

# Operative part of the judicial act · A40-94475-2012 · 31.01.2013

**A40-94475-2012**

**31.01.2013**

Ninth Commercial Court of Appeal

Operative part of the judicial act

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Monetary amounts are shown first in Russian roubles, followed by an approximate USD equivalent calculated at the official Bank of Russia historical rate for the date of the act.

Official Bank of Russia rate used: 1 USD = 30.027700 RUB; effective date 31.01.2013.

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Ninth Arbitration Court 127994, Moscow, GSP-4, Straw Guard Passage, 12 e-mail address: info@mail.9aac.ru website address: <http://www.9aas.arbitr.ru>

DIRECTIVE No. 09AP-40346/2012

d. Moscow Case No. A40-94475/12-149-866 January 31, 2013

Resolution Resolution announced on 24 January 2013 Resolution made in full on 31 January 2013

The Ninth Arbitration Court of Appeal shall consist of: Presiding Judge D.E. Lepikhin, judges: Koltsova N.N., Rumyantseva P.V., while maintaining the protocol by the assistant judge Laukhina A.A., having considered in open court the appeal of the Federal Antimonopoly Service against the decision of the Arbitration Court of the city. Moscow dated 19.11.2012 in case No. A40-94475/12-149-866, taken by Judge Kuzin M.M., according to the statement of Pharmstandard OJSC, CJSC ROSTA to the Federal Antimonopoly Service, a third party: Ministry of Health and Social Development of the Russian Federation, on invalid decision of 25.05.2012 in case No. 1 11/202-11, with participation of: from applicants: from Pharmstandard OJSC - Fedliuk V.P. by power of attorney from 29.12.2012 No. 1289; Arkhangelskaya M.A. by power of attorney from 09.01.2013 No. 2; from ZAO "ROST" - Pokatovich I.S. by power of attorney from 24.10.2012; Sholtyreva O.A. by power of attorney from 11.11.2011 No. 217; Sakanyan M.M. by power of attorney from 15.08.2012; from the defendant: Kozlov E.V. by power of attorney from 13.08.2012 NoIA/26023; Zaitseva N.N. by power of attorney from 15.06.2012 NoIA/18784; Aleshin K.N. by power of attorney from 23.08.2012 NoCA/27371; from the third person: Schatz M.G. by power of attorney from 28.12.2012 NoAD-MZ-52;

S T A N W A I L: Pharmstandard and ROSTA CJSC (hereinafter also the companies) applied to the Arbitration Court of Moscow with applications to recognize the decision of the Federal Antimonopoly Service of Russia (hereinafter the antimonopoly authority) of 25.05.2012 as illegal in terms of recognizing companies as violating the provision of paragraph 2 of part 1 of Article 11 of the Federal Law No. 135-FZ "On Protection of Competition" (hereinafter the Law on Protection of Competition) by concluding and implementing an agreement. , which led to the maintenance of the price of the drug on lot No. 16 of the open auction No. 091127/001550/312. By the court decision of 19.11.2012, the applications of the companies were satisfied.

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Disagreeing with the decision of the court of first instance, the antimonopoly body appealed to the Ninth Arbitration Court of Appeal with a complaint in which it asks to cancel the decision, to adopt a new

