



Elena Kabalkina

MOSCOW ARBITRATION COURT

ARBITRAL AWARD

dated 29 January 2016 in the case N A40-2891/2015

Operative part of the award was proclaimed on 28 January 2016

Complete text of the award was prepared on 29 January 2016

Found:

“First valuation company” Limited Liability Company (further to be referred to as “First valuation company” LLC), company, claimant) appealed to Moscow Arbitration court with petition for invalidation of the resolution of the Office of the Federal Antimonopoly Service for the city of Moscow (further to be referred to as Moscow OFAS of Russia, anti-monopoly authority) dated 12.11.2014 "On dismissal of claimant's appeal in regard to actions of the client during procurement process without prejudice and on removal of restrictions for placement of purchase, introduced by the letter of OFAS of Russia dated 10.11.2014 N МГ/35667", as well as on recovery of payment for representative services in the value of 40 000 rubles and expenses for payment of state duty in the value of 2 000 rubles.

Public Joint-Stock Company “VTB 24” was subpoenaed as a third person.

By the resolution of Moscow Arbitration court dated 08 April 2015, that was upheld by the [ruling](#) of the Ninth Arbitration Court of Appeal of Moscow dated 12 October 2015, the asserted claims were satisfied: the disputed resolution of antimonopoly authority was invalidated, the court obligated the antimonopoly authority to rectify the violation of rights and legal interests of the claimant not later than within 10 days from the effective date of the court ruling and recovered legal costs for representative services from Moscow OFAS of Russia to the benefit of the claimant in the value of 20 000 rubles and expenses for payment of state duty in the value of 2 000 rubles. The remaining part of claim was dismissed.

Disagreeing with the named court rulings the antimonopoly authority appealed to Moscow Arbitration court with cassation appeal, requesting to vacate judicial acts as adopted with contempt of law and to remit the case for a new investigation.

In a court session the representative of antimonopoly authority affirmed the arguments of cassation appeal based of the stated grounds.

The Company and the third person, notified about the hearing of cassation appeal in accordance with the order, stipulated by the law, did not direct a representative to the court. The court of cassation found it fit to hear the case in absence of the named person, who did not show up, since pursuant to [clause 3 of Article 284](#) of the Arbitration procedural code of the Russian Federation, Non-appearance in the court session of the arbitration



court of the cassation instance of the person who has lodged the cassational appeal, and of other persons taking part in the case, shall not serve as an obstacle for considering the case in their absence, if they were duly notified about the time and place of the judicial proceedings.

The claimant in its statement, directed to the court, asked to affirm the court decision, dismissing the claim.

Constitution of the court was not challenged.

Having heard the representative of Moscow OFAS of Russia, and having discussed the arguments of cessation appeal, upon having checked the legality of challenged court rulings in the order, provided for by [Article 286](#) of the Arbitration procedural code of the Russian Federation, verifying the correctness of application of norms of substantive law and of the norms of procedural law as it investigates the case and adopts the judicial act and [ruling](#), the court of cassation does not find any grounds to vacate judicial acts adopted.

Pursuant to case materials and as established by the court, the public joint-stock company "PAO "VTB 24" (the Client) published a notification about open single-step request for proposals in electronic form for the right to conclude a service contract for valuation of immovable property for the purpose of mortgage lending of VTB 24 (PJSC) in Chelyabinsk city and Chelyabinsk region (register number 31401409342) (further to be referred to as the purchase).

"First valuation company" LLC on 23.10.2014 applied to Moscow OFAS of Russia with a claim in regard to activity of the Client during procurement process, reflected in violation of bids assessment.

By resolution of FAS of Russia for Moscow city date 12.11.2014 the claim of the company was dismissed without prejudice due to default of the claimant to meet the appeal deadline with reference to [part 4 article 18](#) of the Federal Law N 135-FZ "On protection of competition" dated 26.06.2006 (further to be referred to as the Law on protection of competition), according to which complaining against actions (omission to act) of the trade promoter, the electronic site operator, tender or auction commission in the procedure established by this [article](#) shall be allowed at latest in ten days as from the date of summing up the sales results or, if the insertion of sales results in the information-telecommunication network Internet is provided for, as from the date of such insertion.

As it appears from the challenged ruling, according to the antimonopoly authority, such placement was made at the official website on 09.10.2014. Thus the deadline for complaining against the named actions is 19. 10.2014.

Meanwhile, according to [part 5 article 18.1](#) of the law on protection of competition, where a contract is not made on the basis of the results of sales or in case sales are declared frustrated, it is allowed to complain against actions (omission to act) of the trade promoter, electronic site operator, tender or auction commission with an anti-monopoly agency in the procedure established by this [article](#) within three months as from the date when the sales results are summed up or, if the insertion of sales results in the information-telecommunication network Internet is provided for, as from the date of such insertion.



At adoption of judicial acts in this case, the courts proceeded from the premise that as of the date of appeal of the claimant to the antimonopoly authority no contract was concluded with any of the winners according to the protocol of bid review for participation of request for proposals, in connection to which the commission of Moscow FAS of Russia, guided by [part 4 article 18.1](#) of the Law on protection of competition, did not accept the claim for consideration, regardless of the fact, that no contract was concluded.

Dismissing the argument of cassation appeal of the antimonopoly authority in regard to the fact that a contract with the winner was concluded on 23.10.2014, i.e. on the day the company appealed with the named claim, the judicial panel proceeds from the premise that it was not this circumstance that served as a cause for refusal to review the application.

As it was correctly specified by courts, Moscow FAS of Russia suspended the contract conclusion term, in connection with which the term was subject to calculation according to [part 5 article 18.1](#) of the Law on protection of competition.

Consequently, the appeal of the company for actions of trade promoter, electronic site operator, tender or auction commission should be considered on merits.

The disagreement of antimonopoly authority with conclusions of the court, different assessment by it of factual circumstances of the case and different interpretation of provisions of the law does not mean that a judicial error was made in consideration of the case and is not a ground for vacation of a judicial act by the court of cassation.

Incorrect application by courts of first instance and appeal instance of norms of substantive law and violation of norms of procedural law, entailing unconditional vacation of a judicial act was not identified.

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 8 April 2015 and [the ruling](#) of the Ninth Arbitration Court of Appeal of Moscow dated 12 October 2015 in the case N A40-2891/2015 and to dismiss the cassation appeal.