

MEASURES AGAINST THE RESTRICTION OF COMPETITION IN THE PROCUREMENT FOR STATE AND MUNICIPAL NEEDS (ON THE EXAMPLE OF THE RUSSIAN CONTRACT SYSTEM)

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***Abstract:** On the example of Russia were considered legal provisions on the contract system in procurement and practice of the activity of customers, by definition and calculation of non-monetary criteria for assessing applications participants that lead to a restriction of competition. Proposed solutions that reduce customers' ability to manipulate the evaluation criteria (performance evaluation), the value of their importance in order to limit participants' access to procurement.*

***Keywords:** Contract system, the principle of competition, corruption factor, non-monetary evaluation criteria, the restriction of competition, state and municipal procurement*

INTRODUCTION

Meaning of existence of the contract procurement system is the organization of interaction of state and municipal customers with market participants, which provides the greatest impact of the financial costs of providing the needs of customers and the growth of the real economy. It is considered that the observance of competitive procurement in order to benefit all participants in the system, however, this sector worldwide has been criticized as the most corrupt [18, 8]. There is no contract system in the world that would not put at the heart of the principle of competitive bidding. However, the problem is that in the event of corruption factor mechanisms to ensure competition, working with the opposite effect and customers use to restrict access to trading participants.

Action corruption factors in the adoption of legislation corruptogenic nullify the transparency of the procurement system [10, 14]. As a result of competitive mechanisms

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in place to ensure equal access to procurement participants are used to create the appearance of fair competition by “sharpening” the provisions of the procurement documentation, in particular, criteria and evaluation procedures under the predetermined winner. This article provides basic manipulation of competitive mechanisms used by the customer intentionally or due to lack of professionalism to limit participants’ access to procurement. The proposed information is typical not only for the Russian contract system, but also for systems of other countries, based on international standards [5, 19]. The main objective of the study is to show the inconsistency of approach, asserting the priority of a competitive bidding procedure, which is not protected from the effects of corruption factor. In connection with that purpose theoretical task is to identify the shortcomings of mechanisms to ensure that competition procurement, and techniques for the manipulation of restriction of competition among the participants. The challenge is to offer practical and reasonable measures aimed at leveling action of corruption factors in the auction. The practical significance of the study is to develop solutions to eliminate the manipulation of the customer with the criteria of evaluation of bids in the design documentation for the purchase, while maintaining the priority of the principle of competitive bidding.

RESULTS AND DISCUSSION

The contract system in the field of public procurement in Russia operates in accordance with the Federal Law № 44-FL dated April 5, 2013. Institutional and legal framework for the protection of competition, including the suppression and prevention of preventing, restricting or eliminating competition regulated by a special Federal law ¹ 135-FL of July 26, 2006. One of the basic principles of contract system in the area of procurement is the principle of competition, according to which prohibited any acts that lead to restriction of competition, including unreasonably limit the number of participants in the procurement [17]. The contract system of procurement is aimed at creating a level playing field between participant’s purchases. This means that the legislation provides for mechanisms to ensure that any interested person an opportunity to become a supplier (contractor, executor) (hereinafter - the supplier) [1]. Competitive mechanisms, in turn, are aimed at improving the efficiency and effectiveness of the procurement by identifying the best conditions for the execution of the contract [15].

These mechanisms determine the procedure for determining and applying the criteria for assessing applications, the final proposals (hereinafter - the application) and the values of their significance. For example, a combination of mandatory mechanism in assessing the cost and non-monetary criteria during all purchases in a way defined by the supplier as a contest. The possibility of establishing maximum required minimum or maximum values of quantitative characteristics to be assessed in the framework established by the customer criteria also helps to identify the best conditions for the execution of the contract. Establishing limit values the importance of the criteria for assessing applications, including taking into account the specifics of

the procurement is also aimed at ensuring competition. As well as a ban on the use of customer value criteria or their significance, is not provided by the law of the contract system with the placement method of procurement. All these and other mechanisms shape the fair price and non-price competition between the parties to procurement [4, 20] that allows the customer to increase the efficiency of providing state and municipal needs.

