities** of joint venture partners, and only in specific cases should request capacity of each partner separately (according to the PPO recommendations)
- In line with the case law, **limitations for joint venture are forbidden** (number of partners etc. should not be limited)
- **Competition law** should be taken into account
- Formation of the joint venture **depends on the tender conditions**
  - Establishment of a legal person
  - Agreement
  - Declaration etc.





## Regulation and case law in Lithuania (2)

- Partners are **jointly liable** before the contracting authority.
- Each and every partner **can be blacklisted** in case of failure
- **Freedom of contract** applies as long as the agreement corresponds to the tender conditions:
  - Liability among each other
  - Proportions in the joint venture
  - Distribution of profit and losses
  - Communication rules etc.





## Regulation and case law in Lithuania (3)

- Indication of **leading (main) partner** is usual requirement
  - Responsibility for communication, delivery, acceptance of funds etc.
- However, in line with the case law, **each partner has independent right to apply to the court**, dispute decisions of the CA





**Latvia**





# Joint tenders

- Tenderers are allowed to **join capabilities** in order to qualify
- Usually capabilities of members of joint tenders are **counted together**
- Contracting authority is **prohibited to require concrete legal arrangement**
- Two possibilities: **sub-contracting or consortium**
- **Freedom to agree on anything** as long as legal and complies with the rules of the tender in question
- **Exclusion grounds** apply to the following persons:
  - Members of consortium (including prior non-fulfilment of a contract with the same contracting authority)
  - Sub-contractors with share of work of at least 10%
- Contracting authority should **request to change** the non-compliant member of a consortium or sub-contractor



# Joint tenders

- In case of a consortium:
  - Conclude a **consortium agreement**
  - **Register a partnership** in the Registry of Companies
  - **Joint and several liability** of partners to the contracting authority, except if a limited partnership
  - Usually **1 partner is nominated** to represent the consortium
- However, a contracting authority may require **joint and several liability of a sub-contractor** together with the general contractor in case of reliance on its economical and/or financial capabilities
- **Sub-contractor is not liable** to the contracting authority

# Thank you!



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