

Operative part of the judicial act · A40-94475-2012 · 22.04.2013

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22.04.2013

Federal Commercial Court of the Moscow District

Operative part of the judicial act

UNOFFICIAL COMPLETE TRANSLATION. The Russian original is the legally controlling text. This translation was prepared for documentary access and should not be relied upon as a certified translation.

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 = 31.460500 RUB; effective date 20.04.2013.

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DECISION

d. Moscow 22 April 2013 Case No A40-94475/12-149-866

Resolution Resolution announced on April 18, 2013 Full text of Resolution made on April 22, 2013

The Federal Arbitration Court of the Moscow District consisting of: Chairman-Judge Dolgasheva V. A., Judges Agapov M. R., Voronina E. Y., with participation in the meeting: from the applicants of Pharmstandard OJSC - Fedliuk V.P. - Dov. from 29.12.2012 No. 1289, Arkhangelskaya M.A. - Dov. from 09.01.2013 No. 2 from ZAO "ROST" - Sakanyan M.M. Dov. from 15.08.2012 Nob/n, Sholtyreva O.A. Dov. 11.11.2011 No. 217, Pokatovich I.S. Dov. 24.10.2012 Nob/n from the defendant FAS Russia – Aleshin K.N. Dov. from 23.08.2012 No. IA/27371, Zay-tseva N.N. Dov. from 15.06.2012 IA/18784, E.V. Kozlov. Dov. 13.08.2012 NoIA/26023 from the third person Ministry of Health and Social Development of the Russian Federation – Shatz M.G. Dov. from 28.12.2012 NoAD-MZ-52, having considered on April 18, 2013 in court hearing the appeal of the Federal Antimonopoly Service (FAS Russia) against the decision of November 19, 2012

2 Arbitration Court of Moscow adopted by judge Kuzin M.M., on the decision of January 31, 2013 of the Ninth Arbitration Court of Appeal adopted by judges Lepikhin D.E., Koltsova N.N., Rumyantsev P.V., on the application of Pharmstandard OJSC, ROSTA CJSC to the Federal Antimonopoly Service (FAS Russia) on invalidation of the decision of 25.05.2012. in case No. 1 11/202-11, a third party: Ministry of Health and Social Development of the Russian Federation

ISSUED: Pharmstandard and ROSTA CJSC (hereinafter referred to as the companies) appealed to the Art-Bribe Court of Moscow with applications for declaring the decision of the Federal Antimonopoly Service (hereinafter referred to as the FAS of Russia, the antimonopoly body) illegal from 25.05.2012. in terms of recognition of companies as violating the provisions of clause 2 of part 1 of article 11 of the Federal law No. 135-FZ "On protection of competition" in terms of the conclusion and implementation of the agreement that led to the maintenance of the price of the drug on lot No. 16 of the open auction No. 091127/001550/312. By the decision of the Arbitration Court of Moscow of 19.11.2012, left unchanged by the decision of the Ninth Arbitration Court of Appeal of 31.01.2013, the stated requirements were satisfied. Disagreeing with the court acts, the FAS of Russia appealed to the Federal Arbitration Court of the Moscow District with a cassation complaint, in which it asks them to cancel. The legality of the

adopted judicial acts shall be checked by the court of cassation in the manner provided for in Articles 284, 286 of the CPC of the Russian Federation. Representatives of the FAS of Russia in the court session supported the arguments set out in the cassation appeal. The court decisions are considered illegal and not based on the norms of the current legislation. Representatives of the societies objected to the arguments of the complaint, pointing to the legality of the appealed decisions and court decisions. In the case file,

3 reviews in which the opposition to the position set forth by the antimonopoly body is expressed. The representative of the third party involved in the case, the Ministry of Health and Social Development of the Russian Federation, left the resolution of the issue at the discretion of the court. Having studied the materials of the case, the arguments of the cassation appeal and feedback on it, having heard representatives of the parties involved in the case, the court of cassation comes to the conclusion that it is necessary to cancel the adopted judicial acts, proceeding from the following. As follows from the case materials and established by the courts, CJSC "ROSTA" concluded with the company "ADOC TRADING (CYPRUS) LTD." (Cyprus) a contract for the supply of a medicinal product, which was the subject of an open auction No. 091127/001550/312, announced by the Ministry of Health and Social Development of the Russian Federation on lot No. 16, which was imported into the territory of the Russian Federation in the amount determined by the terms of the auction. After importing the goods, the specified legal entity sold the imported goods to Pharmstandard OJSC on the eve of the auction, which became its winner at the initial (maximum) price, since ROSTA CJSC, which submitted an application and was admitted to participate in the auction, did not appear at the auction. These circumstances served as the basis for the antimonopoly authority to initiate a case on violation of antimonopoly legislation, according to the results of which 25.05.2012. a decision was made to recognize the companies as violating the provisions of paragraph 2 of part 1 of article 11 of the Federal law of 26.07.2006 No. 135-FZ "On Protection of Competition". Considering the decision illegal, the companies appealed to the arbitration court. In satisfying the stated requirements, the courts proceeded from the illegality of the decision taken by the FAS of Russia, the absence of violations of the provisions of Article 11 of the Federal Law of 26.07.2006 in the actions of the companies. No. 135-FZ "On Protection of Competition". In the case of the courts, the following were not taken into account.

