



**The principle of reasonableness in the legislation on contract system
of Russia and the Usa: some interpretation issues**

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**The principle of reasonableness in the legislation on contract system of Russia and
the USA: some interpretation issues**

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ABSTRACT

This article represents and defines the concept and criteria for filling the category of "reasonableness" as a special valuation concept, widely used in the legislation on contract system in the Russian Federation and other countries, in particular the USA. Clarification of its essence is of great importance for the purpose of applying this legal category in lawmaking and law enforcement activities, first of all, to achieve maximum effectiveness of the operation of legal norms and observance of the principle of fair competition in concluding and executing contracts aimed at satisfying the public needs. The general methodological basis was formed by the general scientific (dialectical) method of cognition, comparative, logical methods that allowed considering the problems of the development of civil legislation in the sphere of satisfying the state and municipal needs.

We presented and analyzed the theoretical studies of scientists in this field, as well as the latest judicial practice of Russia. We proposed to reform the current federal law of the Russian Federation on the contract system.

Keywords: reasonableness; conscientiousness; procurement legislation; state and municipal needs; contract system; appraisal concept; contract system of the USA.



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1. INTRODUCTION

Satisfaction of state and municipal needs is traditional, both in the domestic law and order, and in the foreign law. It is a specific concern for legal regulation, which inevitably affects the formation of a special legal array of rules governing this process. Special Federal Law dated April 5, 2013 No. 44-FZ "On the Contract System in the Procurement of Goods, Works, Services for the Provision of State and Municipal Needs" (hereinafter - the Law No. 44-FZ) stipulates the basic principles on which the implementation of activities on the contract conclusion aimed at satisfying the state and municipal needs should be based. Most of the principles stipulated correspond to the predominantly civilized nature of the emerging relationships. Meanwhile, a comparative analysis of the norms of the Law No. 44-FZ and the Civil Code of the Russian Federation leads to the conclusion that the former does not use the term "reasonableness" so often used in the act of civil law.

Similar contract systems operate in other countries, in particular the USA and Great Britain. For example, all public procurements are managed by the department of state affairs, subordinated to the treasury, in the Great Britain. It is it that assesses the need for carrying out certain state procurements for each department. The same department is engaged in the selection of projects, support of the process of state order placement and contract management (Drabkin D.U. 2007; p. 12).

However, the contract system regulation in the USA is the most mature and well-established. The Federal Acquisition Regulation (hereinafter - the FAR), which has entered into force on October 1, 1984 and is in force to the present, is the starting regulatory legal act governing relations for the planning, placement, execution and administration of the fulfillment of obligations under the federal state contracts in the USA.

2. METHODS

A codified act of a civilistic nature, in terms of mentioning the principles or basic principles, mentions this definitive category "in pairs" with the term of "conscientiousness", which is applied by the Law No. 44-FZ everywhere. Despite the considerable similarity in the interpretation and use of these concepts, they appear to be different in content. This is evidenced by the text of the Civil Code of the Russian



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Federation - as stated in para. 5 of Art. 10: "The conscientiousness of the participants in civil legal relationships and the wisdom of their actions are assumed".

By the way, both reasonableness and conscientiousness are evaluation concepts in their legal nature that are filled in their content in the implementation of each in the specific life situations. In terms of the number of norms with evaluation concepts and their significance, the nest, which is formed around the concept of "reasonable", occupies the first place (Lukyanenko M.F. 2010; p. 144). However, what is the difference between them? By applying logical, systematic and comparative-legal methods, we will be able to answer this question and justify the necessity of introducing this term into the law. The category of reasonableness is also known to the basic US Procurement Act. And, although our attention is concentrated on the federal norms in this case, it should be understood that state legislation is based on the same basic principles and categories as the national act (Ponomarev V.V.1998; p. 35).

FAR, which contains more than 4,300 thousand rules and regulations that regulate the single cycle of planning, placement and execution of the state order in detail, stipulates also a separate special Subpart 15.402 "Pricing Policy". In the sense of this act, the contract officer has the main function - the selection of goods of such a kind, the price of which reasonably reflects the agency's minimum requirements associated with demonstrating the acceptability of the goods to meet the minimum agency parameters (Gordon D. I. 2012; p. 3); (Robinson K.D. U.S.2009).

