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REVIEW OF THE COURT PRACTICE OF USING THE LEGISLATION OF THE RUSSIAN FEDERATION ON THE CONTRACT SYSTEM OF STATE AND MUNICIPAL PROCUREMENT OF GOODS, WORKS AND SERVICES

The Supreme Court of the Russian Federation studied the matters submitted by the courts of general jurisdiction and courts of arbitration as well as case law analyses prepared by the courts which are related to the application of the legislation of the Russian Federation on the contract system of state and municipal procurement of goods, works and services (hereinafter referred to as the contract system legislation), including the conclusion, amendment and termination of state and municipal contracts, their implementation and responsibility for failure to implement and improper implementation.

For the courts to resolve this category of disputes correctly, it is very important to determine the correlation between the provisions of the Federal Law dated April 5, 2013, No. 44-FL "On the contract system for state and municipal procurement of goods, works and services" (hereinafter referred to as the Contract System Law, or Law) and other Federal Laws included into the system of the contract system laws in accordance with part 1 of Article 2 of the Law and the provisions of the Civil Code of the Russian Federation (hereinafter referred to as the Russian Civil Code).

For the purpose of developing fair competition, providing openness and transparency of procurement, preventing corruption and other improper practices the Contract System Law establishes the particular characteristics of concluding, amending, terminating state (municipal) contracts, their implementation and responsibility for failure to implement and improper implementation, but does not contain comprehensive regulation of civil law relationships arising in relation to a state (municipal) contract.

Since, subject to part 1 of Article 2 of the Contract System Law, the legislation on the contract system of state and municipal procurement of goods, works and services is based on the provisions of the Russian Civil Code when resolving disputes arising from state (municipal) contracts, the courts rely on the provisions of the Contract System Law interpreted in conjunction with the provisions of the Russian Civil Code, and in case of absence of specific provisions, directly on the provisions of the Russian Civil Code.

For the purpose of providing unified approach to solving disputes related to application of the provisions of the Contract System Law as well as taking into account the questions arising when the courts consider this category of cases, the Supreme Court of the Russian Federation developed the following legal stances based on Article 126 of the Constitution of the Russian Federation, Articles 2, 7 of the Federal Constitutional Law dated February 5, 2014, No. 3- FCL "On the Supreme Court of the Russian Federation".

Concluding a state (municipal) contract

1. As a general rule, the customer stating in the tender documentation the particular characteristics of the product that meet the customer's demands and that the customer needs given the specifics of use of such a product cannot be interpreted as a restriction of the sphere of the potential participants of the procurement.

   A medical institution (customer) petitioned the arbitration court to invalidate the decision and the order issued by the anti-monopoly authority.

   By this decision, the customer was found to be in breach of part 2 of Article 33 of the Contract System Law, since the tender documentation for supply of medication stipulates a requirement about supplying the medical product in a specific package – a vial or its equivalent that permits ensuring the integrity of the package upon opening. An order was also issued for cancellation of protocols of processing the applications for participation in the electronic tender and of summation of the results of the tender; introduction of amendments into the tender documentation, excluding the requirement towards the primary packaging of the medical product.

   Fulfilling the stated claims and invalidating the decision and the order issued by the anti-monopoly authority, the court of original jurisdiction concluded that the description of the object of procurement in the documentation for the electronic tender for supply of medications complied with the requirements of the Contract SystemLaw.

   Part 1 of Article 33 of the Contract System Law stipulates the rules by which the customer shall be governed in describing the object of procurement in the procurement documentation.

   Paragraph 1 of part 1 of Article 33 of the Contract System Law establishes that the description of the object of procurement must be impartial and include functional, technical, quality and operational characteristics of the object of procurement (if necessary). The description of the object of procurement must not include requirements or instructions concerning trade marks, service marks, trade names, patents, utility models, industrial designs, designation of origin or name of the manufacturer along with requirements towards goods, information, works, services so long as such requirements lead to restrictions in the number of tenderers, except when there is no alternate method to provide a more precise and clear description of the characteristics of the object of procurement.

   When describing the object of procurement in the documentation on procurement, the customer shall use, if possible, standard measures, requirements, designations and terms concerning performance and quality parameters of the object of procurement established in accordance with the technical regulations, standards and other requirements set out by the legislation of the Russian Federation on technical regulation. If the customer does not use such standard measures, requirements, designations and terms when describing the object of procurement, the documentation on procurement shall contain a rationale for the need to use different measures, requirements, designations and terms (paragraph 2, part 1, Article 33 of the Contract System Law).

It follows from the literal interpretation of the aforementioned provisions that the customers implementing procurement according to the rules set up in this law shall, when describing the object of procurement, thus determine the requirements towards the procured goods, works and services in such a way as, on the one hand, to increase the chances to buy goods with precisely those characteristics that they need and that comply with their demands, and on the other hand, not to limit unreasonably the number of the participants of the procurement.

