










Concerted bids on a railway procurement

The Railway of Moldova has initiated a procurement procedure for diagnostic services for carriages with three lots. For these lots, two economic operators with one and the same partner and beneficiary - the Russian citizen Bitiutskii Nikita - submitted tenders. They are Centrul pentru testare nondistructivă (*English: Center for Non-Destructive Testing Ltd*) and "Экспертный Центр вагоностроения" (*English: Expert Center for Carriage Manufacturing*) OOO.

Lotul	Numărul lotului			
Lot №1 Servicii de diagnosticare a vagoanelor marfare	d770da58-fb92-461c-b40c-3e576ee0ee9a			
Ofertantul	Oferta finală	Declarație pe proprie răspundere	Documentele OE	Statutul și decizia Grupului de lucru
CENTRUL PENTRU TESTARE NONDISTRUCTIVĂ IDNO Codul: MD-IDNO-1018600023430	4 075 000.00 MDL achiziției fără TVA	<u>MTender ESPD</u> Declarație pe proprie răspundere		<u>Refuzat</u> 05.09.2023 / 08:09
Экспертный Центр вагоностроения IDNO Codul: MD-IDNO-7820304070	4 921 255.00 MDL achiziției fără TVA	<u>MTender ESPD</u> Declarație pe proprie răspundere		<u>Refuzat</u> 05.09.2023 / 08:10
CVARTAL CAPITAL IDNO Codul: MD-IDNO-1021800034957	5 200 000.00 MDL achiziției fără TVA	<u>MTender ESPD</u> Declarație pe proprie răspundere		<u>Refuzat</u> 05.09.2023 / 08:11
Lotul	Numărul lotului			
Lot №2 Servicii de diagnosticare a vagoanelor de pasageri	d0129d4a-35ed-4ee3-b053-4ff0214078d0			
Ofertantul	Oferta finală	Declarație pe proprie răspundere	Documentele OE	Statutul și decizia Grupului de lucru
CVARTAL CAPITAL IDNO Codul: MD-IDNO-1021800034957	215 000.00 MDL achiziției fără TVA	<u>MTender ESPD</u> Declarație pe proprie răspundere		<u>Refuzat</u> 22.09.2023 / 11:32
CENTRUL PENTRU TESTARE NONDISTRUCTIVĂ IDNO Codul: MD-IDNO-1018600023430	217 000.00 MDL achiziției fără TVA	<u>MTender ESPD</u> Declarație pe proprie răspundere		<u>Refuzat</u> 22.09.2023 / 11:33
Экспертный Центр вагоностроения IDNO Codul: MD-IDNO-7820304070	232 952.00 MDL achiziției fără TVA	<u>MTender ESPD</u> Declarație pe proprie răspundere		<u>Refuzat</u> 22.09.2023 / 11:34
Lotul	Numărul lotului			
Lot №3 Servicii de diagnosticare a boghiurilor (1435 mm) pentru transportarea vagoanelor de pasageri	71d9fe95-8054-4e9b-b1ae-7c449ca30eea			
Ofertantul	Oferta finală	Declarație pe proprie răspundere	Documentele OE	Statutul și decizia Grupului de lucru
CVARTAL CAPITAL IDNO Codul: MD-IDNO-1021800034957	216 500.00 MDL achiziției fără TVA	<u>MTender ESPD</u> Declarație pe proprie răspundere		<u>Refuzat</u> 22.09.2023 / 11:42
CENTRUL PENTRU TESTARE NONDISTRUCTIVĂ IDNO Codul: MD-IDNO-1018600023430	217 000.00 MDL achiziției fără TVA	<u>MTender ESPD</u> Declarație pe proprie răspundere		<u>Refuzat</u> 22.09.2023 / 12:05
Экспертный Центр вагоностроения IDNO Codul: MD-IDNO-7820304070	232 200.00 MDL achiziției fără TVA	<u>MTender ESPD</u> Declarație pe proprie răspundere		<u>În asteptare</u> 04.09.2023 / 15:51

According to the extract submitted from the Single State Register of Legal Entities of the Russian Federation, Bitiutskii Nikita is the sole partner and administrator of Expert Center for Carriage Manufacturing OOO:

Сведения об участниках / учредителях юридического лица		
29	ГРН и дата внесения в ЕГРЮЛ сведений о данном лице	6167847562767 06.05.2016

Выписка из ЕГРЮЛ
16.08.2023 11:20

ОГРН 1057811991632



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30	Фамилия Имя Отчество	БИТЮЦКИЙ НИКИТА АЛЕКСАНДРОВИЧ
31	ИНН	782031864484
32	ГРН и дата внесения в ЕГРЮЛ записи, содержащей указанные сведения	2217803711178 20.10.2021
33	Пол	мужской
34	ГРН и дата внесения в ЕГРЮЛ записи, содержащей указанные сведения	2217803711178 20.10.2021
35	Гражданство	гражданин Российской Федерации
36	Номинальная стоимость доли (в рублях)	10000
37	Размер доли (в процентах)	100
38	ГРН и дата внесения в ЕГРЮЛ записи, содержащей указанные сведения	2217803711178 20.10.2021

