

Schoenherr | Romania: Bid rigging, a slippery slope for snow removal companies

The Romanian Competition Council (the "RCC") recently imposed a total penalty of EUR 1.1m on four companies for indulging in anticompetitive practices. The companies breached the competition rules by colluding to rig bids for winter road maintenance services organised by the National Company for the Management of Road Infrastructure.

Besides the administrative fine, perpetrators who circumvent the tendering process by engaging in bid rigging may face criminal prosecution, including fines and imprisonment of one to five years.

The RCC investigation confirms the strict stance of the Romanian competition watchdog on bid rigging cartels that subvert competition and affect public money.

Main facts

The RCC investigated the companies' behaviour patterns during tenders organised between 2012 and 2013, as well as inconsistencies in the offers submitted by bidders.

According to the RCC findings, the bidders engaged in complementary offers, i.e. some submitted bids that either disqualified them or rendered their proposal incomplete, leading to the cancellation of the tender.

In several instances, the tenders were suspended following appeals lodged by the road maintenance companies. Given the urgency of an autumn closing, the public procurer was forced to organise negotiation proceedings attended simultaneously by the bidders, rendering the tendering process transparent for the bidding companies.

Furthermore, the companies tended to bid higher prices in direct negotiations than in open tender proceedings. The competition authority suspected this was due to concertation.

"The contracts were awarded by rotation in the negotiation proceedings, each of the involved companies winning at least one contract at higher prices compared to those offered during the open tender process," the Chairman of the RCC concluded.

Key takeaways

This case demonstrates the RCC's consistent focus on bid rigging, following several recent cases and prevention campaigns related to cartels affecting tenders.

Companies involved in private or public tenders should be aware that both sectors are under the constant scrutiny of the competition watchdog.

Finally, in terms of evidentiary standard, we note the increasing appetite of the RCC to expand the role played by presumptions in building a case, by inferring collusion from behavioural patterns. The approach of the Romanian competition authority raises the bar for defendant firms, which should increase their evidentiary effort to prove their innocence.

Tips and tricks

A disputed aspect indicated by the RCC is the direct contact between competitors simultaneously attending negotiations organised by a public procurer.

Bidders should be aware that direct contact facilitated by a public procurer will not shield them from liability under the competition rules. Therefore, extra vigilance is called for in a bid review process where direct contact is involved.

Companies that interact repeatedly with their competitors should also take steps to mitigate their exposure and ensure compliance with antitrust rules, especially by:

- carefully documenting the decisions to challenge the final award in a tender process;
- cautiously documenting the pricing decisions and the decisions not to participate in a tender or second stage of a tender;
- avoiding discussing any term and condition of their offer with their competitors;
- indicating to the public procurer that the bidding process must be kept confidential (if the tender design implies direct contact with other bidders), i.e. direct negotiation should take place separately for each bidder in order to observe the competition rules.