Maintain a competitive order corresponds to the prohibition of establishing customer qualification requirements for the participants of procurement, including the presence of their financial resources, equipment and other material resources belonging to them by right of ownership or on other legal grounds, experience related to the subject of the contract, and business reputation, professionals and other employees of a certain level of qualification (hereinafter - the criterion of "qualified participants purchase"). This prohibition is compensated by the rule, according to which the examination of the application is not made in relation to the evaluation of applications for participation in the competition, the request for proposals, and the final proposals [9].

International practice offers the following competitive mechanisms that are recommended to take into account the formation of a contract system:

- public distribution of information relating to procurement procedures and contracts for procurement;
- establishment, in advance, the conditions for participation, including selection criteria and the award of contracts and tendering rules, and their publication;
- use of predetermined and objective criteria for decision-making on public procurement;
- effective system of internal control, including an effective system of appeal;
- measures to regulate matters regarding personnel: responsible for procurement, inspection procedures, training requirements.

Thus, the competitive mechanisms provided by both international and national law, are intended to be effective in preventing corruption. Setting competitive mechanisms ensures that the objectives of the existence of the contract procurement system [12, 16]. Nevertheless, this is only possible with the exclusion of action corruption factors under which a transparent, competitive procurement, the objectivity of decision criteria are empty words.

MATERIALS AND METHODS

Procurement practices in Russia shows that competitive mechanisms can also be used for manipulation of procurement options to limit the number of participants in the procurement, and in establishing redundant evaluation criteria that violate the

conditions of fair competition. Here are some examples of the procedure for determining and calculating the evaluation of applications for non-monetary criteria that illustrate the use of competitive mechanisms to limit participants' access to procurement. The study was conducted on the basis of procurement information posted on the official website (*www.zakupki.gov.ru*). Data sampling was carried out according to procurement carried out during 2014 state and municipal customers. The sample is not taken into account international procurement and procurement of certain types of entities regulated by the government. The subject of the analysis were the only non-monetary evaluation criteria as the most vulnerable to the manifestation of corruption factors in procurement.

Non-monetary indicators of criteria are:

- quality of work, quality of services;
- functional properties of consumer goods;
- compliance with environmental regulations;
- qualification of human resources (managers and key personnel) proposed to carry out works and services;
- experience party's successful delivery of goods, works and services of comparable nature and scope;
- providing the participants with the purchase of material and technical resources in terms of the availability of the participant purchases of own or leased manufacturing facilities, technological equipment necessary to carry out works and services;
- providing the participants with the purchase of labor resources;
- business reputation of participant purchases.

The following are the two main application nuance non-monetary criteria. Firstly, in relation to these evaluation criteria may be provided for indicators that reveal the content of the criteria and taking into account the particular evaluation of the purchased products. Secondly, the evaluation criteria for "qualified participants purchase" can be made only if the customer is established in the documentation for the purchase of indicators that reveal the content of the evaluation criteria, indicating (if necessary) the customer is extremely necessary minimum or maximum value.

Rules for assessing participants' applications including non-monetary criteria established by the Government of the Russian Federation № 1085 from November 28, 2013 were (hereinafter - the valuation rules). Score from non-monetary criteria is carried out according to the rules of evaluation except as assessing applications in terms of "quality of goods (works, services)" and "environmental compliance", as well as cases where the customer installed rating scale. Environmental Compliance and functional properties of consumer products is confirmed by a party document, the criterion of

quality customer often determines the parameters that do not have a quantitative expression. In assessing proposals for the criteria of product quality advantage is determined by the commission on purchases by an expert, as well as by comparing and contrasting proposals participants. Note also that the proposals of the participants on this criterion are not disclosed by the Commission as part of the opening of the envelope, which eliminates the possibility of a full-fledged monitoring the content of submitted bids. In this context, further analysis will be subject to the criteria, the evaluation of which is expressed only quantitative indicators.

