

Joint ventures in public procurement

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For the joint implementation of projects in various fields, joint ventures ("**JVs**", ro. *asociere în participațiune*) are established. We can see these particularly in the award of public contracts.

The subject of the JV is complex and cannot be described here exhaustively. We will address below some aspects that the partners of JVs should particularly take into account in public procurement procedures.

Joint ventures in relation to third parties

Public procurement law includes few provisions regarding JVs. Most important for the contracting authority are the ones for:

- The duration of the JV from the award procedure throughout the execution of the agreement;
- The joint liability of JV partners to the contracting authority;
- The representation of the JV in relation to the contracting authority;
- Participations of the JV partners.

Based on these provisions, the contracting authority will in principle need a simplified form of the JV agreement.

Joint Ventures in relation to its partners

For the partners, all other aspects of the JV are just as important. Since JVs are regulated lightly in the Civil Code – and since the issues around a JV are usually complex – careful and detailed preparation of the JV agreement is essential.

Legal relationships of the joint venture partners

According to the Civil Code¹, a JV has no legal personality; in relation to third parties it represents no person other than the JV partners.

JV partners enter into agreements in their own name and bind themselves accordingly to third parties, even if they act on behalf of the JV². However, if they act in this capacity, they will be jointly³ liable towards third parties.

¹ Art. 1.951 Sentence 1

² Art. 1.953 paragraph 1 Civil Code

³ Art. 1.953 paragraph 2 Civil Code

Third parties have no claims against the JV and bind themselves only to the JV partner with whom they sign agreements⁴.

The JV partners exercise all rights granted in the agreements signed by each partner of the JV. The third party is, however, only bound to the JV partner acting as contractual partner, except for the situation in which the latter has disclosed its capacity at the signing of the agreement⁵.

According to public procurement law, submission of the JV agreement to the contracting authority is necessary. So one may expect the contracting authority to be aware that a JV partner will act on behalf of the entire JV. Consequently, the JV partners are, in principle, jointly liable towards the contracting party.

Ownership structure

Ownership of goods procured by JV partners for use on the project stays with the partners⁶.

They may agree that these goods and what results from their use will be co-owned by the JV partners⁷.

JV partners can also agree that ownership of goods made available to the JV will be transferred to one of the JV partners (e.g. the leader)⁸ for achieving the purpose of the JV, and on dissolution of the JV⁹ it will be returned to the various partners. But this rarely happens in practice.

The exact regulation of the JV partners' ownership can be crucial. It helps to avoid not only disputes between JV partners, but also potential financial problems (even insolvency) of any of the partners.

Dissolution of the joint venture

A JV is of a contractual nature. The Civil Code provides expressly that the grounds for terminating a JV must be specified in the JV agreement¹⁰.

The JV can be set up for one or more public procurement projects. If it is just for one project, the JV agreement will end, in principle, if the tender is awarded to another (third) party, or once the project has been completed. If the JV is set up to run several projects, the JV partners should carefully regulate the termination of the JV agreement.

Conclusion

If several persons decide to take part jointly in a public procurement procedure, they should also draw up as detailed a JV agreement as possible. This helps to avoid problems

⁴ Art. 1.951 sentence 2 Civil Code

⁵ Art. 1.953 paragraph 3 Civil Code

⁶ Art. 1.952 paragraph 1 Civil Code

⁷ Art. 1.952 paragraph 2 Civil Code

⁸ Art. 1.952 paragraph 3 Civil Code

⁹ Art. 1.952 paragraph 4 Civil Code

¹⁰ Art. 1.954 Civil Code

(if the contracting authority awards the public contract to them) throughout the project, from signing the deal with the contracting authority and through the procurement operation to its successful completion; not to mention problems between the JV partners.

JV partners should ensure the express and detailed formulation of the JV agreement between themselves. This agreement must include clear provisions on ownership, representation, liability and termination, as well as the agreement on partners' obligations, and how the profit and loss of the joint venture is distributed.

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