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THE PLENUM OF THE COMPETITION COUNCIL

DECISION

**No. APD – 14**  
**As of 15 October 2013**

**mun. Chișinău**

The Plenum of the Competition Council as constituted:

Viorica CĂRARE – Chairperson

Emil GUȚU – Vice Chairperson

Mihail CIBOTARU – Vice Chairperson

Ion MAXIM – Member

Veaceslav GUȚUȚUI – Member

Victoria BUZULEAC – Secretary,

Acting on the grounds of art. 41 para. (1) let. h) and para. (5) art. 93 of the Law on Competition no 183 as of 11 July 2012, Parliament Decision no 179 as of 12.07.2013 on appointing the members of the Plenum of the Competition Council as well Parliament Decision no 220 as of 27.09.2013 on appointing one member of the Plenum of the Competition Council:

Having analyzed the complaint of LLC „Policontract” no. 199 as of 25.07.2013, the notice of preliminary examination of the complaint submitted by LLC „Policontract”, as well the information collected during the preliminary investigation,

**HAS FOUND:**

On 26 July 2013 the Competition Council received the complaint from LLC „Policontract” (entry no.741) claiming the action of JSC “Servicii Comunale Florești” as to the signs of infringing the competition legislation while organizing the tender *LE/FL-PWP-01-„Provisions of pumps and chlorination equipment for Leova and Florești, water supply entities* by including into the *Requirements for electrolysis* of the requirement that *the electrolysis system must include electrolyzes for producing mixed oxidants*, which in compliance with the complaint was specific only for the company MIOX, whose distributor was Oniko PE, Ukraine. The applicant complained that the tender was

organized in compliance with the purchasing procedures of the EBRD, not pursuant to the purchasing procedure provided for by the Law no. 96 as of 13.04.2007 on public acquisitions.

As a result of examining the information and evidence collected during the preliminary examination of the complaint, the following were found as stated below.

JSC „Servicii Comunale Florești” concluded with BERD an International Loan Agreement „Project Agreement Water Utilities Development Programme” (hereinafter International Loan Agreement), signed on 20.12.2010, on the grounds of which the tender *LE/FL-PWP-01-„Provisions of pumps and chlorination equipment for Leova and Florești, water supply entities* was organized.

**I. As to the acquisition procedure in compliance to which the tender *LE/FL-PWP-01-„Provisions of pumps and chlorination equipment for Leova and Florești, water supply entities* should have been organized (national or EBRD)** it was mentioned that it did not lie in the competence of the Competition Council, but in the competence of the Public Acquisition Agency, institution which expressed its opinion on the subject by letter no. 29/66-1566 as of 17.06.2013. By the mentioned letter, Public Acquisition Agency notified the LLC „Policontract” that in compliance art. 4 let. 1) from the Law no. 96 as of 13.04.2007 on public acquisition, *its provisions should not apply to public acquisition agreements regulated by different procedural norms and attributed in compliance with a procedure specific to an international organization*, and for this reason it could not express on the contestation of LLC „Policontract” on carrying out the tender *LE/FL-PWP-01-„Provisions of pumps and chlorination equipment for Leova and Florești, water supply entities*, in compliance with the procedures of EBRD.

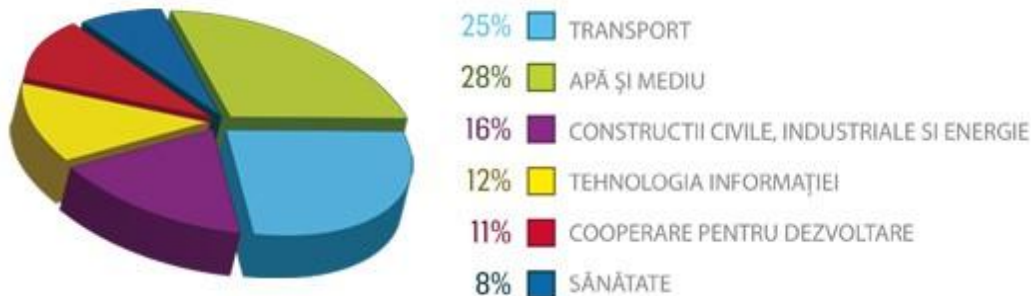
It must be mentioned that art. II, section 2.04 „Procurement” from the Loan Agreement, provided for:

- a) *Goods, works and the services (other than the consultancy services mentioned in section 2.04 (c)) must be procured within public tenders;*
- b) *In the meaning of section 2.04 (a) the procedure needed to be used while carrying out public tenders was the procedure exposed in chapter 3 from “EBRD rules on the procurement procedure” ;*
- c) *The employment of the consultants by the Management Unit of the Project within the Ministry of Environment, which should offer assistance for project implementation, must be carried out in compliance with the provisions of chapter 5 from “ EBRD rules on the procurement procedure”;*
- d) *All the agreements should be subject to the procedure of revision/approval described in “ EBRD rules on the procurement procedure” and should be revised as priority by the Bank.*

Therefore, for granting assistance in carrying out and organizing the tender *LE/FL-PWP-01-„Provisions of pumps and chlorination equipment for Leova and Florești, water supply entities* by the JSC „Servicii Comunale Florești”, the Ministry of Environment (in its capacity of Project Management Unity) selected the consultancy company EPTISA, as a result of carrying out the tender in compliance with the procedures provided for in chapter 5 from “ *EBRD rules on the procurement procedure*”.

The company EPTISA was established in Spain in 1956, as an engineering, architecture and information technology company carrying out its activity at international level and whose objective was to fulfill the requirements of the client. EPTISA implements

complex projects in the field of water and environment, constructions and transports, using technological knowledge, creativity, innovation as well the most recent technologies for sustainable development of the society. During over 50 years of activity, EPTISA incorporated different companies, extending continuously the services supply, fact which allowed for an innovative and multidisciplinary approach in order to offer its clients the most appropriate solutions.



In compliance with the information from the official web page [www.eptisa.com](http://www.eptisa.com), EPTISA terminated the financial year 2012 with a gross income of EUR 135 bn and over 2000 specialists working currently for the company and over 900 experts involved in international projects.

The official web page contains the information related to the fact that assistance and consultancy should be offered within a project in the field of water and environment in the Republic of Moldova, specifying the fact that support should be granted as tot procurement.

The Competition Council was notified about this fact by JSC „Servicii Comunale Florești” in the letter no. 2483 as of 07.08.2013, which specified the fact that the preparation of tender documents, assessment of offers and drafting of the assessment report at appointing the winner should be done by the consultancy company EPTISA, and JSC „Servicii Comunale Florești” had the technical function to place announcements about the tender, opening of offers on the tender day, signing of minutes for offer opening, signing of assessment reports and signing of agreements with the companies appointed as winners. For proving the facts contained in the letter, JSC „Servicii Comunale Florești” attached (in electronic format) the original electronic messages in PDF, in which:

- EPTISA consultant sent the JSC „Servicii Comunale Florești” the draft of the assessment report for introducing some information, revision and afterwards sending it back to the consultant;
- EPTISA consultant sent the JSC „Servicii Comunale Florești” the draft of the reply to the contestation of LLC „Policontract”, specifying in the message the fact that although JSC „Servicii Comunale Florești” was welcome to add anything, it could create uncertainties;
- EPTISA consultant sent the EBRD the finalized assessment report (signed by JSC „Servicii Comunale Florești”), in which it stated the recommendations related to the appointment of winners and declaring the offer of LLC „Policontract” as being inappropriate;
- EBRD representative sent the Ministry of Environment the notice on the lack of objections on the result proceeding from the assessment report of the tender *LE/FL-PWP-01-„Provisions of pumps and chlorination equipment for Leova and Florești*,

*water supply entities, expressing the consent on appointing the winners and requesting to be provided with copies of the agreements concluded with the winner within the shortest time possible.*

## **II. The following were found as to declaring the offer of LLC „Policontract” as inappropriate.**

For the procurement of Lot 2 "chlorination equipment", two companies competed within the tender *LE/FL-PWP-01-„Provisions of pumps and chlorination equipment for Leova and Florești, water supply entities*: LLC „Policontract” and „Oniko” from Ukraine.