judicial act on the case of refusing to companies in satisfying the applications. In the court session, representatives of the antimonopoly body supported the arguments of the appeal, asked to cancel the decision of the court of first instance, since they consider it illegal and unreasonable, to adopt a new judicial act on the case to refuse society to satisfy the application. Representatives of the societies supported the decision of the court of first instance, disagreed with the arguments of the appeal, considered the complaint unfounded, asked the decision of the court of first instance to leave unchanged, to refuse to satisfy the appeal. The representative of the Ministry of Health and Social Development of the Russian Federation (hereinafter referred to as the Ministry) left the result of the dispute resolution at the discretion of the court. The legality and validity of the decision taken by the court of first instance are checked by the appellate instance in accordance with the procedure of the article. 266, 268 AIC of the Russian Federation. Having studied the materials of the case, having heard representatives of the persons involved in the case, the appeal court comes to the conclusion that the decision of the court of first instance was left unchanged, the appeal was not satisfied based on the following. By the decision of the antimonopoly body of 25.05.2012, companies are charged with reaching an agreement prohibited by Article 11, paragraph 2, part 1, of the Law on Protection of Competition. The violation imputed to societies is as follows. CJSC "ROSTA" in the presence of a contractual relationship with the company "ADOC TRADING (CYPRUS) LTD." (Cyprus) (hereinafter also - the company) for the supply of a medicinal product determined by the Ministry for lot No. 16 of the open auction No. 091127/001550/312, ensured its import into the territory of the Russian Federation in the amount necessary for delivery on this auction lot. Instead of participating in the auction, ZAO "ROSTA" sold the drug on the eve of the auction to one of the participants in the auction for lot No. 16 of Pharmstandard. The latter bought the medicine and won the bidding at the initial (maximum) price due to the fact that CJSC "ROSTA", which also applied and was admitted to participate in the bidding on lot No. 16, did not appear at the auction. Competitive legislation assumes that there should be no coordination in the market, economic entities build their policies individually. As stated above, the antimonopoly authority charged the companies with a violation of the prohibition established by paragraph 2 of part 1 of Article 11 of the Law on Protection of Competition. According to paragraph 2, part 1 of article 11 of the Law on protection of competition (in relation to the circumstances of the dispute in question) agreements between business entities, if such agreements may lead to the maintenance of prices at the auction. According to paragraph 18 of article 4 of the Law on protection of competition agreement is an agreement in writing, contained in a document or several documents, as well as an oral agreement. A prohibited agreement is a group model of behavior of its participants, which allows to extract non-competitive advantages. In case of initiation and consideration of the case on grounds of violation of Part 1 of Article 11 of the Law on Protection of Competition, the study of the commodity market is not required, since this legal norm establishes an unconditional prohibition on agreements between business entities that (agreements) lead or may lead to the consequences listed in Part 1 of Article 11 of the Law on Protection of Competition.

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Violation of the prohibition is not permitted under any circumstances. The actions listed in Part 1 of Article 11 of the Law on Protection of Competition are prohibited in themselves. At the same time, the interpretation of Part 1 of Article 11 of the Law on Protection of Competition does not exempt the antimonopoly authority from the implementation of the provisions of Part 1 of Article 65, Part 5 of Article 200 of the APC of the Russian Federation on the submission of evidence. Two circumstances are subject to proof by the antimonopoly authority: the existence of an agreement and the possible consequence in the form of maintaining the price at the auction. The evidence collected by the antimonopoly authority in its entirety must convincingly confirm the circumstances of the commission of the offense imputed to it by the companies. At the same time, the establishment of the mere fact of obtaining the possibility of concluding a state contract at the initial (maximum) price (in relation to the circumstances of the case under consideration) is not sufficient to recognize both companies as violating the provision of paragraph 2 of part 1 of Article 11 of the Law on Protection of Competition. The totality of actions of the companies committed before, during and after the prohibited paragraph 2 of part 1 of Article 11 of the Law on Protection of Competition agreement, and not only the fact of such agreement, shall be subject to assessment and analysis. It is necessary to compare the actions of each company participating, in the

opinion of the antimonopoly authority, in a prohibited anti-competitive agreement. The existence of a prohibited agreement should be confirmed by the achievement of a positive result for the companies from participation in the bidding. In the framework of the case under consideration, the Court of Appeal concludes that the antimonopoly body has not provided sufficient, convincing, unconditional evidence confirming the commission of the imputed offense by the companies, which is confirmed by the following. Under the auction for the right to conclude a contract is understood as a tender, the winner of which is recognized as the person who offered the lowest price of a state or municipal contract (part 1 of the article). 32 of the Federal Law No. 94-FZ "On placing orders for the supply of goods, performance of works, provision of services for state and municipal needs" (hereinafter - the Law on placing orders). The auction is conducted by reducing the initial (maximum) price of the contract (lot price), specified in the notice of the open auction, to the "step of the auction", the winner of the auction is the person who offered the lowest price of the contract (part 4, 6 of Art. 37 of the Law on placing orders). The state contract is concluded with the sole participant of the auction in case of recognition of the auction as invalid (parts 12, 13 of Art. 37 of the Law on Order Placement). 27.11.2009 The Ministry posted official information on the auction, consisting of 38 lots, for the supply of medicines. 25.12.2009 The Ministry held an open auction for the right to conclude state contracts for the supply of medicines. On lot No. 16 of the auction was put up with the drug "Dornaza alpha" solution for inhalation (hereinafter - the drug) in the amount of 80 448 packages. The participants of the auction for lot No. 16 were Pharmstandard OJSC and Rosta CJSC. The protocol of the auction commission dated 25.12.2009 auction for lot No. 16 was declared invalid due to the failure to appear at the auction of representatives of CJSC "ROSTA".