Traditionally, the customer combines the criteria of "qualified workforce (managers and key personnel)" and "party security workforce." That is, participant in the application must identify the labor force engaged for execution of the contract, and qualified personnel proposed for the execution of the contract. The evaluation result is determined by the importance of indicators that reveal the content of the evaluation criteria and taking into account the particular evaluation of the purchased products. Defining the parameters of this criterion, the customer can restrict competition as follows:

- set the maximum inflated required minimum quantitative value by the presence of a participant in the labor force with the appropriate skills;
- set the parameters of the redundant evaluation of the subject in terms of qualification of human resources proposed for the performance of work, provision of services;
- establish unequal intervals (range) values of the indicators;
- combine related works (services) in one subject of procurement that requires the involvement of various specialists or otherwise.

However, the most obvious way of limiting competition is when the customer does not set the maximum required minimum or maximum values of quantitative characteristics. In this case, the maximum number of points under this criterion will be awarded to the member who will offer the maximum number of specialists with the most impressive qualifications. Accordingly, the formation of the participant's application is a list of the staff proposed for the execution of the contract, according to the principle of "more is better", defining the choice is no need for labor to perform the contract, and the desire to increase the number of points in the evaluation of applications in the criterion. In this case, the customer and the participant completely overlooked the fact that to carry out works and services on the subject of procurement objectively necessary number of specialists is much lower than proposed in the application.

This practice is bad because:

- each participant will seek any means to offer the greatest number of specialists. It encourages participants to resort to violations (fictitious provision of supporting documents) and makes an assessment on this indicator in fiction;

- participants having to objectively state the required number of experts have virtually no chance of getting the maximum number of points, and if the gap value with the value of the proposed party leader significant, the number of points by criterion will tend to zero;
- newly created organizations and a small number of specialists, as well as organizations with narrow profile activities are uncompetitive in comparison with the multidisciplinary organization with an expanded staff.

The solution in this case can be bound to establish the maximum required minimum or maximum values of quantitative characteristics of the index. This sets the numerical value must be justified according to the real needs of the customer in the number of professionals and their qualifications to perform the contract. Obviously, the setting in the documentation for the purchase of such parameters as the deadline for the works and services, the amount of the purchase, the customer has a clear understanding of what and how much resources are needed to perform the contract. The only exception is the two-stage competition (Mamedova, 2013).

Exceeding the participant set limit should be considered by the customer as a subjective factor, which characterizes the scale of activities of the participants, but it will not affect the number of points assigned by the criterion of application.

In the proposed solution has another positive effect. As set limits would be attainable for many participants, then *ceteris paribus* the maximum number of points will be assigned to incoming requests to the customer before anyone else. This defeats the purpose of the practice of collusion between the customer and the participant who submits an application within the parameters previously registered applications. The proposed procedure is in line with the principle of maximum degree of competition in the software when installed possibility of filing electronically. Then prepared faster than other application will be accepted by the customer before the others using electronic means of communication without loss of time for delivery.

Indicators criterion “experience party’s successful delivery of goods, works and services of comparable nature and scope” and “goodwill participant purchases” past activities characterize the participant, and the indicator “provide the participants procurement of material and technical resources” characterizes its current capabilities. Information provided by the participant must indicate the positive results of its operations and its potential, which will ensure the faithful performance of the contract. Ways to limit access to participation in the procurement used for these indicators. They are also associated with the establishment of unjustified extremely necessary minimum and maximum quantitative values, which leads to narrowing of the range of potential suppliers or the displacement of scores by inadequate distribution of points on the interval (range) values of the indicators.

However, it is clear that there is no guarantee that a supplier to provide information about the execution of the contract twenty can fulfill the conditions of the contract is

better than a supplier with a smaller number of contracts. Much more significant indicator of the ability of the supplier is an indicator of providing the participants with material and technical resources, especially in the case of a contract for a long period. Raising the limit required minimum quantitative value of the index makes it impossible to take part in the procurement organizations with more modest positive experience, as well as newly created organizations, even though the full resource support activities.