At the same time, according to the State Register of Legal Entities of the Republic of Moldova, "Center for Non-destructive Testing" Ltd. is owned by the same Bitiutskii Nikita:

Date de bază	
IDNO/Cod Fiscal:	1018600023430
Denumire:	Societatea cu Răspundere Limitată CENTRUL PENTRU TESTARE NONDISTRUCTIVĂ
Data înregistrării:	16.05.2018
Forma juridică:	Societate cu răspundere limitată
Lichidată:	Nu
Adresa juridică:	mun. Chişinău, sec. Centru, str. Alexandru cel Bun, 7, ap.(of.) 414
Conducători:	MAEV PETR [Administrator]
Fondatori:	
Nume	Cota parte (%)
BITIUTSKII NIKITA	100,00

For Lot 1, the winning bid was declared "Centre for Non-Destructive Testing" Ltd., and another economic operator filed a complaint with the National Agency for Solving Complaints (ANSC), where it objected to the submission of concerted bids. The representative of the Association for Efficient and Accountable Governance (AGER) attended the meeting to examine this objection.

The AGER team considers it unacceptable that affiliated companies participate in the same public procurement procedures. It is obvious that this causes rigging of the procurement procedure, and in this way circumvents the principle that each economic operator submit only one tender. Protecting this principle allows many competitive advantages to be gained.

However, at the moment we note that there is no effective mechanism to combat this phenomenon, both in the context of procurements regulated by Law No. 131/2015 and in the case of utility procurements, such as this one, regulated by Law No. 74/2020.

AGER has referred similar cases to the Competition Council, but the authority refuses to find anti-competitive agreements, citing Article 5 para. (4) of the Competition Law no. 183/2012, which states that: *"Agreements concluded between dependent undertakings do not qualify as anti-competitive agreements"*.

The option in the case of purchases covered by Law No 131/2015 remained the inclusion of such economic operators on the Prohibited List. Article 14 paragraph 4) of the Regulation on how to draw up the Prohibition List, provides as grounds for which an economic operator may be included in the List, the fact that: *"there is evidence presented by the contracting authority or the control body, which demonstrates that economic operators have participated in the procurement procedure with rigged bids, have participated as members of the group of dependent enterprises in the same public procurement procedure with several bids or have created unfair competition between participants"*. The Competition Council referred AGER's complaints to the Public Procurement Agency, which is the contracting authority responsible for including economic operators on the Prohibited List. However, the Agency did not include the economic operators concerned in the list. The Authority argued that if the Competition Council did not find an infringement of the Competition Act or the existence of a group of dependent undertakings, there was no basis for inclusion on the Prohibited List:

multe oferte sau au creat o concurență neloială între participanți." În același timp, în scrisoarea

nr. AAP-02/81-731 din 28.04.2023, Consiliul Concurenței a menționat că acțiunile descrise în plângere nu cad sub incidența art. 5 al Legii concurenței, iar prin scrisoarea AAP-02/106-1046 din 03.07.2023 Consiliul Concurenței a informat că în conformitate cu art. 46 al Legii nr. 183/2012, Consiliul Concurenței emite decizii, dispoziții, prescripții și hotărâri, iar referitor la situația în cauză nu a adoptat vreun act administrativ de constatare a încălcării Legii concurenței și nici un act de constatare a faptului că SA „Drumuri-Bălți”, SA „Drumuri-Briceni”, SRL „Magistrala-Nord” fac parte dintr-un grup de întreprinderi dependente.

În așa fel, nu s-a constatat existența unui act adoptat de un organ competent privind constatarea de acțiuni ce s-ar încadra în cele menționate la pct. 14 subpct. 4) al Regulamentului.

This decision of the Agency is open to criticism and clearly contravenes Article 14 paragraph 4) of the Regulation on the drawing up of the Prohibited List. Paragraph 14 of the Regulation does not even impose as a requirement for placement on the list a finding of a violation of the Competition Act, which has, as its consequence, a prohibition from participating in public procurement for

three years. Therefore, para. 14 para. (4) of the said Regulation refers to other situations, namely when dependent undertakings submit bids in the same procurement procedures, and their dependence can also be ascertained by the Public Procurement Agency, since the Competition Council does not have the power to ascertain the dependence of undertakings, if this does not constitute an infringement of the Competition Act.

We hope, however, that in the future the Agency will correctly apply Art. 14 para. 4) of the Regulation on how to draw up the Prohibited List and will thoroughly examine the cases related to the inclusion in the Prohibited List of dependent enterprises submitting concerted bids in public procurement.

However, in the case analyzed above, the Regulation on how to draw up the Prohibition List is not applicable because it only refers to Law no.131/2015 on public procurement.

