

## SUMMARY OF RESOLUTION S/0226/10 LICITACIONES CARRETERAS

On 19 October 2011, the Council of Spain's antitrust authority, the Comisión Nacional de la Competencia (CNC), issued its resolution on infringement proceeding S/0226/10 GOVERNMENT ROADWORK TENDERING (*LICITACIONES DE CARRETERAS*).

The case originated with a complaint filed by an individual against CAMPEZO CONSTRUCCIÓN S.A.U., OSCAL OBRAS Y SERVICIOS S.L.U. and other indirectly involved companies alleging the commission of an infringement of article 1 of the Spanish Competition Act 15/2007 of 3 July 2007 (LDC). According to the complaint, the companies held meetings and concluded agreements to modify bids in a government tender called by PROMOCIÓN DE VIVIENDAS, INFRAESTRUCTURAS Y LOGISTICA, S.A. (PROVILSA, a public sector company owned by the regional government of Castilla y León) for the rehabilitation of a road.

In light of the complaint, the CNC Investigations Division opened a confidential probe, which included inspections at the offices of six companies involved.

As a result, on 18 February 2010 the Investigations Division opened an infringement proceeding against 53<sup>1</sup> companies for alleged anti-competitive conduct prohibited by article 1 of the LDC, consisting in arrangements to share out markets and fix prices for government tenders called in Spain for the preservation, improvement, renovation and rehabilitation of road surfaces and platforms.

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<sup>1</sup> GRUPO CAMPEZO OBRAS Y SERVICIOS, S.L.; CAMPEZO ASFALTOS DE CASTILLA Y LEÓN, S.L. (formerly OSCAL OBRAS Y SERVICIOS, S.L.); TEBYCÓN, S.A.; COMPAÑÍA GENERAL DE HORMIGONES Y ASFALTOS, S.A.; EXCAVACIONES SAIZ, S.A.; EXTRACO CONSTRUCCIONES E PROXECTOS, S.A.; MISTURAS OBRAS E PROXECTOS, S.A.; CONSTRUCCIÓN INTEGRAL DE FIRMES CPA, S.A.; PAVIMENTOS ASFÁLTICOS DE CASTILLA, S.A.; ALARIO OBRA CIVIL, S.L.; ASFALTOS DE LEÓN, S.A.; ALVARO VILLAESCUSA, S.A.; ARCEBANSA, S.A.; ASCAN EMPRESA CONSTRUCTORA Y DE GESTIÓN, S.A.; ASFALTOS Y CONSTRUCCIONES ELSAN, S.A.; RAFAEL MORALES, S.A.; BECSA, S.A.; CONALVI, S.L.; CONRADO JIMÉNEZ E HIJOS, S.A.; CONTRATAS IGLESIAS, S.A.; COPISA CONSTRUCTORA PIRENAICA, S.A.; CYES INFRAESTRUCTURAS, S.A. (formerly CONSTRUCCIONES Y ESTUDIOS, S.A.); ECOASFALT, S.A.; EIFFAGE INFRAESTRUCTURAS, S.A.; EMILIO BOLADO, S.L.; EOC DE OBRAS Y SERVICIOS, S.A.; EUROPEA DE ASFALTOS, S.A.; GEVORA CONSTRUCCIONES, S.A.; ASFALTOS GUEROLA, S.A.; OBRAS HERGÓN, S.A.; CONSTRUCTORA HORMIGONES MARTINEZ, S.A.; OBRAS, CAMINOS Y ASFALTOS, S.A.; OBRASCÓN-HUARTE-LAIN, S.A.; PAVIMENTOS BARCELONA, S.A.; PAS INFRAESTRUCTURAS Y SERVICIOS S.L. (ANTES PAVIMENTOS ASFÁLTICOS SALAMANCA, S.L.); PAVASAL EMPRESA CONSTRUCTORA, S.A.; PADELSA INFRAESTRUCTURAS, S.A. (formerly PAVIMENTOS DEL SURESTE, S.A.); PROBISA TECNOLOGIA Y CONSTRUCCION, S.L. (formerly PROBISA TECNOLOGIA Y CONSTRUCCION, S.A.); SERVICIOS Y OBRAS DEL NORTE, S.A.; SORIGUÉ, S.A.; TRABAJOS BITUMINOSOS, S.L. (formerly TRABAJOS BITUMINOSOS, S.A.); VÍAS Y CONSTRUCCIONES, S.A.; ALVARGONZÁLEZ CONTRATAS, S.A.; ASFALTOS LOS SANTOS, S.A.; BENITO ARNÓ E HIJOS, S.A.; CARIJA, S.A.; CEYD, S.A.; CONSTRUCCIONES Y OBRAS LLORENTE, S.A.; OBRAS, PAVIMENTOS E INSTALACIONES INDUSTRIALES, S.L.; OVISA PAVIMENTOS Y OBRAS, S.L.; SOCIEDAD ANÓNIMA DE BETUNES Y FIRMES; CONTRATAS Y OBRAS SAN GREGORIO, S.A.; and CONSTRUCCIONES SEVILLA NEVADO, S.A.

