



**REPUBLIC OF ALBANIA
COMPETITION AUTHORITY
COMPETITION COMMISSION**

DECISION

No. 358 of 16 April 2015

On

concluding the in-depth investigation into the procurement of the construction of the Outer Ring Road of Tirana—the northeast section from *Kthesa e Saukut* to *Bregu i Lumit*—Lots 1, 2 and 3, and providing recommendations to the Albanian Road Authority

The Competition Commission, composed of:

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|-----------------------|--------------|
| • Lindita MILO (LATI) | Chair |
| • Servete GRUDA | Deputy Chair |
| • Koço BROKA | Member |
| • Iva ZAJMI | Member |
| • Eduard YPI | Member |

and with the participation of Servete Gruda, Koço Broka, Iva Zajmi and Eduard Ypi, in its meeting of 16 April 2015 reviewed the Case with:

Subject-matter: Review the report on the in-depth investigation into the procurement of the construction of the Outer Ring Road of Tirana—the northeast section from *Kthesa e Saukut* to *Bregu i Lumit*—Lots 1, 2 and 3

Legal basis: Articles 24 (d), 26 and 43 (1) of Law no. 9121 of 28 July 2003 “On Competition Protection”, as amended, (hereinafter referred to as the Law), Article 12 of the Regulation on the Functioning of the Competition Authority, and Article 4 of the Regulation on the Competition Authority investigative procedures.

After reviewing

- the report on the in-depth investigation into the procurement of the construction of the Outer Ring Road of Tirana—the northeast section from *Kthesa e Saukut* to *Bregu i Lumit*—Lots 1, 2 and 3 and the Competition Authority Secretary-General Report:

THE COMPETITION COMMISSION NOTES THAT:

I. PROCEEDINGS

The Competition Authority noted the information from the Supreme State Audit Institution, which had found that *“in relation to the 2013 public procurement of the lots 1, 2 and 3 of the construction of the Outer Ring Road of Tirana—the section from Kthesa e Saukut to Bregu i Lumit—economic operators that had participated and been disqualified in Lot 1 had been awarded a contract on a rotation basis in Lots 2 and 3, after submitting tenders on the same requirements for each lot with negligible differences between their tenders. This method of bidding results in a small group of economic operators controlling a large part of the market through secret agreements among them and through market monopolisation.”*

Competition Commission Decision no. 346 of 16 February 2015 ordered an in-depth investigation into the procurement of the construction of the Outer Ring Road of Tirana—the northeast section from *Kthesa e Saukut* to *Bregu i Lumit*—Lots 1, 2 and 3.

In order to collect the necessary facts and data in relation to the investigation, pursuant to Articles 33 and 34 of the Law, the Working Group requested data and information from the Contracting Authority regarding the procurement under investigation.

Pursuant to Article 35 and 36 of the Law and the Competition Commission Authorisation, on-site inspections at the undertakings operating in this market were carried out.

II. UNDERTAKINGS UNDER INVESTIGATION

The in-depth investigation included all the participating undertakings and the temporary consortia of those undertakings as part of the procurement of the construction of the Outer Ring Road of Tirana—the northeast section from *Kthesa e Saukut* to *Bregu i Lumit*—Lots 1, 2 and 3.

- Gener 2 Sh.p.k,
- Albavia Sh.p.k,
- Gjkuria Sh.p.k,
- Gjoka Konstruksion Sh.a,
- Favina Sh.p.k,
- Alpin S.r.l,
- The consortium between Gjoka Konstruksion & Gjikuria,
- The consortium between Albavia & Favina & Alpin Srl (JV).

During the preliminary inquiry dawn raids were carried out at all the undertakings under investigation, followed by the keeping of the relevant inspection and interview records. In addition, during the in-depth investigation inspections were carried out in cooperation with the Albanian Road Authority in the construction sites of each of those undertakings.

The inspections found no direct evidence of collusion or prohibited agreements among undertakings under investigation.

In order to collect facts and data necessary for the investigation, the undertakings under investigation and the Albanian Road Authority were asked to submit information to the Competition Authority.

III. COMPETITION ASSESSMENT

A. The product market:

For economic operators to participate in procurement procedures, they have to meet all the criteria that are considered necessary by the Contracting Authority in relation to professional qualifications, technical skills, economic and financial position, legal capacity and required quality standards. Those criteria should be proportionate to the nature and size of the contract under procurement, and should not be discriminatory. They should be designed in such a way as to encourage small and medium-sized business participation.