According to the specifications, namely technical specifications, the main requirements for the electrolytic system were as follows:

- i. The electrolytic unit must be small, fully assembled, tested in the cycle of production and comprise the following main components:*
  - a) water softener unit;*
  - b) the electrolytic unit with control panel and the power supply;*
  - c) the tank for keeping the disinfectant solution;*
  - d) the tank for keeping the brine;*
  - e) pumps for adjustment / dispensing the consumption of disinfectant and brine;*
  - f) Automatic system of maintaining the concentration of chlorine;*
  - g) Pumps for water and brine;*
  - h) Other pieces;*
- Additionally, the electrolysis unit must be of modular form, easily accessible for maintenance, intuitive in operation and endowed with a digital display for displaying the information to the operator;*
- i) The electrolysis system must be mounted on the floor or wall, provided with a constant flow of air for proper ventilation and must include:*
  - Electrolysis to produce mixed oxidants;*
  - Block of continuous water supply;*
  - Touch screen;*
  - Pump for dosing the solution;*
  - Control System.*

*The electrolysis, electrolytic cell and metal parts inside the generator must be manufactured from durable material, with appropriate coverage for usage in cold water.*

*ii. Electrolysis plant parameters:*

- 1. Performance:*
  - Up to 6,8 kg/day equivalent chlorine for Florești.*
  - Up to 13,6 kg/ day de equivalent chlorine for Leova.*
- 2. Consumption of salt for the equivalent of 1 kg Cl<sub>2</sub> – at most 3 kg.*
- 3. Consumption of electricity for the equivalent of 1 kg Cl<sub>2</sub> - at most 6,6 kw/h.*
- 4. Connection to the electricity supply source -220V,50 Hz.*
- 5. The system must be cleaned independently without the use of acid.*
- 6. The concentration of oxidant should not exceed 0,5 %.*

7. *The presence of other secondary products than the hydrogen shall not be allowed.*
8. *The interface must be in Romanian.*
9. *There must be a multi-touch monitor for supervision and management of the installation.*
10. *The residual chlorine content after the treatment of water shall not exceed 1 mg/l.*
11. *Full automation of the dosing solution, depending on the residual content of chlorine in the water tank.*
12. *The installation must be equipped with a water treatment system: water filtration, water softener, water heater*
13. *The protection and stopping depending on certain parameters: voltage, water pressure in the system at the entry and the exit of the installation, water temperature and disinfectants at the entry and the exist, the degree of contamination of filters and water softeners, liquid leaks from the plant.*
14. *Disinfectant tank volume should be sufficient for at least 24 working hours.*
15. *The volume of the brine tank should be sufficient for at least 15 working days.*
16. *The installation must be scheduled to start at a certain hour. The operator shall be able to modify the parameters.*
17. *The disinfecting solution must not alter the properties for at least 30 days.*
18. *The possibility of dispatching and centralized remote control should be provided (SCADA).*
19. *In addition to the position C in the technical specification "the dispensing point is located at a certain distance the electrolysis. The dosing machine for drinking water must be included in the offer price."*

In the letter no. 139 as of 02.03.2013, LLC „Policontract” addressed to JSC „Servicii Comunale Florești” in order to provide the reasons for which its offer was deemed inappropriate, therefore, JSC „Servicii Comunale Florești” sent to LLC „Policontract” a reply in compliance with which the offer of LLC „Policontract” was deemed inappropriate for the following reasons:

1. *„The dosing system was not included in the offer or the specification of the proposed equipment is not clear. This was a not clear requirement in the tender documents. Your offer contains a clear mention “dosing pumps shall be necessary for the solution dosing (they are not included in the delivery set)”.*
2. *The product obtained by means of the equipment proposed shall be a mixed oxidant, not “a very clean solution of hypochlorite with a concentration of 5 g/liter pH 9”, as specified in para. 1.2, p. 1.2.1.*
3. *The yield of the oxidant expressed in Kg of chloride does not comply with the bill of quantities. In this respect the data for Florești and Leova were mixed. The bill of quantities specifies an yield up to 13,6 kg/day of chloride equivalent for Florești and 6,8 kg/day for Leova. Your offer does not comply with the requirements.*

4. *The source of electricity supply was clearly identified as 240 V AC power. Your offer was grounded on a source of electricity supply with 3 phases of 400 V.*
5. *The list of pieces and activities which shall be accomplished (not included in the delivery set) includes pH correction equipment, chlorine and pH regulator, and phone line for modem. The tender documentation clearly requests for the complete set of all analyzers, metering pumps and interface SCADA. These are clearly excluded from your offer or are not identified with sufficient detail degree.*
6. *Your offer does not indicate the fulfilment of minimum performance requirements provided for in the tender documentation (salt consumption- 3kg Na/Cl/ kg Cl<sub>2</sub>), electricity consumption 6.6 kWh/kgCl<sub>2</sub>, etc.)”.*

The letter provides for the following:

- Many unclear facts could have been identified or solved by means of the Request for Clarification sent within the process of tender, in compliance with the provisions of “ *EBRD rules on the procurement procedure*”, but JSC „Servicii Comunale Florești” did not receive any formal Request for Clarification from behalf of „Policontract”;
- The main requirement for the tenderers was to submit a complete offer insofar the tenderer to assist at installing the system and to ensure the installment of the pipelines and the execution of other connections for exploiting the system. The obligation of the tenderer to purchase additional pipelines and other assessment equipment needed for the exploitation of the chlorination system shall not be practiced without an additional budget.

JSC „Servicii Comunale Florești”, in its letter no. 1929 as of 18.02.2013, as a result of request for clarification on behalf of a potential tenderer about the availability of a project for the tender *Provisions of pumps and chlorination equipment for Leova and Florești, water supply entities*, mentioned the following: *„there is no technical project available for analysis and for reference to it, in the process of presenting the offer for this tender, the offers shall be presented including the costs for developing a detailed technical project, which further shall be developed and approved by the authorized institution ”.*

Therefore, examining the tender documents and the offers of participants to tender, it can be mentioned that although LLC „Policontract” considered it was discriminated by including in the *Requirements for the electrolysis* of the requirement that the *system of electrolysis should include electrolytes for producing mixed oxidants*, it was found that its offer was inappropriate and for the reason of not observing other 6 conditions mentioned above. The company „Oniko” from Ukraine corresponded to all the requirements, fact confirmed in the assessment report drafted by the consultancy company EPTISA, signed by the JSC „Servicii Comunale Florești”.

An important requirement specified in the invitation to the tender and tender documents, was that the , tenderer should have „experience in delivery within at least 3 agreements within the last 5 years, each of which amounting at least EUR 300 000 euro per lot or the equivalent in MDL”, this being successful and substantially executed being similar to the proposed goods”, condition which “Policontract” did not fulfilled, the biggest contract amounting EUR 300 000, in partnership with LLC „Prominent”. Another aspect is

the fact that the partnership between LLC „Policontract” and LLC „Prominent” was not proved, no document proving this fact was submitted within its offer by LLC „Policontract”.

„Oniko” PE company presented 4 contracts in value of over EUR 300 000 within its offer, one of which in partnership with „Salonix-teh” LLC, the partnership being proved by attaching an agreement concluded between „Oniko” PE and „Salonix-teh” LLC referring to the joint participation to the tender organized by JSC „Servicii Comunale Florești”, and attaching a power of attorney by which „Salonix-teh” LLC empowered the company „Oniko” to act on its behalf within the tender at issue.