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The state contract for the supply of medicines for lot No. 16 was concluded with the sole participant of Pharmstandard at the initial (maximum) price. Such conduct, in the opinion of the antimonopoly authority, indicates the conclusion of an oral agreement between the companies, which resulted in the maintenance of initial (i.e., the first two companies). The highest prices for lot number 16 auction. However, the antitrust authority does not take into account the following. 31.03.2008 between CJSC "ROSTA" and the company "ADOC TRADING (CYPRUS) LTD." (Cyprus) was signed a contract No. 70 for the supply of medicines, including medicines, put up for auction at lot No. 16. Under this contract, JSC "ROSTA" is the buyer, and the company is the seller. 17.09.2009 CJSC ROSTA and the company signed general specifications No. 4 and 5 under contract No. 70. According to General Specification No. 4, 10,233 packages of medicinal product were to be delivered from the company to CJSC "ROST", and according to General Specification No. 5 - 93,820 packages of medicinal product (total - 104,053 packages). 01.10.2009 CJSC "ROSTA" (seller) and OJSC "Pharmstandard" (buyer) signed a purchase and sale agreement No. 129-P. 01.11.2009 in pursuance of this agreement, the companies signed General Specification No. 2 for the supply of a medicinal product in the amount of 32,180 packages in the period up to 04.02.2010. 19.04.2010, in pursuance of this agreement, the companies signed General Specification No. 3 for the supply of a medicinal product in the amount of 48,268 packages in the period up to 15.05.2010. The total number of generic specifications to be delivered is 80,448 packages. All of the above actions were committed by the companies until 27.11.2009 (dates of placement of official information about the auction by the Ministry). According to paragraph 1 of article 2 of the Civil code of the Russian Federation (hereinafter - the Civil code of the Russian Federation) entrepreneurial activity is an independent, carried out at your own risk activities aimed at systematic profit from the use of property, sale of goods, performance of work or provision of services by persons registered in this capacity in accordance with the procedure established by law. Consequently, the purpose of the activities of CJSC "ROSTA" and JSC "Pharmstandard" is systematic profit. Therefore, when announcing participation in the auction, the companies pursued a single goal - to make a profit. One of the principles of civil legislation is the principle of freedom of contract (Article 1 and 421 of the Civil Code of the Russian Federation). Thus, actual participation in the auction is a right, not an obligation, of the applicant. At the same time, the behavior of the person who declared participation in the auction should be explained from the point of view of obtaining a positive financial result in accordance with paragraph 1 of Article 2 of the Civil Code of the Russian Federation. In its decision of 25.05.2012, the antimonopoly authority came to the following conclusions: At the same time, only the Ministry of Health and Social Development of Russia, being the organizer of the auction No. 091009/001550/284 and the person

preparing the auction documentation, in fact has information about medicines, volumes and terms of their purchase. In the same decision, the antimonopoly body writes that "At the same time, documents certifying the provision on behalf of the Ministry of Health and Social Development