4 In accordance with clause 11 1 2 of the Competition Protection Act, a prohibition is established on agreements between business entities or concerted actions of economic entities in the commodity market if such agreements or concerted actions led or could lead to an increase, decrease or maintenance of prices at tenders. According to Article 4, paragraph 18, an agreement is an agreement in writing, contained in a document or several documents, as well as an oral agreement. In accordance with subsection 8 (2) of the Competition Protection Act, the performance by the persons referred to in subsection 8 (1) of the Competition Protection Act of the agreement does not refer to concerted actions, but is an agreement. As it is seen from the case materials and confirmed by the antimonopoly body, the actions of CJSC ROSTA on filing an application for participation in the auction for lot No. 16 and its subsequent refusal to participate in the auction, as well as the submission of only two applications for the lot, led to the fact that the customer was forced to conclude a contract with the only participant in the placement of the order who appeared at the auction at the maximum possible price (part 1 of Article 32). , parts 12 and 13 of article 37 of the Federal law of 21.07.2005 No. 94-FZ "On placing orders for the supply of goods, performance of works and provision of services for state and municipal needs". Before the auction, the applicant sold a batch of medicines in the volumes declared in the auction to his competitor and the winner of the auction for lot No. 16 - Pharmstandard OJSC. These objectively expressed actions of bidders on lot No. 16 already in themselves indicate the presence of an oral agreement between them aimed at maintaining the price under the contract, which the presence of such an agreement shows the analysis of the behavior of bidders during the bidding period, as well as after their completion. Based on the documents submitted to the case materials, the court of cassation considers that the antimonopoly body came to a reasonable conclusion that the actions of the applicant and Pharmstandard OJSC during the auction for lot No. 16, as well as after signing a contract with the auction winner do not indicate that the applicant and Pharmstandard OJSC did not

5 the availability of their economic feasibility and expediency in general, and in relation to each participant. Based on General Specifications No. 4 and No. 5, concluded in September 2009, ROSTA

acquired from ADOC Trading (Cyprus) Ltd. Dornaza alfa medicines in the amount of 104,053 up-forging. 27 November 2009 The Ministry of Health and Social Development of the Russian Federation on the official Internet resource posted an announcement about bidding for the supply of this drug in the amount of 80,448 packages (auction No. 091127/001550/312, lot No. 16). Applications for participation in the auction were submitted from JSC "ROST" and JSC "Pharm-standard". However, the latter, not having the necessary quantity of goods, wrote 01.11.2009. General specification No. 2 for the supply of the drug Dornaza alfa in the amount of 32,180 packages, and 19.04.2010 General specification No. 3 of this medicine in the amount of 48,268 packages, that is, in total - 80,448 packages that were necessary for the execution of the state contract. The FAS of Russia has established and the case materials confirmed that at the time of the auction, Pharmstandard had no contractual relationship with the distributor of the drug ADOC Trading (Cyprus) Ltd. The legal entity itself did not have the necessary quantity of goods for the execution of the state contract, and therefore appealed to its competitor - CJSC "ROSTA", which had these medicines in the required quantity. CJSC "ROSTA" decided not to participate in the bidding, referring to other more profitable contracts that were not provided to the antimonopoly authority or the courts during the consideration of the dispute. The Company also points out that knowing that there is only one participant besides him - Pharmstandard OJSC, decided not to disrupt the auction announced by Mini-sterstavn by refusing to submit an application, and did not appear on the announced date.

6 to participate in the auction, which is not prohibited, in his opinion, by the current legislation. Meanwhile, these actions of the companies led to the conclusion of Pharm Standard OJSC state contract at the highest possible price and benefit, which is established by the antimonopoly authority. In such circumstances, the court of cassation comes to the conclusion that the antimonopoly body established and proved that an oral agreement was concluded between the company and Pharmstandard OJSC, which found its objective expression in the behavior of the auction participants before and after the bidding and the receipt of benefits, both by the winner of the bidding and by the party that did not take part in it at the summing up stage. The FAS of Russia rightfully rejected the applicant's arguments about his good faith behavior, since the result of the auction for lot No. 16 outside of the agreement (mutual awareness) of the applicant and a third party is incredible, and the facts studied and established testify to atypical, unfair behavior of participants in the auction for lot No. 16, (by submitting an application for participation in the auction, incurring the costs of participation in the auction). The participant should be interested in his participation and in winning the auction, and that the result of the auction in question for lot No. 16 is impossible without full knowledge of each participant about the behavior and intention to support the price at the auction. The courts of first and appellate instances had evidence that there was an agreement between the applicant and a third party that led to the maintenance of the price at the auction on lot No. 16, while they incorrectly applied the provisions of the Law on Protection of Competition, which regulate the prohibition of agreements between business entities in the trade market. which led to the maintenance of the price at the auction. On the basis of the above, the decision of the court of first instance and the decision of the court of appeal are subject to cancellation, and the satisfaction of the requirements of the companies on the recognition of the decision of the antimonopoly body of 25.05.2012, which recognized the company as violating paragraph 2 of part 1 of article 11 of the Law on the Protection of Competition, should be refused.

7 Guided by Articles 284, 286-289 of the Arbitration Procedural Code of the Russian Federation, the Court DECIDED: the decision of the Arbitration Court of Moscow of November 19, 2012, the order of the Ninth Arbitration Court of Appeal of January 31, 2013 in case No. A40-94475/12-149-866 to cancel. Refuse to satisfy the requirements of Pharmstandard and ROSTA on the recognition of the FAS decision of Russia dated 25.05.2012 as illegal. 1 11/202-11.

Presiding judge V.A. The longest judges: M.R. Agapov E.Yu. voronina