In the context of assessing the undertaking behaviour and its impact on the market, the relevant market is the *procurement of the construction of the Outer Ring Road of Tirana—the northeast section from Kthesa e Saukut to Bregu i Lumit—Lots 1, 2 and 3.*

B. The geographic market

In the context of the bidding impact, as specified in the inquiry opening decision, the relevant geographic market is the *procurement of the construction of the Outer Ring Road of Tirana—the northeast section from Kthesa e Saukut to Bregu i Lumit.*

IV. ASSESSMENT OF THE BEHAVIOUR OF THE UNDERTAKINGS

In order to assess the behaviour of undertakings in the public procurement of the construction of the abovementioned road the investigation looked at the data received from the contracting authority, as no evidence of collusion in the preparation of bids for public procurement was found in the raids at the undertakings that had participated in the said procurement.

The undertaking behaviour was assessed based on the OECD Guidelines for Fighting Bid Rigging in Public Procurement, and a review of all the documentation submitted by the undertakings participating in the three lots of the procedure: all the documents completed by the undertakings on the basis of the Standard Tender Procedures, which are developed by the Contracting Authority, the documentation collected in the inspections and the documentation received by the Contracting Authority (Albanian Road Authority) during the stage of complaint review.

The presence of such factors as the rotating bids and the proximity of the winning bid to the limit fund are indications of the existence of bid rigging in the procurement that was organised by the Albanian Road Authority in 2013 for the construction of the Outer Ring Road of Tirana—the northeast section from *Kthesa e Saukut to Bregu i Lumit—Lots 1, 2 and 3.*

A. Bid rotation.

In Lot I, with limit-fund of ALL 1,955,797,770 (exclusive of VAT), there were three bidders who submitted bids, with the winning operator being Gener 2, while operators Gjoka Konstruksion and Gjiguria (as a Joint venture) and Albavia submitted higher bids.

In Lot II, with limit-fund of ALL 1,942,441,074 (exclusive of VAT), the same bidders participated, with the winning operator this time being the consortium composed of Albavia and Favina and Alpin, while operators Gjoka Konstruksion & Gjiguria and Gener 2 submitted higher bids.

In Lot III, with limit-fund of ALL 1,933,742,407 (exclusive of VAT), there were only two operators who submitted bids (the same operators as in Lots I and II), with the winning operator being the consortium composed of Gjoka Konstruksion & Gjiguria, while Albavia submitted a bid as a sole operator.

B. Proximity to the limit-fund

In Lot I, winner Gener 2 submitted a bid that was 99.82% of the limit fund, while the other two operators were the consortium Gjoka Konstruksion with 99.91% of the limit fund and Gjiguria (as a Joint venture) and Albavia with 99.96% of the limit fund.

In Lot II, the winner was the consortium of operators Albavia & Favina & Alpin, which submitted a bid that was about 99.9% of the limit fund, while the other operators were Gjoka Konstruksion&Gjiguria with 99.98% and Gener 2 with 99.99% of the fund.

In Lot III, the winner was the consortium of operators Gjoka Konstruksion and Gjiguria, which submitted a bid that was 99.9% of the limit fund, while the other operator was Albavia with 99.95% of the limit-fund.

IV.1. In-depth analysis of each Lot, based on the information collected during the on-site inspections

The analysis based on the investigation carried out for each evaluation of the bids that the parties submitted focused on:

- 1 An analysis of the documents requested from the Albanian Road Authority, the submitted documents, and any missing documents, comparing them with the actual documentation submitted under each lot;
- 2 An analysis of the documents in order to assess whether the winning companies have subcontractors and, if so, who those subcontractors are.

LOT 1 includes the round-about built on the Tirana–Elbasan highway, at the location near “Natyra e Qetë” and ends in Pr. 208 , - km 4.14, length 4140 m – awarded to GENER 2 shpk, at ALL 1,952,308,394.

IV.2. Analysis of the requested documents, the submitted documents, or any missing documents, comparing them the actual documentation submitted under the relevant lot.

A comparison of the electronically submitted documents on the first lot with the relevant records that the Albanian Road Authority kept on each tendering stage and the submitted documents shows that the submitted documentation is the same as the documentation described in the relevant records.

The analysis of the submitted documentation was made on the basis of an assessment whether the companies executed the contracted works relying on their own technical capacities or subcontracted other companies for various works; the analysis found no subcontractors.

