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MOSCOW ARBITRATION COURT

ARBITRAL AWARD

dated 26 December 2016 in the case N A40-37651/16

LLC "RaShine Cleaning" and LLC "Service workshops" appealed to Moscow Arbitration court with a petition to Moscow OFAS of Russia for invalidation of the resolution N ЕП/48038-2 dated 27 November 2015 and warrants N ЕП/48039, N ЕП/480040 dated 27 November 2015.

By the resolution of Moscow Arbitration court dated 25 May 2016, that was upheld by the ruling of the Ninth Arbitration Court of Appeal of Moscow dated 23 August 2016 the claim was satisfied.

The Moscow OFAS of Russia in its cassation appeal requests to vacate the judgment and the ruling, since those were adopted illegally and unreasonably, with violation of rights. Judgments of courts do not comply with actual circumstances of the case and with evidences, submitted in the case.

According to opinion of the antimonopoly authority, the aggregate of evidence in the case confirms presence of component elements of antimonopoly offense in acts of claimants according to clause 2 part 1 article 11 of the federal law N-135-ФЗ dated 26 July 2006 "On protection of competition " (further to be referred to as the Law on protection of competition).

In a court session the representative of Moscow OFAS of Russia affirmed the arguments and claims of cassation appeal, and representatives of LLC “RaShine cleaning” and LLC “Service workshops” objected against its satisfaction.

Having verified the correctness of application by courts of the first instance and courts of appeal of norm of substantive law and norms of procedural law, having discussed the arguments of cassation appeal and objections against it, the arbitration court of cassation instance finds no grounds for invalidation of the resolutions and ruling.

Arbitration courts have established, that Moscow OFAS of Russia received a statement from Ilyina S.V., which reported that the open electronic auction with register number N 0373100009914000824 passed without significant reduction of contract price and founders of firms participating in auction were sisters.

In the course of review of the claim Moscow OFAS of Russia, having observed in activity of LLC «RaShine Cleaning» and LLC «Service Workshops» signs of violation as per clause 2 part 1 article 11 Law on protection of competition, initiated proceedings N 1-11-1039/77-15 on violation of antimonopoly legislation.

By resolution of Moscow OFAS of Russia N ЕП/48038-2 dated 27 November 2015 LLC «RaShine Cleaning» and LLC «Service Workshops» were recognized as having violated clause 2 part 1 article 11 of the Law on protection of competition by conclusion of cartel, realization of which resulted in maintenance of prices at 3 auctions in electronic form with register numbers 0373100096513000354, 0373100009914000508, 0373100099140000824, subject of which was, accordingly: cleaning of the territory of hospital, performance of the whole scope of works related to janitorial service in premises of buildings of State Tretyakov gallery, cleaning and landscaping of the territory and removal of garbage.

On the basis of this resolution the antimonopoly authority issued to LLC «RaShine Cleaning» a warning notice N ЕП/48040 dated 27 November 2015 on prohibition of activities, which may become an obstacle for competition and (or) may result in restriction, removal of competition and in violation of antimonopoly legislation, it was also ordered that information of trading was presented to Moscow OFAS of Russia by 1 June 2015.

According to clause 2 part 1 article 11 of the Law on protection of competition it is prohibited to conclude agreements between economic entities, if such agreements result or may result in rise in, reduction or maintenance of, prices when trading.

According to clause 18 article 4 of the Law on protection of competition agreement shall mean an understanding in writing contained in a document or several documents, as well as a verbal understanding.

Clause 2 of the Resolution of the plenum of the supreme arbitration court of the Russian Federation N30 dated 30 June 2008 "About some questions arising in connection with application of the antitrust law by Arbitration Courts" clarifies, that coordination of actions can be established also in the absence of documentary confirmation of availability of the arrangement on their making.

Such assessment may be applied also for consideration of cases on conclusion of anti-competitive contracts, since the interpretation, stated in the named resolution relates to analysis of behavioral aspects of anti-competitive elements of offense. Since an agreement as a legal category assumes presence of both its conclusion and its execution, the evaluation of activities of economic entities at conducting tender procedures, competitive nature of which are presumed, shall be carried out based upon the principle of completeness, objectivity and comprehensive analysis of all factual circumstances of the case, and not of limiting to statement of facts.

Cartel is an agreement, prohibited by law and entails either administrative or criminal liability, cases of conclusion of formal (documental) anti-competitive agreements are extremely rare. Agreements are concluded (reached) by oral arrangements, electronic communication or implicative acts of participants.