Customers also restrict competition in procurement by combining related activities, services in one subject of the contract. In this case, the purchase cannot take part suppliers, job profile which is one of these types of works and services. Or to participate in the purchase of the supplier will need to expand staff. Customer base for determining such a procurement subject consist in the fact that thus guarantees the customer targeting their claims in case of unfair performance of the contract, including the period of operation of the object of purchase. Customer also aims to reduce the risk of non-performance of the contract by transferring the entire volume of works and services to one supplier. However, the step of determining a supplier such an approach to the development of the documentation for the purchase restricts participants.

Defining the parameters of indicators to measure the customer, primarily seeks to comply with its own interests, which are based on the concepts of efficiency and effectiveness of procurement. However, in this effort to establish a customer runs the risk of such parameters that restrict access to procurement participants. One of these "excesses" is to establish as a matter of assessing the total value of all contracts comparable nature with some nuances. For example, the customer takes into account only the contracts that are made within one year before the date of application for participation in the procurement. Alternatively, take into account the contracts made just on their own, that is, contracts executed as a subcontractor, they are not taken into account when assessing the application.

It appears that in both cases the customer is sufficient to identify the subject of evaluation in terms of providing the participants with material and technical resources, as even the minimal prescription provider experience is not a guarantee of good performance of the contract. On other indicators enough to indicate the minimum value, as provided by the party validation of data and documents is carried out only by the customer. In addition, there are specific items procurement market where subcontracting is normal practice. Do not consider this specificity is known to limit the number of potential participants in the procurement. Customer seems the design documentation for the purchase should take into account the rules of business and especially the functioning of the market of the purchased products. By the development process it is advisable to involve experts, based on the conclusions which the customer determines appropriate border indicators that corresponds most suppliers of purchased products.

To help to determine how wide the practice of methods that restrict access to the procurement of the participants, the official website of the data may be purchasing.

As an example, examine the information on procurement in the construction sector, in particular procurement to perform work on the design (design documentation).

Taking into account that in respect of the specified object purchase limit value non-monetary criteria for assessing the significance of applications is 40%, the customer self-distributes this amount between the characteristics of quality and qualifications. According to the official website of the procurement have been analyzed in the following areas of certification: work on the preparation of project documentation, engineering surveys, geodetic work. Here are some of the most typical ways of restricting competition committed customers.

In particular, it is noted in some cases a significant advantage of the indicator "quality of work" in comparison with the qualifying performance - the maximum value of the index at 100 points is 85 points offers quality assessment of the participant. In this case, the customer uses the vague wording on which the party can not determine the order of evaluation. For example, the following wording is permitted - "estimated degree of detail and elaboration of organizational and technical proposals, including taking into account the technical requirements, methodology, technology and quality of works and services, in terms of achieving the best possible result, the organization of coordination and expertise."

Also often a way of limiting competition is to bring together in one piece of the purchase of several types of work are required for delivery and special equipment (logistical means), and human resources with specific qualifications and experience. Most often customer unites related activities, such as "the development of the project with the preparation of engineering research" or "development of project documentation and the passage of state examination." But there are procurement, the subject of which is separate kinds of work. For example, a customer formulates the subject of procurement as "design and reconstruction (construction or installation of engineering communications)," or as a "project development and overhaul." Combining the two types of work is not the limit. Noted the following wording:

- execution of contract work on the project: "Overhaul institutions. Surrounding territory. Development of project documentation. Overhaul of the interior";
- execution of contract works on construction of capital construction: School (second starting complex) - the reconstruction of the street, the design and construction of travel;
- perform engineering research; development of project documentation with reference model project, with external engineering networks to the connection point, in an amount sufficient for the construction, to obtain all necessary approvals for the design and estimate documentation; the positive conclusion of the state examination of project documentation and engineering survey results (if necessary), a positive conclusion on verification

determining the estimated cost; the implementation of the supervision of the project within the framework of the state program.