The analysis of the various matrix elements and the descriptions in the records shows that the elements described in the records and the documents submitted by the participating companies are the same. In addition, the actual documentation did not indicate any subcontracting of the various works to be executed.

LOT 2 (the *Kthesa e Saukut – Bregu i Lumit* section), – Entrance to the Helicopter Unit Facility follows the Shkalla Stream alignment, Pr. 208 – Pr. 314 Km 4.14 –Km. 6.34. awarded to ALBAVIA SHPK & FAVINA SHPK & ALPIN SRL, at the amount of ALL 1,939,904,984.

Analysis of the requested documents, the submitted documents, or any missing documents, comparing them the actual documentation submitted under the relevant lot.

A comparison of the electronically submitted documents on the first lot with the relevant records that the Albanian Road Authority kept on each tendering stage and the submitted documents shows that the submitted documentation is the same as the documentation described in the relevant records.

The analysis of the submitted documentation was made on the basis of an assessment whether the companies executed the contracted works relying on their own technical capacities or subcontracted other companies for various works. In the end, the analysis of the actual works documentation found no subcontractors.

A comparison of the electronically submitted documents on the first lot with the relevant records that the Albanian Road Authority kept on each tendering stage and the submitted documents shows that the submitted documentation is the same as the documentation described in the relevant records.

LOT 3 (the *Kthesa e Saukut – Bregu i Lumit* section), Lot 3 consists of section I Pr. 314 – Pr. 388, Km 6.34 – Km 7.85; Section II (landscaping of the Lana, and the parallel roads) in pk. 00 – 79, km 0.00 – km 1.57).

This was awarded to Gjoka Konstruksion shpk & Gjiguria shpk, at the amount of ALL 1,931,953,307.

IV.3. Analysis of the requested documents, the submitted documents, or any missing documents, comparing them the actual documentation submitted under the relevant lot.

The analysis of the third lot is based on the information on the general, special and technical eligibility and qualification requirements, legal, financial and economic criteria, the submitted documents and missing documents for each participating company, and the amount of the bids they had submitted. The third lot was awarded to Gjoka konstruktion shpk & Gjiguria shpk.

A comparison of the electronically submitted documents on the first lot with the relevant records that the Albanian Road Authority kept on each tendering stage and the submitted documents shows that the submitted documentation is the same as the documentation described in the relevant records.

According to the records, company JV ALBAVIA did not submit full tender documents. At the end of the bidding procedure, the commission awarded the contract to the consortium of operators Gjoka Konstruktion shpk & Gjiguria shpk, at the amount of ALL 1,931,953,307.

In the folder of the documents available on the third lot, there is a file named after the company name VICTORIA INVEST, but it does not contain the requested information and the relevant documentation for this lot. This file contains only the "Licence certified copy" document. The relevant records kept by the Albanian Road Authority do not contain any further information and do not describe anything in relation to VICTORIA INVEST.

The actual documents in the relevant folder do not have any information in relation to: (a) a turnover certificate for the next three years for Gjiguria shpk; and (b) 2009 financial statements of Gjiguria shpk.

The analysis of the submitted documentation was made on the basis of an assessment whether the companies executed the contracted works relying on their own technical capacities or subcontracted other companies for various works. In the end, the analysis of the actual works documentation found no subcontractors. During the in-depth investigation the Working Group conducted inspections in cooperation with the Albanian Road Authority on the site where each undertaking was executing the works for each of the three lots under investigation:

On 1 April 2015 an inspection was conducted in the construction site of the temporary consortium of companies Gener 2 SHPK, in the presence of the representative from the Albanian Road Authority. An inspection record was kept, bearing the date of 01.04.2015 and the title "Taking explanations and documents in relation to the investigation subject-matter and goal."

On 1 April 2015 an inspection was conducted in the construction site of the temporary consortium of companies Gjoka Konstruktion SH.A and Gjiguria shpk, in the presence of the representative from the Albanian Road Authority. An inspection record was kept, bearing the date of 01.04.2015 and the title "Taking explanations and documents in relation to the investigation subject-matter and goal."

In addition, on 1 April 2015, the Working Group carried out an inspection in the construction site of the consortium of companies Albavia & Favina and Alpin SRL (JV), but no representatives from the undertakings were not present.