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The above information to the Russian Federation to the address of JSC "ROSTA" and (or) OJSC "Pharmstandard" in the case materials is absent. It follows from the provisions set forth that only the Ministry had information about the upcoming auction. It follows from the provisions set out that there is no evidence that the Ministry provided information about the upcoming auction to the companies. Therefore, the actions of the companies (in relation to the conclusions of the antimonopoly body in its decision) should be considered as independent, committed at its discretion in the absence of information about each other. The reasons for the behavior of CJSC "ROSTA" within lot number 16 are set out in the letter No. 463 dated 14.09.2011 (received 15.09.2011 for No. 53750) to the antimonopoly authority. By submitting an application for participation in the auction, CJSC "ROSTA" notes that previously had experience in bidding for the supply of medicines. Indicates that the drug, exposed on lot number 16, has specific features of production and transportation. The order for the supply of the first batch of the drug was sent to the company by ROSTA on 01.12.2009 (after posting official information about the auction). The bid for the auction was submitted because The order for the production of the drug was placed in the company. Participation in the auction is explained by the exclusion of the possibility of canceling the auction due to the absence of participants, or their suspension, disruption of public supplies. The decision not to participate in the auction for lot No. 16 is explained by CJSC "ROSTA" lack of experience in public procurement for the drug. JSC "ROSTA" indicates that Pharmstandard offered him a favorable financial condition in the form of prepayment. The reasons listed by CJSC "ROSTA" for applying for participation in the auction for lot No. 16, refusal to actually participate in the auction for this lot, the appeal court finds explainable from the point of view of the objectives of entrepreneurial activity. At the same time, the Court of Appeal takes into account that Pharmstandard and ROSTA did not know about the actions of the friend, did not have information about the upcoming auction, as follows from the decision of the antimonopoly body. The acts listed in clause 2, part 1 of Article 11 of the Law on Protection of Competition are prohibited as such, in themselves. However, the assessment of such acts for compliance with the Law on Protection of Competition involves the analysis of the behavior of business entities before, during and after the imputed agreement. As follows from the case materials, both companies carry out economic activities on the turnover of pharmaceuticals. At the same time, there is no evidence confirming the affiliation of companies, joint participation of companies in the management of other economic entities. There is also no evidence of joint activities by the companies in any form, except for the purchase and sale agreement No. 129-P dated 01.10.2009. As stated above, lot 16 is one of 38 lots of auction held by the Ministry. From the content of the auction documentation it follows that Pharmstandard and ROSTA were participants in several lots of this auction. So, Pharmstandard OJSC participated in the following lots: 16, 28, 30, 31. JSC "ROSTA" participated in the following lots: 16, 17, 18, 19, 25, 26, 29, 32.

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Lot 16 is the only lot to which both companies have applied. Lot 16 is not the only lot on which the auction was declared invalid. Thus, by the decision of the auction commission, the auction was declared invalid for the following lots: 2, 3, 4, 5, 24, 30, 33, 34, 35, 36. The above facts confirm, among other things, the conclusion of the antimonopoly body in its decision that the companies could not have information about the upcoming auction. The above facts confirm the absence of a prohibited agreement imputed to the companies. As indicated in the decision of the antimonopoly body, only the Ministry had information about medicines, volumes and terms of their purchase. Documents indicating the submission of such information by the Ministry to the companies are absent in the case materials on violation of antimonopoly legislation. This conclusion allowed the antimonopoly authority to stop the consideration of the case under paragraph 6 of part 1 of Article 15 of the Law on Protection of Competition in relation to the Ministry. The Court of Appeal rejects the argument of the antimonopoly body in the decision of 25.05.2012 that the signing of the general specifications of 17.09.2009 by CJSC ROSTA is explained by the auction. As the antimonopoly body indicates in its decision, only the Ministry had information about

the upcoming auction. The case file does not contain documents indicating that the Ministry provided information about the auction to the companies. The Court of Appeal also takes into account the fact that the antimonopoly authority has terminated the case against the Ministry for reasons of violation of Article 15, paragraph 6, part 1 of the Law on Protection of Competition. The facts stated by the antimonopoly body in the decision of 25.05.2012 and confirm the lack of awareness of the companies about the upcoming auction. Without information about the auction, the companies could not reach any agreements. Besides. The transactions on the purchase of the medicinal product were concluded with the participation of the companies before the Ministry published official information about the auction, before the decision of the auction commission to conclude a state contract with Pharmstandard OJSC. And, as follows from the decision of the antimonopoly body, in the absence of information about the auction. Convincing, unconditional in its totality evidence that the companies have reached an agreement to maintain the price of lot No. 16 auction by the antimonopoly authority has not been submitted to the court. CJSC "ROSTA" explains the reason for not sending representatives to participate in lot No. 16 by the fact that the sale of the drug is not within lot No. 16, but to Pharmstandard OJSC is more profitable from a financial point of view. Pharmstandard explains the reason for participation in the auction for lot No. 16 by the fact that it had a legally secured supply of a medicinal product to its address from ZAO ROSTA. The Court of Appeal finds these explanations permissible from the point of view of the companies' economic activity at its discretion, taking into account the achievement of the goal of profit. The Court of Appeal takes into account the fact that the companies could not have known about the upcoming auction. Besides. Positive financial result from participation in the auction for lot No. 16 received only OJSC "Pharmstandard", and not CJSC "ROST".

