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## OVERVIEW OF COURT JUDGMENTS INVOLVING APPLICATION OF THE LAWS OF THE RUSSIAN FEDERATION ON THE CONTRACT SYSTEM IN FEDERAL AND MUNICIPAL PROCUREMENT OF GOODS, WORKS AND SERVICES

The Supreme Court of the Russian Federation has considered the enquiries received from courts of general jurisdiction and arbitration courts, as well as case law analyses prepared by courts that are related to application of the laws of the Russian Federation on the contract system in federal and municipal procurement of goods, works and services (hereinafter referred to as Contract System Laws), including as regards the execution, amendment or termination of state and municipal contracts, performance of such contracts and liability for non-performance and improper performance thereof.

In order to achieve correct resolution of such disputes by courts, it is very important to define the correlation between the provisions of Federal [Law](#) No. 44-FZ "On the contract system in federal and municipal procurement of goods, works and services" enacted on 5 April 2013 (hereinafter: Contract System Law, the Law) and other federal laws that are part of the system laws on the contract system in accordance with [Part 1 of Article 2](#) of the Law and the provisions of the Civil [Code](#) of the Russian Federation (hereinafter - the Civil Code).

In order to develop fair competition, to ensure publicity and transparency of procurement, to prevent corruption and other abuses, the: Contract System [Law](#) stipulates the specifics of execution, amendment or termination of state (municipal) contracts, performance of such contracts and liability for non-performance and improper performance thereof; however, it does not comprehensively govern all civil law relations arising in connection with a state (municipal) contract.

Since, pursuant to [Part 1 of Article 2](#) of the Contract System Law, all laws on the contract system in federal and municipal procurement of goods, works and services shall be founded on provisions of the [Civil Code](#) of the Russian Federation, when resolving disputes arising from state (municipal) contracts, the courts are guided by the norms of the Contract System [Law](#) interpreted in conjunction with the [Civil Code](#) provisions, and if no special norms are available the courts are guided directly by the norms of the [Civil Code](#).

In order to ensure a uniform approach to resolving disputes involving application of the provisions of the Contract System [Law](#), and considering the courts' enquiries that arise when judging such cases, the Supreme Court of the Russian Federation, based on [Article 126](#) of the Constitution of the Russian Federation, [Article 2, 7](#) of the Federal Constitutional Law N 3-FKZ "On the Supreme Court of the Russian Federation" enacted on February 5, 2014, has developed the following legal positions.



## ***Execution of a State (Municipal) Contract***

1. As a general rule, a customer which enters into the procurement documentation certain special properties of the goods that meet the customer's needs and are required for the customer, given the specific intended application of such goods, cannot be deemed to be reducing the number of potential competitive bidding participants.

A medical institution (customer) asked an arbitration court to invalidate a resolution and an order issued by an antimonopoly authority.

The said resolution held that the customer had breached [Part 2 of Article 33](#) of the Contract System Law, since the procurement documentation for supply of pharmaceuticals contained a requirement that the pharmaceuticals be delivered in certain packaging - in a flask or similar packaging that ensures the package tightness once opened. An order was issued to cancel the records of the session held to carry out electronic bid evaluation and summarize the competitive bidding, to amend the procurement documentation and to remove the requirements to the pharmaceuticals' primary packaging.

The court of first instance upheld the Claimant's request and invalidated the antimonopoly authority's resolution and order. The court found that the subject matter of the procurement held as an electronic competitive bidding for supply of pharmaceuticals had been described in the procurement documentation in accordance with the requirements of the Contract System [Law](#).

[Part 1 of Article 33](#) of the Contract System Law sets the rules which the customer shall follow when describing the subject matter of the procurement in the procurement documentation.

[Clause 1 of Part 1 of Article 33](#) of the Contract System Law requires that the description of the subject matter of the procurement be objective and state functional, technical and quality properties of the subject matter and its performance properties (if necessary). A description of the subject matter of the procurement cannot include requirements or indications with respect to trademarks, service marks, trade names, patents, utility models, industrial designs, place of origin of the goods or manufacturer name, nor can it include any requirements to goods, information, works and services if such requirements reduce the number of competitive bidding participants, unless there be no other method to provide a more accurate and clear description of the properties of the subject matter of the procurement.