The on-site inspections and the analysis of the submitted documentation made an assessment whether the companies executed the contracted works relying on their own technical capacities or subcontracted other companies for various works. In the end, the analysis of the actual works documentation found no subcontractors.

A review of the documents submitted by the bidding undertakings in the investigated procurement procedure did not find any indirect evidence of communication such as identical errors in the drafting of bids, identical bills of quantities, identical or consecutive serial/protocol numbers, etc. However, from how the Albanian Road Authority conducted the procurement or allocated the limit-funds to the individual lots, divided the geographic procurement market and specified the advance payment under the awarded contracts, it established conditions for competition restriction.

Based on the conducted analysis and submitted evidence, the Commission determines that, despite the indications of rotation and winning bid proximity to the limit-fund, the documentation review and conducted inspections did not find any elements that would be proof of collusion among the winning undertakings and other bidding undertakings pursuant to the practices and experiences on the detection of bid-rigging in public procurements as applied by the Competition Authority.

However, in order to assess their behaviour in accordance with the OECD methodology on bid-rigging and the best practices, in addition to any indications of winner rotation and proximity to the limit-fund, other additional necessary factors were assessed in order to verify any coordination of bid-rigging behaviour, such as communication among the undertakings and any subcontracting among the bidders and their related companies.

The process of the preparation, harmonisation and coercion of public procurement procedures between the contracting authority and the undertakings submitting bids under those procurement procedures is a combination of many factors, not all of which are and can be addressed by the Competition Law and the Competition Authority. The public procurement process might have resulted in distortions in the form of unfair competition, which might be due to human behaviour beyond the scope of the Competition Protection Law but which is governed by the Public Procurement Law and is addressed by the correct application of the legislation during the drafting of the requirements and the acceptance of the documentation by the procuring authority and human behaviour and compliant behaviour by the officials charged with the task of applying the laws and regulations in the area of procurement.

Based on this, the Supreme State Audit Institution filed a criminal report against the persons in charge of the public procurement procedures in this case. In order to obtain any evidence of collusion among the operators participating in the tender procedures, the Competition

Authority requested information from the Prosecution Office of Tirana Judicial District, in its Letter No. 1285/6, of 31.03.2015, the reply time-limit of which was 20 April 2015.

In addition, the Competition Authority verifications in relation to Lot III found that the Albanian Road Authority had not requested any economic and financial documentation for both operators of the consortium Gjoka shpk & Gjiguria shpk, and there was lack of information on the annual turnover for the last three years for Gjiguria shpk and the financial statements of 2009 for Gjiguria shpk although the Albanian Road Authority had signed the contracts.

In conclusion, in the documentation review and the inquiry dawn raid inspections in all the undertakings under investigation and the investigation on-site verifications no elements of collusion between the winning undertakings and other undertakings were found, but it was the Contracting Authority behaviour the one that makes the process suspicious in terms of potential bid rigging, and it was on the basis of those suspicions that Tirana Prosecution Office began criminal proceedings.

FOR THESE REASONS:

The Competition Commission, pursuant to Article 43 (1) of Law no. 9121 of 28 July 2003 “On Competition Protection”, as amended, and Article 12 of the Regulation on the functioning of the Competition Authority,

HAS DECIDED:

- I. Conclude the in-depth investigation into the procurement of the construction of the Outer Ring Road of Tirana—the northeast section from Kthesa e Saukut to Bregu i Lumit—Lots 1, 2 and 3, against undertakings: Gener 2 Sh.p.k, Albavia sh.p.k, Gjoka Konstruksion Sh.a, the consortium of companies Albavia, Favina and Alpin Srl (JV) and the temporary consortium of companies Gjoka Konstruksion & Gjiguria, and the temporary consortium of companies Albavia & Favina & Alpin Srl (JV).
- II. Recommend that the Albanian Road Authority:
 - a- should not, when dividing procurement lots, create any possibilities for market division based on the volume of works among competitors and division of geographic markets;
 - b- should make a full evaluation of the economic and financial criteria for all bidders or bidder consortia in order to ensure equitable and non-discriminatory treatment among bidding undertakings;
 - c- should avoid any forms of predetermination and preferential evaluation among the various undertakings, which restricts competition.
- III. The Secretary General shall enforce this Decision and communicate it to the parties.

This Decision shall enter into force immediately.