In the abovementioned case the customer's indication of the need to supply the medical product in a vial is based on the specifics of the prescription and method of its use: an opened ampoule will not permit keeping the product airproof during the necessary time of application and it will not be suitable for use, so procurement of the product in ampoules will lead to unreasonable expenditure of medical products; a vial permits using and storing the medical product upon its opening for the required period of time. At the same time the tender documentation did not contain limitations concerning the quantity of the medical product (active substance) and dosage.

Therefore, in the tender documentation the medical institution set up the requirements towards the medical product taking into account its own needs and based on the specifics of the implemented activity.

The court noted that for the purposes of Article 6 of the Contract System Law the basic principles of the contract system include the principle of responsibility for the effectiveness of procurement for state and municipal needs and the principle of efficiency of purchase implementation (efficient use of sources of financing) which has to be followed together with the principle of competitiveness.

The possible restriction of the pool of participants of the procurement together with simultaneous increase in efficiency of use of financing (economizing on it), based on the provisions of paragraph 1 of Article 1 of the Contract System Law cannot by itself be viewed as a violation of requirements of the Federal Law dated July 26, 2006, No. 135-FL, "On protection of competition" (hereinafter referred to as the Law on Protection of Competition).

In the case in question, the anti-monopoly authority did not produce evidences that the requirements formulated by the customer towards the object of procurement led to unreasonable limitation of the number of participants of the tender; the state registry of the manufacturers of the product that produce it in vials has two such manufacturers registered; there are seven applications submitted for participation in the tender, in which the suppliers proposed to supply the product in vials of both manufacturers.

2. By including in the tender documentation the requirements towards the goods to be bought which indicate its specific manufacturer, in absence of the specifics of using such goods the customer is in breach of the provisions of Article 33 of the Contract System Law.

The company petitioned the arbitration court to invalidate the decision of the anti-monopoly authority which declared its claim to be unreasonable. In the opinion of the company, the customer unlawfully included into the documentation on conducting an

electronic tender for supply of medication the requirements towards the goods to which corresponds a medical product produced by a specific manufacturer.

The ruling of the court of original jurisdiction, upheld by the court of appeal, dismissed the asserted claims on the grounds that the customer had the right to establish requirements towards the procured medical product that determine the form of the pill, the method of its division and the packaging.

The district court of arbitration reversed these court decrees and upheld the asserted claims on the grounds that the customer included into the tender documentation the requirements towards the goods to be purchased (form of administration, dosage, pharmaceutical form) that do not concern pharmaceutical properties of the medical product, are not in any way related to its therapeutical effectiveness and are not based on the specifics of prescribing and using the product being procured, but were a direct evidence of a single manufacturer of this medical product.

Moreover, it is not confirmed in writing that any of the participants of the tender had an opportunity to purchase the medical products from this manufacturer for the purpose of supplying them for the needs of the customer.

Hereupon the court came to a conclusion about the misapplication by the customer of the rules of placement of orders, which led to creation of unreasonable obstacles for the participants of the disputed procurement resulting in their decreased number which is indicative of limitation of competition. Taking into account the aforementioned, the court found the decision of the anti-monopoly authority to be unlawful.

3. When conducting state (municipal) procurements it is acceptable to include in one lot goods, works and services which are technologically and functionally interrelated.

The customer petitioned the arbitration court to invalidate the decision of the anti-monopoly authority. In the opinion of the anti-monopoly authority, the customer violated the provisions of paragraph 1 of part 1 of Article 33 of the Contract System Law, since while conducting an electronic tender for supply of computer hardware for state needs it improperly combined into a single lot the delivery of computers and the delivery of software product which led to restriction of competition (part 3 of Article 17 of the Law on Protection of Competition).

The arbitration court, in invalidating the decision of the anti-monopoly authority, proceeded from the fact that, subject to paragraph 1 of part 1 of Article 33 of the Contract System Law, it is admissible to combine goods (works, services) into a single lot if it does not lead to restriction in the number of participants of the procurement. Taking into account that the customer combined into a single lot the goods that are technologically and functionally connected – the computers and the software without which it is impossible to start using the hardware, such combination complies with the requirements of Article 8 and paragraph 1 of part 1 of Article 33 of the Contract System Law.

In another case the arbitration court pointed out the wrongfulness in the customer's actions in combining into a single lot the works on preparing the design estimate and on implementing construction and assembly works. The result of such combination is unreasonable limitation of the number of participants of the competition due to the fact that

design and construction works are represented on different product markets, each of them having a sphere of potential participants of the tender ready to implement these works.

Moreover, the absence of full design documentation within the set of documentation for the tender for construction of an object means that the customer did not set up requirements towards quality, technical characteristics, safety, work results, which is a violation of the provisions of Article 33 of the Contract System Law.

4. For the purposes of two and more customers holding a joint tender, the same goods shall mean goods that have the same generic characteristics or make up a set of such goods.