By letter no. APD-08/219-589 as of 01.08.2013 the Competition Council requested the LLC „Policontract” to submit information if it addressed to JSC „Servicii Comunale Florești” as to the fact that the condition from the technical documents of the tender specified in the section *Requirements to the electrolysis equipment, let. a): „... mixed oxidant production”* is a „commercial publicity notion for a certain equipment trade mark”, since this condition was stipulated in the invitation to the tender. In its reply the LLC „Policontract” specified the fact that it did not address to JSC „Servicii Comunale Florești” because it did not know that „Oniko” company participated to the tender.

It is important to mention the position of EBRD on organizing and carrying out the tender at issue, presented on 21.08.2013, upon the request of the Competition Council no. APD-08/218-588 as of 01.08.2013. In its reply EBRD confirmed that there existed a requirement that all public acquisitions organized within the projects financed by the EBRD should have been organized in compliance with the provisions from “*EBRD rules on the procurement procedure*”, and the tender *LE/FL-PWP-01-„Provisions of pumps and chlorination equipment for Leova and Florești, water supply entities”* was part of those tenders which had to be organized in compliance with “*EBRD rules on the procurement procedure*”, and should have been subjected to the process of revision/approval by EBRD. In the same letter EBRD mentioned that LLC „Policontract”, as a party participating in the tender, had the right to address with a complaint to JSC „Servicii Comunale Florești” or to EBRD, mentioning that all the complaints completed pursuant to the complaint form provided for by “*EBRD rules on the procurement procedure*” should be examined by EBRD and that the detailed instruction on the complaint procedures, including the complaint form could be accessed on the official page [www.ebrd.com](http://www.ebrd.com).

Proceeding from the above mentioned it was observed that the preparation of tender documents, assessment of offers and the elaboration of the assessment report while appointing the winner shall be performed by the consultancy company EPTISA selected in compliance with the EBRD procedures by the Ministry of Environment, and the final decision while appointing the winner was made by EBRD (as a result of expressing the agreement for appointing the winner), not by the JSC „Servicii Comunale Florești”, the latter being entitled the technical function of placing tender announcements, opening offers on tender days, signing of minutes of offer opening, signing of assessment reports and concluding of contracts with the companies appointed as winners.

Therefore, in the vein of the above mentioned, it was found that *de facto* the author of the claimed actions in the complained submitted by LLC „Policontract” was not JSC „Servicii Comunale Florești” but the consultancy company EPTISA together with EBRD, being in fact those which make the final decision within the tenders organized within the projects financed by EBRD, fact confirmed by EBRD and the provisions from „*EBRD rules on the procurement procedure*”.

On the grounds of art. 53 para.(2) and para. (3) from the Law on Competition no. 183 as of 11.07.2012, the Competition Council, by letter no. APD-08/280-729 as of 19.09.2013, notified the LLC „Policontract” about the lack of reasonable grounds for suspecting the infringement of the competition legislation by JSC „Servicii Comunale Florești”, and requested the written opinion of LLC „Policontract” within 10 working days, but the author of the complaint did not submit observations within the set period.

Proceeding from the above mentioned, on the grounds of art. 41 and art. 53 of the Law on Competition no. 183 as of 11.07.2012, the Plenum of the Competition Council,

**DECIDES:**

1. To reject the complaint of LLC „Policontract” no. 199 as of 25.07.2013, as to the lack of reasonable grounds to suspect infringement of the Law on Competition no. 183 as of 11.07.2012 by JSC „Servicii Comunale Florești”;
2. This Decision shall enter into force on the date of its adoption and shall be notified to the parties;
3. The decision of the Competition Council can be appealed in court.

**Chairperson of the Plenum  
Competition Council**

**Viorica CĂRARE**