In the case of a composite object such purchases as a result of the analysis indicated that the significance of the indicator "experience" is increased in comparison with other indicators. In addition the customer specifies in the documentation for the purchase of that accounting information to be carried out on similar contracts, in some cases with the addition of "made in-house."

Note the practice established by the Customer intervals for values, as well as extremely necessary minimum. For example, in terms of "experience" minimum 25 points correspond to the value of the cost of the contracts in the range of 10 to 20 mln. rubles. Accordingly, participant provides information about contracts totaling less than 10 mln. rubles, will receive zero points. The maximum number of points (100 points) corresponds to an amount exceeding 31 million. rubles the implementation of contracts for the purchase of similar items for the last 3 years. When the starting maximum value of procurement is less than 5 mln. rubles arises the question in the professionalism and integrity of the customer's intentions.

In estimating the parameters of the "security of human resources", customers often use intervals, setting them without reference to the minimum values really needed to perform the work of labor. As a result, the value needed to attract labor resources in the best case is on the border of the minimum set value range. The maximum number of points (100 points) in terms corresponds to the number of labor resources, twice, three times or more higher than the required amount.

The indicator "provision of material and technical resources" is to be evaluated in the majority considered purchases. At the same time its absolute significance in the overall assessment criterion is always negligible. The same observation is typical for the indicator "goodwill party procurement."

Summarizing the results of the analysis should be noted that in almost all cases the use of the customer selected measures to limit participants' access to procurement led to a decrease in the number of participants of purchase. In the above purchases the number of participants does not exceed two in 94% of the total procurement analyzed the specified object placed during 2014. Further noted that in none of the cases considered in the supervisory bodies haven't been received customer complaints about the actions that lead to a restriction of competition.

FINDINGS

Considering the problem of the development of competition in the procurement under the possible impact of the corruption factor, we must conclude that the only market conditions determine the goal of maximum development of competition in public procurement, namely the possibility of timely and meet the needs of government customers, quality and cost of purchased products. The ideal state of the procurement

market is a state of perfect competition, which satisfies two criteria: 1) the goods sold must be identical; 2) buyers and sellers should be so much that no one buyer or seller could not affect the market price [4, 6]. Obviously, that is not always market products bought by the state, is in a state of perfect, or at least close to the model of perfect competition [11, 20]. In this regard, the development of competition in the procurement of the state should eliminate the practice of using competitive mechanisms in the corrupt interests, namely to limit participants' access to trading.

It seems that in Russia as part of an action plan for the implementation of the Federal Law № 44-FL appropriate to provide for measures to develop a common approach to the identification of ways of restricting competition in procurement with regard to the existing competitive mechanisms. In procurement law must be provided of the offense of antitrust laws, such as the restriction of competition, which is currently lacking. An obvious consequence of developing this approach is to develop recommendations to the competent authorities for the development of customer documentation for the purchase. Such advice may relate in particular to increase the importance of the position indicator "logistical resources" and the procedure for determining, documenting. Recommendations may also contain provisions on the establishment of sound performance evaluation parameters "experience party procurement" and "qualified labor force." The development of competitive mechanisms in the procurement will promote the spread of model contracts, unifying subject, conditions of purchase. If the customer finds it necessary to combine several views of works and services in one subject procurement, this decision must be justified. It is also possible to establish a harmonization of procurement responsibilities with the competent authorities.

As a guideline, customers may also be offered to attract experts to determine the parameters of the indicator "security workforce," on the basis of expert opinion which the customer generates the appropriate conditions for the purchase and the order of evaluation of bids. On the basis of expert opinion or expertise may be determined by estimating the values of indicators intervals so that is really required amount of resources was reflected in the composition of the maximum interval. The use of intervals estimates for the indicator "the experience of the participant" is also advisable to install depending on the initial maximum price of the contract, according to which the customer specifies the maximum amount.

Implementation of proposed solutions will increasingly realize the principle of the contract system to ensure competition in procurement, to develop competitive mechanisms and practices to limit their use to manipulate the terms of procurement.