When describing the subject matter of the procurement in the procurement documentation, the customer shall use, if possible, standard descriptions, requirements, notations and terminology concerning technical and quality properties of the subject matter of the procurement, as established in accordance with technical regulations, standards and other requirements stipulated by the law of the Russian Federation on technical regulation. If the customer does not use such standard descriptions, requirements, notations and terminology when describing the subject matter of the procurement, the procurement documentation shall provide a justification of using such other descriptions, requirements, notations and terminology ([Clause 2 of Part 1 of Article 33](#) of the Contract System Law).



Literal interpretation of the above provisions means that the customers who carry out their procurement processes in accordance with this law, when describing the subject matter of the procurement, shall state the requirements to the goods, works, and services to be procured, so that, on the one hand, increase their chance to acquire the goods with the properties they require and thus to meet their needs, while, on the other hand, avoiding an arbitrary reduction of the number of competitive bidding participants.

In the aforementioned case, the customer's requirement that the pharmaceutical product be delivered in flasks was based on a specific purpose and application: an opened vial will not preserve the pharmaceutical through the period of its use and the pharmaceutical will be wasted. Thus, purchasing the pharmaceutical in vials would cause a waste of pharmaceuticals; a flask, when opened, allows using and storing the pharmaceutical for the required period of time. At the same time, the procurement documentation contained no restrictions in terms of the pharmaceutical's (active substance's) amount or dosage.

Thus, the medical institution stated such requirements to the pharmaceutical in the procurement documentation that were based on the institution's needs and the specifics of its activity.

The court noted that, pursuant to [Article 6](#) of the Contract System Law, efficiency of meeting the federal and municipal needs and efficiency of the procurement process (efficient use of funds) are among the cornerstone principles of the contract system and must be observed alongside the requirement to ensure fair competition.

A possible reduction of the number of competitive bidding participants, if connected with a more efficient use of funds (saving), based on the provisions of [Clause 1 of Article 1](#) of the Contract System Law, cannot in itself be considered a violation of the requirements of Federal [Law No. 135-FZ "On Protection of Competition"](#) enacted on 26 July 2006 (hereinafter - the Law on Protection of Competition).

In the aforementioned case, the antimonopoly authority did not provide evidence that the requirements to the subject matter of the procurement stated by the customer did lead to an arbitrary reduction of the number of competitive bidding participants; the state register of pharmaceutical product manufacturers contains the names of two manufacturers of such pharmaceutical which produce it in flasks; seven bids were submitted, in which suppliers offered to supply the pharmaceutical produced by both manufacturers and packaged in flasks.

2. If a customer's requirements to goods stated in the procurement documentation do point to a particular manufacturer, such requirements do violate the provisions of [Article 33](#) of the Contract System Law, unless such goods have a specific application.

A company asked an arbitration court to invalidate an antimonopoly authority's resolution which had rejected the company's complaint. According to the company, the customer had breached the law by including in the procurement documentation for an electronic competitive bidding for supply of pharmaceuticals such requirements to the product which corresponded to the pharmaceutical produced by a particular manufacturer.

The court of first instance denied the Claimant's claims, and the court of appeals upheld the judgment, since the customer, as the courts held, was entitled to set requirements to a



pharmaceutical product to be procured by determining the tablet's shape and splitting and the packaging size.

A District Court of Arbitration revoked the said awards and granted the Claimant's claims. The court found that the customer included in the procurement documentation such requirements to purchased goods (dosage form, dosage, shape) that were not related to the pharmacological properties of the pharmaceutical product, nor related to its therapeutic efficiency, nor determined by specifics of the pharmaceutical product's prescription and use, but did directly point to the sole manufacturer of such pharmaceutical product.

In addition, there was no documentary evidence to prove that any of the competitive bidding participants were able to purchase the pharmaceuticals produced by that manufacturer in order to supply them to the customer.

As a result, the court found that the customer had violated the rules of order placement, which caused an arbitrary hindrance to participants in the disputed procurement and reduced their number, thus constituting a restrictive practice. Based on the aforesaid, the court invalidated the antimonopoly authority's resolution.