In justification of offense, imputed upon the claimant, Moscow OFAS of Russia specified legally significant actions in the course of trade from same IP-address; the coincidence of register entries, to which application files were changed, as well as in certain cases – dates and times of creation of such files; the identical content of application files in the part of offered commodities, manufacturers thereof and technical characteristics; register entries of "RaShine Cleaning", which changed the file “Consent 0373100009651300354",

submitted within the scope of application of LLC «Service Workshops», coincides with a part of name of the second respondent - "LLC RaShine Cleaning".

According to the respondent, the foregoing evidences use by the claimants of coordination of preparation of auction applications, use by competitors of uniform infrastructure, which is possible only in case of cooperation and consolidation for achievement of universal goal for all.

In this connection, the respondent concluded that the outcomes of the abovementioned auctions cannot be recognized as a result of competitive struggle, but are merely a result of an oral agreement, which does not comply with principles of competition, whereat the claimants are not a part of same group of persons.

The abovementioned behavior allowed LLC «RaShine Cleaning» to win the auction with 1% reduction, which resulted in profit of 66231000 rubles for the latter.

Considering this case, satisfying the appeal, rebutting the assertion of antimonopoly authority, the courts proceeded from the premise that Moscow OFAS of Russia did not take into account that LLC «RaShine Cleaning» and LLC «Service Workshops» are located at the same address: Moscow, 1-st Dubovskaya str. 13A, building 2. For the purposes of saving resources claimants rent offices next door to each other at the same address in a business center, where there is only one provider. This explains coinciding of IP-address and record entries during creation of files.

Claimants, in the course of review of the case pointed out, that do not have specialists on their staff, only Director Generals participate in tenders, who usually turn to same specialists for preparation of applications, which explains coinciding of record entries. However, they independently participate in tenders each with own EDS, at that the possibility of being aware of the content of each other's applications as such does not evidence that they really exchanged information and did not have own interest.

The indicated circumstances were not evaluated by the antimonopoly authority at adoption of the challenged resolution. No evidence was submitted in regard to the named circumstances could not provide competition during participation of claimants in electronic auctions.

Apart from that, courts pointed out that at imputing upon tender participants the violation of clause 2 part 1 article 11 of the Law on protection of competition, the antimonopoly authority should prove that behavior of each participant independently and their cumulative actions evidence conclusion of cartel agreement. Such analysis is not presented in challenged resolution.

For the purpose to qualify the actions of economic entities as performed in violation of clause 2 part 1 article 11 of the Law on protection of competition the following facts are to be substantiated: those evidencing participation of the entities in the same market of commodities, conclusion by them of an agreement (in written or oral form), absence of objective reasons for conclusion of such agreement, whether or not a real reduction or maintenance of prices took place in trading or there was a threat of occurrence of such circumstances.

At that the antimonopoly authority is to establish the fact that participants of competition restricting agreement received economic benefits, i.e. apart from the above mentioned circumstances, it is to be proven that all persons who are recognized as having violated clause 2 part 1 article 11 of the Law on protection of competition, received any benefit from the outcomes of the auction.

The above mentioned circumstances are to be substantiated in relation to each of the three episodes of identified violations, specified in resolution of the respondent. LLC «Service Workshops» had no objective reasons to conclude an agreement, which restricts competition at the auction N 0373100009914000824.

The named auction initially had four participants, i.e. apart from claimants two more companies submitted bid applications, which were not allowed to participate by the client due to non-compliance of submitted applications to requirements of auction documentation, and as a result only claimants were allowed to participate.

The said circumstance could not have been known to claimants beforehand.

LLC «RaShine Cleaning» committed no actions, which could cause other participants not to be allowed to participate in electronic auction.

Antimonopoly authority did not prove that LLC «Service Workshops» had no economic interest to participate in auction N 0373100009914000824.

Moscow OFAS of Russia did not prove that the contract could have been concluded at more beneficial terms for the client, services could have been actually rendered at a lower price, actions of claimants resulted in removal from competition of any other competitors. At that, the challenged resolution established that no damage was caused to third persons and that LLC «Service Workshops» had no income from winning of LLC «RaShine Cleaning».

Clause 2 of the Resolution of the plenum of the supreme arbitration court of the Russian Federation N30 dated 30 June 2008 "About some questions arising in connection with application of the antitrust law by Arbitration Courts" clarifies, that confirmation of absence of violation by a particular economic entity in the form of coordinated actions can be achieved among others by evidence of objective reasons for own behavior of such economic entity on the market of commodities and (or) absence of dependence of its actions on actions of other persons.