On the basis of part 1 of Article 25 of the Contract System Law the customers held a joint tender on procuring interactive and computer equipment, that is: interactive whiteboards, multimedia short throw projectors, wall mounting for short throw projectors, document cameras, multifunctional devices, laptops, interactive desks (training units), work stations, voting systems.

The decision of the antimonopoly authority found the customers' actions unlawful and in conflict with the provisions of part 1 of Article 25 of the Contract System Law, since the procured goods do not fall into the category "the same goods".

Contesting the decision of the antimonopoly authority, the customers stated that combining the said goods into a single lot was conditioned by their common purpose and technological interconnection due to performance specifications and use properties, the said goods were intended for a shared objective – the customers forming a single complex of interactive and computer equipment in a classroom to be used during the process of teaching.

The court of the original jurisdiction and the appellate court dismissed the stated claim.
According to part 1 of Article 25 of the Contract System Law, when implementing procurement of the same goods, works or services by two or more customers, such customers have the right to hold joint competitions or tenders. A contract with the winner or winners of a joint competition or tender is concluded by each customer.

The courts noted that this standard provides a balance between effective and rational use of funds when conducting competitions and tenders, including driving down the costs for holding them, and preventing unreasonable restriction of the number of participants of procurements. For the purposes of this standard "the same goods" shall mean goods having common generic features (for example, school boards, including chalkboards and whiteboards) or making up a set of such goods (for example, "school chair-school desk"). The goods specified by the customers in the tender documentation (interactive boards, projectors, laptops, etc.) do not possess common generic features.

Therefore, the customers having a common purpose of equipping classrooms with complexes of interactive and computer equipment does not constitute sufficient grounds for them holding a joint tender stipulated by part 1 of Article 25 of the Contract System Law.

5. In case of a statutory ban on admissibility of goods originating from foreign countries for the purposes of implementing state (municipal) procurements a participant of a tender for the right to conclude a state or municipal contract has to submit a document confirming the country of origin of the goods offered for supply.

   The anti-monopoly authority found that the customer violated part 7 of Article 69 of the Contract System Law and issued a prescription for elimination of violations which took the form of the second part of the company's application being found not compliant with the relevant documentation for the tender for the right to conclude a state contract for goods procurement.

   The customer petitioned the arbitration court to invalidate the decision and the order issued by the anti-monopoly authority.

   Upholding the stated claims, the court of original jurisdiction and the court of appeal came to the conclusion that the customer's actions in rejecting the company's application due to failure to provide country of origin documents comply with the Contract System Law, for which reason the disputed decrees of the anti-monopoly authority are unlawful.

   The courts found that according to the tender documentation a proof of the country of origin of the supplied goods was required; the second part of the company's application included as a country of origin document a declaration under its own signature: the document stated that the supplied goods were manufactured in the Russian Federation. The courts acknowledged that such a document does not constitute an admissible evidence that permits to identify goods as originating from the territory of a particular geographic object. The application included no other documents (their copies) that allowed to determine the country of origin of the goods proposed for procurement.

   The district arbitration court cancelled the decision of the court of original jurisdiction and the decree of the court of appeal. The court proceeded from the premise that by virtue of paragraph 3, part 5, Article 66 of the Contract System Law the customer does not have the right to demand submission of documents which in accordance with the legislation of the Russian Federation are submitted together with the goods. At the same time, paragraph 2 of Article 456 of the Russian Civil Code does not stipulate the seller submitting to the buyer any country of origin documents for the goods.

   The Chamber for Commercial Disputes of the Supreme Court of Russian Federation cancelled the decree of the district court of arbitration and upheld the decision of the court of original jurisdiction and the decree of the court of appeal on the following basis.

   In accordance with part 3 of Article 14 of the Contract System Law, for the purpose of protecting the foundations of the constitutional system, supporting the defense of the country and safety of the state, protection of the internal market of the Russian Federation, development of national economy, support of the Russian commodity producers, the Government of the Russian Federation established a ban on admissibility of the goods originating from foreign countries, works and services respectively implemented and rendered by foreign persons, and limited the admissibility of the said goods, works and services for the purposes of implementing the procurement. The country of origin of

the said goods is determined in accordance with the legislation of the Russian Federation.

The Decree of the Government of the Russian Federation dated December 24, 2013, No. 1224 "On instituting a ban and limitations on admissibility of goods originating from foreign countries, works (services) implemented (rendered) by foreign persons for the purposes of procurement of goods, works (services) for the needs of the defense of the country and safety of the state" (hereinafter referred to as the Decree of the Government of the Russian Federation No. 1224) established a ban on admissibility of goods originating from foreign countries, works (services) implemented (rendered) by foreign persons for the purposes of procurement of goods, works (services) for the needs of the defense of the country and safety of the state, except for the cases when the manufacture of such goods, the implementation of works and the rendering of services on the territory of the Russian Federation is absent or does not comply with the requirements of public contracting authorities.

The district arbitration court annulled the decree of the court of appeal and upheld the ruling of the court of original jurisdiction, agreeing with its conclusions.