COMPETITION COMMISSION

Servete GRUDA

(_____)

Deputy Chair

Koço BROKA

(_____)

Member

Iva ZAJMI

(_____)

Member

Eduard YPI

(_____)

Member

Lindita MILO (LATI)

CHAIRPERSON

Dissenting Opinion

Position in relation the Report on the in-depth investigation into the procurement of the construction of the Outer Ring Road of Tirana—the northeast section from *Kthesa e Saukut* to *Bregu i Lumit*—Lots 1, 2 and 3, and the Draft Decision on concluding the in-depth investigation in that market.

Both the Report and the Draft Decision state that this public procurement were characterised, among others, by two elements: proximity of the winning bid to the limit-fund, and rotating bids:

1) Proximity to the limit-fund:

In Lot I, the contract was awarded to Gener, at 99.82% of the limit-fund.

In Lot II, the contract was awarded to the consortium of operators Albavia & Favina & Alpin, at 99.87% of the limit-fund.

In Lot III, the contract was awarded to the consortium of operators Gjoka Konstruksion and Gjiguria, at 99.91% of the limit-fund.

II- Rotating bids – see page 5 of the Draft Decision and the Report.

In fact, these two elements are taken from the letter that the Supreme State Audit Institution sent to the Competition Authority on 1 August 2014.

Thus, there is no added value from the Competition Authority in this case; these elements are merely confirmed by the Secretariat or the investigation team that prepared the Report.

- 2) Secondly, I agree with, and share the same position in relation to, the basic investigation method that the Working Group employed: the Guidelines on fighting bid rigging in public procurement, which is also the methodology that is applied by the OECD or the World Bank.

- 3) I do not share the same position with the formulators of the Draft Decision, stated in pages 6 and 7, and in the Disposition section. Therefore, I do not share the same position of the Working Group regarding its activity in detecting whether there was bid rigging and competition evasion in the public procurement case in question. I read the Report carefully, as well as the Secretariat's assessment in relation to the activity and conclusions of the Working Group. I noticed that we draw different conclusions. I reread the Report several times, but I still do not share the same position, for the following reasons:

The OECD and World Bank bid rigging in public procurement methodology is clear. It states that the mechanism that is used to evade competition in those markets is a mechanism working by submitting bids as close to the limit-fund as possible. The proximity to the Limit Fund consists of these elements:

First, **rotating bids**. This has been recognised by everyone, prior to and after the investigation.

Second, **bid cancellation**. One or more bidders agree to withdraw before a contract is awarded, so that the other company wins it.

Third, **complementary bids**. The bidders strike an agreement on who will win the tender, and therefore submit artificial bids so as to create the appearance of strong competition.

What has happened and what has the Working Group assessed in accordance with the requirements of the Methodology?

In the tender for Lot I, three undertakings participated: (a) të Gener, (b) consortium of operators Gjoka Konstruksion and Gjiguria, and (c) Albavia.

The latter did not meet the general and special conditions as laid down in the Competitive Bidding Procedure Standard Documents, but it did participate in the tender in order to leave the impression of strong competition. It was not important that it would not qualify; it was nonetheless aware of its failure to meet the tender conditions. (The Working Group and the Draft Decision should have highlighted this fact.)

The same occurred in the Lot III tender procedure. In fact, only two operators participated in the tender: The operator receiving the contract—the consortium of operators Gjoka Konstruksion and Gjiguria—and undertaking Albavia. The latter would be disqualified, and it knew that it would not qualify.

So, in my opinion, undertaking Albavia has committed bid rigging by creating the appearance of competition in this market. It participated in both Lot I and Lot III artificially so as to leave the impression that there was competition in the market.

In the Lot II tender, undertaking Gener applied the mechanism of bid cancellation. Since it had been awarded the contract under Lot I, it was aware of the conditions it had to meet for its bid to be considered. The evaluation record shows that it was disqualified because it had not met one of the tender conditions, since it had failed to provide bid security at the amount of 2% of the limit-fund.

The same applies to the requirement on rented or owned assets. There should be accurate identification of who owns which assets and who rents which assets. This difference has more implications in the bills of quantities than the bid differentials or the difference between the bids and the limit-fund.

Therefore, during the public procurement competitive bidding procedure the competition rules were not complied with due to the application of the known bid rigging mechanisms. Competition has been evaded as a result of the activity of the abovementioned undertakings (Albavia and Gener).

As a result, I do not agree with the Report and the submitted Draft Decision, and am voting against it.

Commission Member

Koço Broka, 16 April 2015