Evidence of objective reasons of own behavior of LLC «Service Workshops» is the information letter of LLC “Independent Strategic Partnership” (an organization which renders mediation services in the field of issuance of bank guarantees in partner banks) in regard to refusal from banks to issue a bank guarantee to LLC «Service Workshops», availability of which is an obligatory condition for conclusion of a contract in case of winning the tender. The information, specified in the letter was forwarded to the Director General of LLC «Service Workshops» at the time when auction was in process.

This circumstance conditioned the withdrawal from further competitive struggle, since winning the tender with no possibility to provide execution of the contract would entail adverse consequences for LLC «Service Workshops», including in the form of exclusion into the blacklist of suppliers.

Apart from that, LLC «Service Workshops» made its auction bid offer, but reducing the price below the competitor's offer was economically unprofitable, since the initial price of the trade subject was already below market price, and further reduction of price was not in the interest of the company.

Within the scope of auction documentation the client presented a justification of initial price of contract, which was set by the client on the basis of request for commercial offers.

LLC «RaShine Cleaning» made an offer for price of services, which was already below the lowest of commercial offers, on the basis of which the client calculated auction price and reduction of price by 1% not only did not violate the interests, but was in line with the interests of the client, who concluded the contract on the most favorable terms.

No evidence was submitted in the resolution of the antimonopoly authority as to the fact that claimants maintained the price.

By implication of clause 2 part 1 article 11 of the Law on protection of competition punishable is not just any agreement of economic entities, but only an agreement, which resulted in or could result in maintenance of price, which was not the case in issue under consideration.

The courts established that LLC «Service Workshops» had no interest in such agreement, did not have any material gain in connection with withdrawal from further competition.

On the contrary, the 2014 record book of income and expenditure of organizations and individual entrepreneurs, using simplified taxation system, the list of counteragents, submitted to materials of the case, evidence that LLC «RaShine Cleaning» is not a counteragent of LLC «Service Workshops».

Yet, in case if there is an agreement aimed at winning of LLC «RaShine Cleaning», LLC «Service Workshops» would withdraw from participation in auction and the contract would in such case be concluded with the sole participant at the initial price without reduction.

Apart from that, the respondent did not take into consideration the fact that conclusion of a contract at the most favorable terms is a common behavior of participants of economic turnover, the main goal of which is profit.

Auction participants are entitled to be guided, among others, by own economic expectations in regard to optimal for them prices for commodities, offered for supply.

Along with that, applicable Russian legislation does not stipulate an obligation for auction participants to reduce initial (maximal) price of contract.

Refusal of participants to further reduce the initial price does not indicate an unconditional evidence of their actions being directed at maintenance of price.

Based upon clause 18 article 4 of the Law on protection of competition, an agreement shall mean an understanding in writing contained in a document or several documents, as well as a verbal understanding.

No written or verbal understandings were concluded between LLC «RaShine Cleaning» and LLC «Service Workshops» in regard to establishment of a cartel.

Offer price of LLC «RaShine Cleaning» at electronic auction N 0373100009914000824 was 31 680 000 rubles.

Further reduction of price could result in losses for the company, which would make if inexpedient to conclude the contract.

Reduction of contract price at electronic auction from 32 000 000 rubles to 31 680 000 rubles was significant for LLC «RaShine Cleaning», since turnovers at the company accounts are not big, size of charter capital of the company is 10000 rubles, the company uses simplified taxation system.

Therefore, courts reasonably concluded that antimonopoly authority did not prove violation of clause 2 part 1 article 11 Law on protection of competition by actions of claimants.

Under these circumstances, having conducted in the course of the court hearing a comprehensive, complete and objective investigation of all arguments and evidences of persons, participating in the case, having evaluated them accordingly, the first instance arbitration court, and in case of reconsideration of the case – the court of appeal instance, resolved the dispute without violation of norms of procedural law, entailing invalidation of the challenged judiciary acts.

Conclusions of arbitration courts and courts of appeal on application of norms of substantive law correspond to facts of the case, established by them and to evidence submitted in the case.

Therefore, arguments of cassation appeal, actually leading to different from that of the court evaluation of circumstances of the case and available evidences, checked and reasonably dismissed by the courts, cannot serve as a ground for invalidation of challenged judicial acts, since they do not evidence violation of norms of law by the courts.

Guided by articles 284 - 289 of the Arbitration procedural code of the Russian Federation, the court

ruled:

to affirm the decision of the Moscow Arbitration court dated 25 May 2016 and the ruling of the Ninth Arbitration Court of Appeal of Moscow dated 23 August 2016 in the case N A40-37651/16 and to dismiss the cassation appeal.