

Resume of

Decision no. 71/2012

regarding the infringement of the provisions of article 5 (1) letter f) of the Competition Law no. 21/1996, republished, with subsequent amendments and completions and of article 101 (1) of the Treaty regarding the functioning of the European Union, by S.C. CONDMAG S.A. and S.C. INSPET S.A. that participated at "*Butimanu-Brazi natural gas connection for the gas-supply of Brazi cogeneration power plant*" public procurement procedure organized by S.N.T.G.N. TRANSGAZ S.A. Medias in 2009

By the President Order no. 759/29.09.2011, the Competition Council launched an ex officio investigation having as object the alleged infringement of the provisions of article 5 (1) letter f) of the Competition Law no. 21/1996, republished, with subsequent amendments and completions (hereinafter referred as *law*) and art. 101 (1) of the Treaty regarding the functioning of the European Union (TFEU) by some undertakings that participated at some public procurement procedures organized by S.N.T.G.N. TRANSGAZ S.A. Mediaş (hereinafter referred as TRANSGAZ) and S.N.G.N. ROMGAZ S.A. Mediaş (hereinafter referred as ROMGAZ) during 2009-2011 in order to allocate some contracts on natural gas connections, modernization and maintenance of related plants.

Directorate for Investigating Organized Crime and Terrorism (hereinafter referred as DIICOT), subordinated to Prosecutor's Office attached to the High Court of Cassation and Justice, referred to the Competition Council regarding some possible agreements between some undertakings, through their decision markers (associates/presidents/administrators), consisting in participating with rigged bids in some public procurement procedures organized by TRANSGAZ and ROMGAZ during 2009-2011. These agreements have been materialized in informal acts on the content of the submitted offers and on the way they supported these offers during the procedures so, simulating the competition, the contracts would have been won according to their prior conventions.

In the present case, the contracting authority was TRANSGAZ, a Romanian legal person owned by the Romanian state through Ministry of Economy, Commerce and Businesses. TRANSGAZ has as the main activity the transport through pipelines, transport, control and international transit of natural gas, research, projecting in the field of natural gas transport and assures the access without discrimination to the national system of natural gas transport pipelines.

In order to award the contract "*Butimanu-Brazi natural gas connection for the gas-supply of Brazi cogeneration power plant*", TRANSGAZ has selected the negotiation procedure, with a prior publication of a participation notice. The financing of the contract was from its own resources. The estimated value of the contract was 77,500,000 lei, without V.A.T. The awarding criterion was the most economically advantageous proposal.

On the 25.08.2009, the pre-selection of the candidates took place and every proposal was opened and checked from the containing documents point of view.

On the 31st of August 2009, the opening and evaluation of the preliminary bids took place and during 02.09.2009 – 07.09.2009, two rounds of negotiations took place with each candidate. Following the first round of negotiations on the 02.09.2009, the contracting authority asked upgrading the preliminary bids concerning the financial and technical aspects. Following the second round of negotiations on 07.09.2009, every candidate upgraded its own preliminary bid and they were invited to submit the final bid until 10.09.2009, 12:00.

On the 14.09.2009, the contracting authority declared the association between INSPET and T.M.U.C.B. as the winning bid with the most economically advantageous bid.

During the investigation procedure, several dawn raids have been carried out on the 30th of September 2011 and the 2nd of November 2011, taking into consideration there were signs that relevant documents or information could be found at the headquarters/branches of the parties involved in the investigation. The documents raised during the dawn raids constitutes probative evidence that proves that the decision markers of some of the involved parties have agreed to participate with rigged bids that constitute an anticompetitive practice materialized in exchange of sensitive information, such as the financial costs of the bids, unit prices of materials and workmanship, rates for overheads and profit, the evaluation factors (warranty works, intervention time, payment terms).

According to the documents in the case file, the two candidates, INSPET in association with T.M.U.C.B., respectively CONDMAG have drafted their bids, including the evaluation factors, so INSPET could won the procedure.

During the dawn raids at the INSPET headquarter carried out by the competition inspectors on the 4th of October 2011, two documents were found at the Bids Service. The first document drafted by INSPET should have contained prices and costs of this candidate in order to make Gas measuring station Brazi. This form should have included the prices of the equipment part of the gas measuring station, according to its accounting, as they are purchased from its equipment suppliers. In fact, this form contains a handwritten column with the competitor's prices, CONDMAG, for each type of equipment, that INSPET has used in order to draft its own bid. So, INSPET completed its own prices adding 5% at CONDMAG's prices, representing its level of transport costs.

The second document raised during the dawn raid is relevant as well as contains, handwritten, all the elements part of the preliminary offers submitted by both candidates: the total prices, the elements part of the prices, quotas for indirect costs, profit, building site organization, average hourly rate of labor and all the other evaluation factors: warranty, service and payment term.

After analyzing the preliminary bids, TRANSGAZ invited the two candidates to the first round of negotiations on the 2nd of September 2009, 10:00 with CONDMAG and 11:00 with INSPET.

One day before the negotiation, on the 1st of September 2009, CONDMAG sent to its competitor sensitive information included in its own bid. The Bids-Contracts Head of Unit sent

a mail on the 1st of September 2009 to INSPET. This mail clearly proves the anticompetitive agreement between CONDMAG and INSPET to participate with rigged bids at the public procurement procedure organized by TRANSGAZ in order for INSPET to win the contract. Moreover, CONDMAG sent to its competitor other possible options negotiated at internal level, either reducing transport costs and supply either negotiating the evaluation factors: warranty, intervention time in service activity and payment terms, important factors in granting points by the contracting authority.

Another evidence in considering the communication between the two competitors as an anticompetitive agreement is the mail sent by CONDMAG to INSPET on the 3rd of September 2009 with four attachments consisted in the whole bid submitted by CONDMAG.

CONDMAG sent to its competitor two price options, the first option representing the bid that has the transport costs and supply reduced from 4% to 3%, as it was mentioned as an alternative in the mail on the 1st of September 2009, and the second option representing in fact the official preliminary submitted bid of CONDMAG to the contracting authority.

The exchange of commercial sensitive information between those two competitors took place in the very period when they drafted and submitted their offers and negotiation with the contracting authority took place, when CONDMAG put at INSPET's disposal its whole and complete bid, drafted in two options, so INSPET had the opportunity to choose the option that had allowed it to win the procedure.

S.C. CONDMAG S.A. and S.C. INSPET S.A. participated with bid rigging at the auction organized by TRANSGAZ for the allocation of the work contract " Butimanu-Brazi natural gas connection for the gas-supply of Brazi cogeneration power plant". Consequently, these undertakings infringed Article 5 (1) of the *law* and art. 101 (1) of the Treaty.

The total amount of penalties imposed to these two undertakings was 11,844,862 lei (aprox. 2.7 million euros).