References

- Bovaird T. (2006), Developing new relationships with the "market" in the procurement of public services. *Public Administration*. 84, 1: 81 102.

- Brunk DE. Government Procurement: «FAR» from a Competitive Process // *Advancing Public Procurement: Practices, Innovation and Knowledge-Sharing*. Florida, 2007. P. 162.
- Celentani, M. and J.-J. Ganuza, (2001), Organized vs. competitive corruption, *Universitat Pompeu Fabra, Department of Economics, Working Paper No. 526*.
- Dekel O. The Legal Theory of Competitive Bidding for Government Contracts // *Pub. Cont. L. J.* 2008. N 37. P. 240-251.
- Eremina A.B. Impact of globalization on the formation and transformation of the competition // *Bulletin of the Saratov State Socio-Economic University*. 2010. №2. pp 64-66.
- Johnston M.J., Girth MA. Outsourcing Local Government Services: Holding Contractors Accountable in Noncompetitive Contract Markets. 2011. URL.: <http://www.ssrn.com/abstract=1900945> (дата обращения: 04.02.2015).
- Mamedova N.A. Federal contract system: providing state needs // *Problems of the theory and practice of management*. 2013. № 10. pp 42-44.
- Manuel K.M. Competition in Federal Contracting: An Overview of the Legal Requirements // *Congressional Research Service*. 2013. P. 13-14.
- Molden R. Public procurement and competition law from a swedish perspective – some proposals for better interaction // *Gärde Wesslau Svensk Och Internationell Affärsjuridik: Offentlig verksamhet och upphandling*. 01.2014. URL: <http://www.garde.se/wp-content/uploads/2014/01/Article-on-Public-Procurement-and-Competition-Law-Euro-parättslig-Tidskrift-4-2012.pdf> (äàòà íáðàùàíèÿ: 03.02.015).
- Ohashi, H. Effects of Transparency in Public Procurement Practicies on Government Expenditure: A Case Study of Municipal Public Works // *Review of Industrial Organization*, 2009, Vol. 34, p.267-285.
- Piga, G. & Thai, K. V. (2006), The Economics of Public Procurement *Rivista di Politica Economica* 7(1): 3-10.
- Podkoložina EA., Pivovarova S.E, Balsevich AA. Information Transparency in Public Procurement: How it Works in Russian Regions. Higher School of Economics Research Paper No. WP BRP 01/EC/2011. URL: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1998069.
- Savas E.S. (2002), Competition and Choice in New York City Social Services. *Public Administration Review* 62 (1): 82-91.
- Sanchez-Graells A. The Difficult Balance between Transparency and Competition in Public Procurement: Some Recent Trends in the Case Law of the European Courts and a Look at the New Directives. University of Leicester School of Law Research Paper No. 13-11. URL: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2353005&rec=1&srcabs=1928724&alg=1&pos=3## (дата обращения: 03.02.2015).
- Schooner SL. Desiderata: Objectives for a System of Government Contract Law // *Pub. Proc. L. Rev.* 2002. N 11. P. 103.
- Taylor, S. (2011), The challenge of competitive neutrality in public procurement and competition policy: the U.K. health sector as case study *Competition Policy International* 7. Available at http://www.wragge.com/published_articles_7650.asp. [Retrie-ved January 23, 2012].
- Tasalov F.A. The principle of the development of competition in the contract system of Russia and the United States: concept, value, guarantee the implementation // *Act*. 2014. № 5. pp 150-152.

Thai KV. Public Procurement Re-examined // Pub. Proc. J. 2001. N 1. P. 27.

Volchik V.V., Bulatova A.G. The international experience of the incentive mechanisms and limiting competition in the formation of the state order // The space economy. 2008. 1-3. pp 405-408.

Weishaar Stefan E. Cartels, Competition and Public Procurement Law and Economics Approaches to Bid Rigging / New horizons in competition law and economics.

"United Nations Convention against Corruption" (adopted in New York 31.10.2003 Resolution 58/4 on the 51st plenary meeting of the 58th session of the UN General Assembly).