The parties are construction companies engaged in civil engineering work, among other activities, especially the construction and rehabilitation of roads, and have offices in Castilla y León, Galicia, Castilla La Mancha, Cantabria, Madrid, Andalusia, Valencia and Catalonia.

The relevant market is government tenders for the preservation, improvement, reinforcing, renovation, rehabilitation and construction of road surfaces and platforms (roads, trunk roads etc.). These services are sought by public authorities and engaged by means of tender procedures under the Public Sector Procurement Law (*Ley de Contratos del Sector Público*). The most common procedures for this type of contract are open and restricted.

The CNC Council has found that the evidence shows:

1. The following meetings were held:

- Meeting of 16 June 2009 in Burgos, aimed at reaching an agreement to modify the bids to be submitted in a tender called by PROVILSA for the rehabilitation of a road. Eleven companies participated in this meeting.
- Meeting of 16 December 2008 at an unspecified location, attended by 34 companies, aimed at reaching an agreement on the successful bidder and the bids to be submitted in seven tenders called by the Ministry of Development for the rehabilitation of roads in the provinces of Alicante, Albacete, Ávila, Cantabria, Murcia, Soria and Valencia.

2. Mechanism to agree on bids for government tenders for the preservation, improvement, renovation and rehabilitation of road surfaces and platforms:

It can be inferred from the evidence gathered that, in the 14 tenders under investigation, at least, a mechanism was in place to agree on bids, the operation of which can be described as follows:

- a. The mechanism mainly operated in tenders organised under the restricted procedure.<sup>2</sup>
- b. Contacts and meetings took place between the companies invited to submit financial bids before their bids were filed.
- c. The aim of these meetings was to analyse the bids (marked-down with respect to the tender price) for one or more tenders, which the invited companies planned to submit for each tender on competitive terms.
- d. After disclosing the competitive markdowns and announcing the company that would have won the tender in the absence of any agreement, the same company was kept on as the successful bidder but a new, far lower, markdown was agreed for it than would have been the case had it bid on

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<sup>2</sup> In this procedure, prior to issuing the invitation to tender, the contracting authority must establish certain objective criteria of creditworthiness, on the basis of which it will select a minimum of five candidates who may submit tender bids. See articles 162 to 168 of the revised Public Sector Procurement Law, approved by Legislative Royal Decree 3/2011 of 11 November 2011.

competitive terms. The remaining companies would then submit lower markdowns than that agreed for the winner.

- e. The competitive markdown of each company and the new markdown agreed for the winner were included in the maximum budget for each project using a formula to calculate the monetary difference to be shared out and the amount to which each company was entitled for having participated in the tender, modifying its planned financial bid.
- f. The formula was proportional so that the higher the markdown offered on competitive terms, the higher the reward under the bid agreement. The formula used for the share-out to each company was:  
*Amount to be shared out \* [(company's markdown in competitive conditions i)/(sum of all markdowns in competitive conditions)]*
- g. Once the bidders had reached an agreement and the amounts to which each were entitled as a result of participating in a specific tender had been ascertained, the company elected as winner would issue an unspecified number of promissory notes to each participant in order to guarantee payment of the agreed amounts.
- h. It was possible to calculate the amount divided between the companies in eight of the fourteen tenders. Over €14 million was shared out.