The indicative criteria for determining the reasonableness should be also indicated. According to the meaning of Subpart 7.2 "Planning for the Purchase of Supplies in Economic Quantities", the conclusion of a contract with a supplier is not allowed only on the basis of a low price, as this can only be a false saving, since subsequent default, delays in delivery, or other unsatisfactory performance as a result of supplementary contracts or administrative expenses may occur. Therefore, the officer should pay attention to the identity of the supplier.

It is noted in the literature that almost 2/3 of the expenses within the FAR are spent on services, while this act establishes seven ways of determining prices, more suitable, however, for the goods. The foreign researchers emphasize that the resulting prices do not exactly meet the principle of reasonableness, and we should agree with them



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(Chalfant D. 2016; p. 44).

This is only a small example of the application of the term under study in US legislation. Similarly, it occurs in other countries. Thus, the contract is concluded with the most economically profitable participant according to the tender results. At the same time, the economic benefit is understood not as the price reduction due to tender, and not as the purchase of the cheapest goods, works and services in Germany. The economic benefit is the purchase of quality goods at an affordable price. This combination can be provided by an experienced, financially free and reliable supplier. But at the time of application, all suppliers are equal in accordance with the principle of open competition (Fabey M. 2015; p. 3); (Hanjra A.R. 2012; p. 34). As we can see, these provisions are very consonant with the American Act.

Reasonable price is also the main requirement in the acts of international level - the UNCITRAL Model Law on Procurement of Goods, Works and Services, which establishes the procedure for concluding government contracts (Hanjra A.R. 2012; p. 34).

3. RESULTS AND DISCUSSION

Summarizing the numerous studies carried out in this area, we believe that it is possible to single out the further "dry residue" of these discussions on the current domestic legislation.

Conscientiousness as an independent categorical unit reflects "a certain system of representations formed in society, the morality of conduct of the subject of law in civil circulation, that is, in the acquisition, exercise and protection of law, as well as in the performance of obligation" (Bogdanova E.E. 2014, p. 1,369). The author is impressed with the understanding of conscientiousness by the individual researchers as a model of behavior, a special standard of honest behavior, "expected from an average participant in public relations in similar circumstances. Due to this standard, the behavior in the society becomes positively predictable, since each participant of certain relations understands by default that it links its activity with an honest counterparty" (Belov V.A. 2015, p. 44).

Morality, being, therefore, a guide to behavior, is always subject to the influence of the order of a particular society and the period of its existence. It seems that in this case the



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perception of morality on the basis of a sign of taking into account the rights and legitimate interests of counterparties that assists them, including in obtaining the necessary information, should be a cornerstone. It is this factor that is considered decisive in the special order of the higher court.

Studying the concept of reasonableness, most authors use synonymous, and therefore almost identical concepts: "expediency," "rationality," "necessity," etc. In this case, it seems almost impossible to understand the essence of the concept of "reasonableness". It seems more correct to understand the concept of reasonableness as an objective, external restriction of the subject activity corresponding to the general criteria for the conformity of activity to the sign of normal development of the corresponding group of legal relations.

Therefore, conscientiousness is determined by morality, internal constraints of the subject actions, and intelligence - objective criteria. The latter are also linked with the subject judgment, taking into account the requirements of good faith, but they are more "measurable", usually by quantitative or specific qualitative criteria (days, monetary units, etc.). This point of view is holistically expressed by D.V. Grivanov: "The essence and content of intelligence form a combination and separation of the rational and moral foundations of human activity, which determines the general humanistic role and general legal significance" (Gribanov D.V. 2015, p. 115).

The revealed essence of the evaluation concept considered undoubtedly testifies to its independent meaning and the necessity to introduce the concept of "reasonableness" as the limit of the subject actions in the legislation on the contractual system, which is acute from the law enforcement practice.

A repeated stumbling point was the allocation of action different in nature as an object of an independent lot. So, the following test case was assessed for good faith: the subject of the competition was a whole range of works - the facility (preschool) construction, as well as the supply and installation of equipment for equipping the nutrition unit, laundry and installation of a gymnastic wall. Since the construction of these facilities and the delivery (installation) of equipment could be carried out by different persons, the antimonopoly body considered that their merger in one lot entailed a limitation on the number of participants in the tender. As the court, having



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considered a complaint to the decision of the Federal Arbitration Court of the Russian Federation, correctly noted, the main task of the legislation setting the tender procedure was not so much to ensure the maximum number of participants, but rather to identify the person who would fulfill the contract most effectively for the purposes of effective use of funds (Resolution of the Arbitration Court of the West Siberian District dated June 17, 2015).