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The Court of Appeal shall also take into account the following. According to the provisions of Part 12, 13 of Art. 37 of the Law on Order Placement, the state contract is concluded with the sole participant of the auction in case of recognition of the auction as invalid. Article 37, Part 12 of the Order Placement Act states that an auction shall be declared invalid if one participant participated in it. If one participant participated in the auction, the customer within three working days from the date of signing the protocol specified in part 7 of this article, shall be obliged to transfer to the sole participant of the auction the draft contract attached to the auction documentation. In this case, the contract is concluded subject to the provisions of part 4 of article 38 of this federal law on the conditions provided for by the auction documentation, at the initial (maximum) price of the contract (lot price) specified in the notice of the open auction, or at the agreed with the specified participant of the auction price of the contract. not exceeding the initial (maximum) price of the contract (lot price) (part 13 of Art. 37 of the Order Placement Act). Thus, even if ROSTA CJSC had not declared participation on lot No. 16, the state contract would still have been signed with Pharmstandard OJSC (as the only participant) on the terms provided for in the auction documentation, at the initial (maximum) price of the contract (lot price) specified in the notice of the open auction, or at the price of the contract agreed with the specified bidder. not exceeding the initial (maximum) price of the contract (lot price). There were no other bidders for Lot 16. Consequently, the failure of representatives of CJSC ROSTA to participate in the auction was not the basis for concluding a state contract with Pharmstandard at the initial (maximum) price of the contract. In accordance with Part 1 of Article 65 of the CPC of the Russian Federation, the obligation to prove the circumstances that served as the basis for the adoption of state bodies, local self-government bodies, other bodies, officials of the contested acts, decisions, actions (inaction) is assigned to the relevant body or official. According to Part 5 of Article 200 of the CPC of the Russian Federation, the obligation to prove the compliance of the contested non-normative legal act with the law or other normative legal act, the legality of the contested decision, the commission of the contested actions (inaction), the presence of the body or person with the proper powers to adopt the contested act, decision, commission of the contested actions (inaction), as well as the circumstances The law, which served as the basis for the adoption of the contested act, decision, commission of the contested actions (inaction), is imposed on the body or person who adopted the act, decision or performed actions (inaction). The circumstances cited by the antimonopoly authority in the decision of 25.05.2012 neither individually nor in aggregate do not prove a violation of the prohibition established by the companies under paragraph 2 of part 1 of Article 11 of the Law on Protection of Competition. From the objective picture of events taking place on

lot No. 16 of the auction, it certainly and convincingly does not follow that the companies have reached the agreement prohibited by paragraph 2 of part 1 of Article 11 of the Law on Protection of Competition. The provisions of part 1 of article 65, part 5 of article 200 of the AIC of the Russian Federation by the antimonopoly body are not executed. In the circumstances described, the court of appeal considers that the decision of the court of first instance is lawful and justified, corresponds to the case materials and the current legislation, the rules of substantive and procedural law are not violated and applied correctly, the court fully

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the circumstances relevant to the case have been clarified, in connection with which there are no grounds for revoking or changing the decision and satisfying the appeal. The arguments set out in the appeal are not based on the law and the factual circumstances of the case. Unconditional grounds for cancellation of the contested decision of the court of first instance, provided for in part 4 of article 270 of the CPC of the Russian Federation, the court of appeal has not established. Based on the above and guided by Articles 266, 268, 269, 271 of the Arbitration Procedure Code of the Russian Federation, the Ninth Arbitration Court of Appeal

CA T NA WA EL: The decision of the Arbitration Court of Moscow of 19.11.2012 in case No. A40-94,475/12-149-866 to leave unchanged, the appeal - without satisfaction. The decision shall enter into force from the date of its adoption and may be appealed within two months from the date of the decision in full in the Federal Arbitration Court of the Moscow District.

The presiding judge shall: D.E. Lepikhin

Judges: N.N. Circle

P.V. Rumors

The telephone number of the court's information service is 8 (495) 987-28-00.