3. Factual admissions by certain companies: Eight companies admitted their involvement in the events to differing degrees.

The collusive mechanism described above restricts competition by its object and effects and, therefore, the CNC Council **assesses** the conduct examined in this case as a single infringement of article 1 of the LDC.

The CNC Council finds that normal competition in the restricted tenders for road rehabilitation work was replaced by an agreement between bidders which maintained the status quo of the winner and distorted the markdowns to be applied and, ultimately, the prices for services of this kind. The infringement affected tenders for the rehabilitation of road surfaces and platforms which were awarded in 2008 and 2009. The CNC Council also regards the infringement as very serious under article 62.4.a) of the LDC and, as such, it warrants a sanction.

In the CNC Council's view, this case involves a single infringement as it concerns a mechanism that operated time and again, with the same aim and subject to the same criteria, in several tenders, even though the body organising the tender or the location of the future work may have varied. Despite the fact that the collusive mechanism gave rise to different arrangements for each tender, each agreement was part of a common strategy.

Indeed, it has been evidenced that the same meeting saw agreements being reached on different tenders called around the same dates, even though not all of the companies were selected for the same tenders and the compensation mechanism did not operate

separately for each tender; instead, the companies occasionally setoff the payments arising from different tenders amongst themselves.

The CNC Council finds there to be sufficient evidence that all of the companies that participated in the tender called by PROVILSA and the seven tenders in respect of which an agreement was reached at the meeting of 16 December 2008 took part in the collusive arrangements.

With respect to the other six tenders, in contrast to the tenders referred to above, we do not know who attended the meetings, or whether documents resulted from the agreements which mentioned all of the participants, or the total amount of markdowns initially bid. However, a number of the companies that participated in these tenders *do* appear in documents evidencing the existence of collusion there, documents which confirm that the collusion operated by way of the same mechanism in all cases.

Accordingly, the CNC Council considers it proven that there was collusion in these six tenders based on the same mechanism, described above, that the mechanism required the participation of all or at least most of the bidders and that, in the vast majority of cases, the bidders participated in other tenders where their involvement in the collusive agreement has been established, from which it can be logically inferred that they were also involved in these six tenders.

The CNC Council also finds that this line of reasoning cannot be applied to companies whose participation in the meetings has not been established or which do not appear in any documents, although there are certain cases in which, even in these circumstances, there is conclusive evidence that a specific company participated in the events.

There is no exemption from liability for companies that participated in the tenders through a temporary business association<sup>3</sup> (Unión Temporal de Empresas or UTE), even if its purpose was "convenience" or "courtesy" and the companies took no interest in the terms of the association. Such actions are regarded as an infringement of article 1 of the LDC, at least on the ground of negligence, if the UTE, through its management or conduct, was legally required to participate and did so by engaging in bid rigging. Based on these criteria, the Council is of the view that 47 companies are responsible for the infringement, resulting in a loss of €14 million to the public purse.

The CNC Council calculates the sanctions on the basis of the turnover for the preservation, improvement, reinforcing, renovation and rehabilitation of road surfaces and platforms (roads, trunk roads etc.) in 2008 and 2009, although the calculation takes account of the number of tenders in which each company participated. In view of the seriousness of the infringement and the level of compensation paid out, if the calculated fine is less than €100,000, this figure will be applied as the base amount of the sanction. The figure will apply to companies that participated in tenders but did not record any turnover in the affected market. The CNC Council has applied aggravating circumstances to one company for failing to respond to information requests and attenuating circumstances to other companies based on the degree of cooperation and factual admissions that they provided.

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<sup>3</sup> In a UTE, two or more companies join together to perform works or provide a specific service. It takes the form of a single temporary venture lasting for the duration of the work or service, normally large-scale.

In view of all of the foregoing, the CNC Council considers it proven that 47 companies participated in the collusive agreements described above in order to manipulate markdowns in tenders for public works and has decided to impose fines in excess of €47 million.

Moreover, the CNC Council instructs that an infringement proceeding be opened against CAMPEZO CONSTRUCCIÓN, S.A. for its involvement in the events set forth in this resolution.