The final goal of the procurement was the construction of the facility not as such, but prepared for operation or provision of services, that was, the association of works on the construction of facilities and the supply of equipment meeting the customer's needs, which allowed concentrating the functions of managing all stages of the process of creating finished products in one organizational structure, reducing costs and rationally spending the budget funds.

Such a summary given by the court is reasonable, it is not possible to evaluate the customer's approach objectively in terms of categories of "morality", "honest conduct", because in case of bad faith, the direction of the tender organizer's actions would be related to obtaining benefits or certain benefits from the persons involved in the procurement. The considered combination of different actions is not connected with conscientiousness, it is expedient. The following test case is similarly decided in this sphere: the supply of software and the supply of computers can be the subject of a single procurement, since the use of computer equipment is impractical without the necessary software (Resolution of the Arbitration Court of the Volga District dated April 9, 2015 No. F06-22212/2013 on the Case No. A65-18409/2014).

There is one more interesting thing: when analyzing the practice of the Krasnoyarsk OFAS (Office of the Federal Antimonopoly Service) of Russia, we have found a complaint about the violation of the requirements of the legislation of the Russian Federation alleged by the applicant when the customer had decided to cancel the ongoing procurement.

Having examined the circumstances of the case, the antimonopoly authority found that the customer canceled the procurement in connection with the introduction of changes to the Regulations of the Central Bank of the Russian Federation regarding the size of the base rates and the ratios of insurance tariffs. With regard to this circumstance, the



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submission of applications from the tender participants in accordance with the provisions of the tender documentation was impossible, since the procurement participants had no right to conclude service agreements on the insurance of civil liability of vehicle owners not in accordance with the Regulations of the Central Bank of the Russian Federation.

The complaint was found to be unfounded, the controlling body referred specifically to the tender unreasonableness on the basis of the prescriptions of the invalid act. Indeed, in this case, if good faith is the criterion for assessing the qualifications and the reasonableness of the procurement, it should be considered unfair to continue the implementation of contractual procedures.

The reasonableness criterion is used by another subdivision of the Federal Arbitration Court, however, in a different context. In one of the cases, the applicant, who filed a complaint to the Federal Arbitration Court, and who had an intention to participate in the contractor's selection for a particular contract, pointed out that the unreasonable (unreal) time of delivery set by the customer did not meet the requirements of good faith, reasonableness and fairness (para. 2 of Art. 6 of the Civil Code of the Russian Federation) and led to the prevention, restriction or elimination of competition. However, the claim was refused, as "in accordance with the legislation of the Russian Federation on the contract system in the procurement sphere, the customer has the right to establish any term for the delivery of goods depending on his own needs" (Decision of the Ossetia OFAS of Russia dated May 19, 2015).

4. SUMMARY

Thus, the domestic supervisory authority came to the principle possibility of establishing the arbitrary conditions in the state order description by the customer, without investigating the essence of the term stipulated and its characterization from the point of view of the limiter in the activity of the contract system subjects studied by us. Such omission of the existence of the basic principles of legal regulation, their significance for existing legal relations in the functioning of the contracting system aimed at meeting the state and municipal needs, can have a very negative impact on the implementation of the norms of the same institution.

It will be unfair not to mention that the main supervisory body in this area - Federal



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Arbitration Court of the Russian Federation, which recognizes the need to establish a "reasonableness" limiter in terms of the terms of the contractual procedure and a special act of the Federal Antimonopoly Service of the Russian Federation: "In addition, when determining the time limits for signing and sending the draft contract by the participant, it is reasonable to proceed from the principle of reasonableness" (The Standard of Procurement Activities of Certain Types of Legal Entities: Approved by the OFAS of Russia // Legal Reference System "ConsultantPlus).

5. CONCLUSIONS

So, the analysis of the provisions of the Russian legislation on the contract system and the Civil Code of the Russian Federation, the civil doctrine and the law enforcement practice show that the category of "reasonableness" should be recognized the main principle of legal regulation of relations in the sphere of state procurement implementation, although not directly named in the text of the regulatory legal act. The author argues for fixing the price and non-price competition among the procurement participants in order to identify the best conditions for the supply of goods, the performance of work, the provision of services, as well as a sign of their reasonableness in Art. 8 of Law 44-FZ along with the criterion of conscientiousness. This state of affairs has already been fixed in the US regulatory legal act and is a positive example for the Russian legislator. The main argument in favor of this innovation is the fact that the absence of such a special legislative provision predetermines the need to prove the presence of this objective constraint every time, which makes it difficult to widely apply it in practice.

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