

# Russia Practice

August 2018

## Russian antimonopoly authority clarifies issues on how to classify agreements on tenders and auctions (competitive bidding) as anti-competitive

On 30 May 2018 the Presidium of the Federal Antimonopoly Service of Russia ("FAS") issued a Clarification<sup>1</sup> which considers different issues on how to prove and classify as anti-competitive agreements concluded by business entities during the preparation for and participation in competitive bidding (the "Clarification").

### Competitive bidding covered by the Clarification

The Clarification does not stipulate expressly the specific types of competitive bidding covered by the conclusions contained in the document. Therefore, it can be assumed that the provisions of this document apply to any competitive bidding that complies with the requirements of applicable legislation of the Russian Federation, and not only to procurements of goods, work services to meet state and municipal needs<sup>2</sup> or the procurement of goods, work and services by certain types of legal entities<sup>3</sup>.

### Proving cartel agreements in competitive bidding

The Clarification concerns, *inter alia*, issues on how to prove cartels in competitive bidding. For example, the Clarification stipulates that the issue to be proved in cases on cartels in competitive bidding consists of the following components:

- The existence of a written or oral agreement;
- Competitive bidding is the subject of the agreement;
- The actual parties to the agreement and whether they are competitors;
- The onset or possible onset of the consequences of a cartel agreement in competitive bidding, namely an increase, decrease or maintenance of prices in competitive bidding. Furthermore the actual limitation of competition as a result of the onset or possible onset of these consequences is assumed and does not need to be proved by the antimonopoly authority;
- Causal link between the conclusion of the agreement and the onset or possible onset of consequences in the form of an increase, decrease or maintenance of prices in competitive bidding.

### Classifying agreements in the event of passive behaviour of participants in competitive bidding

The Clarification focuses in particular on the issue as to whether an agreement concluded between participants in competitive bidding, which stipulates that one of the participants must participate in competitive bidding solely for compliance with the requirements of the competitive bidding on the number of participants, constitutes a cartel. The following circumstances are key to the classification as a cartel of an agreement in which one of the participants is required to participate in competitive bidding purely on formal grounds and is not competing for the conclusion of a contract:

- Whether participation in the competitive bidding of a sole business entity constitutes legal grounds for declaring such competitive bidding invalid and as a result grounds for the conclusion of a contract with the sole participant that complies with all the requirements of the bidding;
- Whether there is a causal link between the agreement of the participants, which stipulates that the participation of one participant in the competitive bidding is formal in nature, and adverse consequences in the form of an increase, decrease or maintenance of prices in competitive bidding.

In instances when legislation of the Russian Federation does not stipulate the conclusion of a contract with a sole participant as a result of invalid (failed) competitive bidding, the passive behaviour of participating business entities (expressed for example, in the failure to submit price offers) or the fact that such passive behaviour is the subject of an agreement between participants in the competitive bidding, may not act per se as the sole grounds for classifying the agreement as a cartel. For this purpose, the antimonopoly authority must submit additional evidence that the respective agreement was concluded for the purposes of increasing, decreasing or maintaining prices in the competitive bidding.

If the conclusion of a contract with a sole participant in the competitive bidding as a result of invalid (failed) competitive bidding is mandatory pursuant to the requirements of the legislation of the Russian Federation or in instances when other unrelated business entities participate in the competitive bidding, the antimonopoly authority will reject the reference of a party to the agreement to the effect that such an agreement was concluded to comply with the formal requirements of the competitive bidding for the purposes of declaring that the competitive bidding was duly held. Furthermore such passive behaviour of certain participants in the competitive bidding could be interpreted by the antimonopoly authority as evidence attesting to a concluded anti-competitive agreement.

In such instances the antimonopoly authority is required to adhere to the provisions of the previously issued Clarification No. 3 of the Presidium of the Federal Antimonopoly Service<sup>4</sup>.

<sup>1</sup> Clarification No. 14 of the Federal Antimonopoly Service of Russia dated 30 May 2018 "On the Classification of the Agreements of Business Entities Participating in Competitive Bidding". The Clarification was published on 3 June 2018 on the official website of FAS of Russia (<https://fas.gov.ru/documents/635642>).

<sup>2</sup> They are regulated by Federal Law No. 44-FZ of the Russian Federation dated 5 April 2013 "On the Contract System in the Area of the Procurements of Goods, Work, and Services to Meet State and Municipal Needs".

<sup>3</sup> They are regulated by Federal Law No. 223-FZ of the Russian Federation dated 18 July 2011 "On Procurements of Goods, Work and Services by Certain Types of Legal Entities".

<sup>4</sup> Clarification No. 3 of the Presidium of the Federal Antimonopoly Service of Russia dated 17 February 2016 "Proving Inadmissible Agreements (including Cartel Agreements) and Concerted Practices on Product Markets, including in Competitive Bidding".

## Conclusion

The arguments set out in the Clarification provide companies with an opportunity to assess the extent to which the Federal Antimonopoly Service might consider the agreements that they conclude as anti-competitive. Similarly, the Clarification may also be used by the competitors of companies that concluded agreements in competitive bidding through the submission in an appeal filed with the Federal Antimonopoly Service of all the evidence required for the declaration of the agreement as anti-competitive.



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## Imprint

This publication is issued by  
BEITEN BURKHARDT Rechtsanwaltsgesellschaft mbH

Ganghoferstrasse 33, D-80339 Munich  
Registered under HR B 155350 at the Regional Court Munich/  
VAT Reg. No.: DE811218811

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