Therefore, at the moment, there is no legal basis for rejecting the bids of ,Centre for Non-Destructive Testing Ltd. and Expert Center for Carriage Manufacturing OOO, although it is certain that they submitted concerted bids.

AGER, together with IDIS Viitorul, came up with a number of proposals to the Ministry of Finance in relation to the amendment of Law no. 74/2020. In this context, they also indicated the need for economic operators who submit false documents, conclude anti-competitive agreements and/or do not execute contracts in the framework of sectoral procurement to be included in the ban list. The Ministry of Finance rejected this amendment on the grounds that:

"Not accepted.

In the framework of the project "Consultancy services to support the elaboration of the National Programme for the Development of Public Procurement in Moldova and the related Action Plan", financed by the World Bank, one of the problems identified by the experts and requiring intervention at the regulatory level is the Prohibition List of Economic Operators (art. 25 of Law no. 74/2020). Thus, until the removal (revision) of the given provisions, national regulations will be in contradiction with the principles set by the TFEU and the procurement legislation at European level. Ensuring the contracting authority/entity the proper fulfilment of the obligations undertaken by the economic operators, as well as making them accountable for the performance of the obligations undertaken is carried out on the basis of the contractual clauses on the application of penalties, etc."

However, the Ministry of Finance's arguments do not fully reflect the view of the SIGMA experts who, in the draft report to be presented on October 24, 2023, did not necessarily argue that the Prohibited List is a problem, but that the grounds for exclusion in the EU directives have not been properly transposed and leave room for excessively broad application of the exclusion criteria: *"Furthermore, the list of banned economic operators overlaps with other grounds for exclusion and may generate an automatic exclusion effect for some economic operators, which is generally prohibited by EU law. Some exclusion grounds foreseen in the EU Directives, such as those referring to situations in which "the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract" or has been "guilty of serious misrepresentation in supplying the information" have not been properly transposed into national legislation and therefore allow excessively broad application of the exclusion criteria."*

Therefore, according to the Ministry of Finance's view, until the shortcomings in the Prohibited List regulation are remedied, economic operators will not be included in the List for violations related to sectoral procurement (in fact, not even in the case of low-value purchases). However, it is not clear when these shortcomings will be remedied, and whether once they have been remedied, amendments will also be made to Law No. 74/2020 immediately, or whether it will again take years for more amendments to accumulate. In any case, for the time being, the problem highlighted in this article remains unresolved and we do not know if and when it will be resolved.

In the case under consideration, as expected, ANSC by [Decision No 03D-712-23 of 18.10.2023](#) rejected the appeal, indicating that there was no act of a competent body to establish the conclusion of an anti-competitive agreement. ANSC added:

"However, taking into account that until the Agency has taken its decision, the contracting entity is not entitled to conclude the contract, with regard to possible actions by these companies through withdrawal or any other possible behaviour that may appear to be motivated by the aim of forcing the contracting entity to designate the winning bid with the highest value submitted by the group, it is incumbent on the entity to refer the matter to the competent body and not to allow distortion of competition/termination of the procedure through collusive practices."

In this paragraph, the ANSC has noted the main danger of such situations, namely that a single beneficiary uses two or more economic operators, which it controls to submit bids, one higher, one lower. Thus, if the bid with the lower of the two prices proposed by the associated bidders is also the lowest in the tender, and if a competitor's bid follows it, then that bid wins the procurement contract. If, however, there is no competitor between the bids, then the first economic operator may refuse to sign the contract, even with the loss of the bid guarantee, and then win a larger sum of money by signing the contract with the second economic operator, which offered a higher price. This would be a classic case of procurement rigging, and [AGER's team has also detected such a case and informed the Competition Council about it](#).

Another possibility for rigging tenders through concerted bidding is: if two bids with similar prices are submitted, the likelihood of challenge can be reduced, or the next bidder will have to object to the compliance/admissibility of at least two bids and not just one, as would have been the case if only one bid was submitted. If errors are made in one bid and it is disqualified, the second bid can win, or the likelihood of errors being made in two bids is lower than in one bid. There are other possible benefits for bad faith economic operators, but we will not refer to them in order to avoid them being taken over by malicious economic operators.

The aim of those who submit rigged bids is to obtain various benefits, which, however, affect the interests of the contracting authorities in obtaining a contract with a lower value. We consider it appropriate that the given problem should be properly remedied: on the one hand, by amending the legislation so that the regulation on how to be included in the Prohibited List is also applicable to sectoral procurement, and on the other hand, the Public Procurement Agency should apply it properly and investigate such cases on its own, and where associated bidders are found, to note this with their subsequent inclusion in the Prohibited List. We also believe that the ANSC should also directly apply the grounds for inclusion on the Prohibited List, in order to exclude those economic operators who meet those grounds. In this regard, it is necessary to include such a possibility in Article 19 of Law No. 131/2015 on public procurement.

Source: [Association for Efficient and Accountable Governance](#) AGER