

Legal Risks Reduction for Unjustified Maximum Price of Governmental Contracts

Khusei A. Akhmatov^a and Irina A. Astrakhantseva^b

Department of Information Technologies and Digital Economy of the Ivanovo State University of Chemical Technology, Ivanovo, Russia

Keywords: contractual system, market analysis, integral method, public contract, maximal price, valuation activities, correlation and regression analysis, money flow, rate of return method, uniform goods, bill of quantities.

Abstract: For the time being, the specific administration and judicial practice in disputes on the formation and justification of the maximum price of contract in the public order placement system is being formed in each region. As a rule, breach of legislative norms of pricing in the contractual system are revealed based on the results of scheduled and unscheduled checks by tax, control and supervisory and executive state authorities. The most proceedings are related with the incorrect use of methods of formation and justification of the maximal starting price of contract, with the use of one method, but not several cumulatively. In this paper, the authors revealed possibilities to use methods, used in professional valuation activities (e.g., the correlation and regression analysis, and income approach methods) for justification of maximum price of public and municipal contract.


1 INTRODUCTION


According to the practice of applying standards of the Federal Law on the contractual system, it was established that control authorities can hold the customer responsible for breach of the procedure of formation and justification of the maximum starting price of public contract in case of using only one of the methods specified in Part 1, Article 22 of the Federal Law dated April 05, 2013, No. 44-FZ "On the Contractual System in the Field of Procurement of Goods, Works, Services for Provision of Public and Municipal Needs" (hereinafter No. 44-FZ) [5]. Therefore, the combination of methods that can further result in obtaining several values of the maximum starting price of contract (hereinafter - the "MSPC"), considerably differing from each other, forces the customer to make an independent choice preference of one of them, or create a private integral method of the public contract price justification, with regard of the individual procurement specifics [19]. In connection with continuous monitoring of financial relevancy and efficiency of expenditure of

budgetary funds from the side of controlling authorities, issues of justification of the maximum starting price of the public and municipal contract always remain the most sought-after discussion subject among the procurement members [6, 17]. The specific law enforcement practice on forming the maximum price of contract, that increases the customer's responsibility and the amount of labor when forming the procurement plan schedule, may be formed on the regional level. In connection with this, it becomes necessary to have knowledge not only in the field of regulatory requirements under No. 44-FZ, but in practice of interpretation of requirements of statutory instruments related to justification of the maximum starting price of the public and municipal contract [7, 12] and appraisal law by controlling and judicial authorities.

2 MATERIALS AND METHODS

For the purposes of this study, the authors used statutory materials, relating to the contractual system

^a  <https://orcid.org/0000-0002-9428-1450>

^b  <https://orcid.org/0000-0003-2841-8639>

in the field of procurement of goods, works, services for provision of public and municipal needs, orders of collegial body of executive powers, orders and decrees of executive authorities. The analysis of judicial practice of hearing cases on incorrect justification of the initial maximal contract price in the public order placement system was performed. Legal trends in settlement of disputable situations of setting the maximum starting price of public and municipal contract were revealed.

Partially scientific methods, such as the rather-legal analysis, the formally logical approach, the method of comparative law and law enforcement, analysis and synthesis, were used as a methodological base.

3 RESULTS AND DISCUSSION

The use of method of forming the maximum starting price of contract, different from those established by law, is allowed according to Part 12, Article 22, No.44-FZ. In this case, the customer is obliged to prepare the justification of the need to use a different method of forming the maximal price of the public and municipal contract [13]. For example, in the field of urban planning, the Ministry of Construction, Housing and Utilities of the Russian Federation provides official explanations [4], specifying the need to use the aggregate methods of justification of the initial maximal price of the public and municipal contract at the use of design documentation, the development of which requires involving the costing standards database [16].

As is known, the estimated construction cost indices, current as of the date of justification of maximum price on contract are used with the purpose of bringing types of work, established by the bill of quantities, to current value. Price deflator values are used when calculating the anticipated inflation index that is used for forming the maximum price of contract in contractor's work paid for by subsidies for state job performance. The Webpage of the Federal State Statistics Service (hereinafter - "Rosstat") provides methodical recommendations for definition of values of price indices, calculation of anticipated and actual inflation indices, and the deflator.

The main method for setting the maximum starting price of public contract in the conduct of trade procedures for contractual work is the design and estimate method [15]. It provides for the use of special estimate standards, included into the federal registry. It is allowed to use the other methods in

absence of estimate standards for project design work and engineering surveying, in the federal registry.

On practice, other methods for justification of maximum starting price of the public and municipal contract can be borrowed from directions of economic and financial analysis [18], that became common in terms of good business practices, have the advisory or binding nature of application according to the requirements of statutory instruments of federal or regional level. One of such directions can include valuation activities, providing for the presence of professional skills for determination of market, cadastral and other value of the proprietary item. The results of such assessment are actively used in the practice of corporate relations, bankruptcy regulation, privatization, mortgage security, and taxation. Federal Law dated July 29, 1998, No. 135-FZ "On Valuation Activities in the Russian Federation" is the main statutory instrument for regulating valuation activities, including those in terms of judicial appraisal and determines legal grounds of regulation of valuation activities in relation to the appraisal objects, belonging to the Russian Federation, subjects of the Russian Federation or municipal institutions, natural and legal entities, for the purposes of making transactions with the subject properties, and for the other goals [2]. Therefore, expressing an opinion on cost of proprietary items both in terms of cost assessment and in terms of judicial appraisals belongs to the field of appraisers' professional activities.

In accordance with the requirements of Article 3 of the Federal Law dated July 29, 1998, No.135-FZ "On Valuation Activities in the Russian Federation" (hereinafter No. 135-FZ), federal valuation standards (hereinafter - "FVS") of value are also used in terms of valuation activities. The federal valuation standards are mandatory for use at valuation activities, and according to Article 20 of No. 135-FZ, it is specified that FVSs are developed with regard of international assessment standards.

According to FVS No.1, the price shall mean the amount of monetary funds that may be requested, paid and proposed by the participants as a result of effected or proposed deal [9]. In this case, the similarity between the terms "price" under FVS No.1, and "maximum starting price of contract" according to No.44-FZ is noticeable. The maximum price of public contract is equivalent to the monetary amount, proposed by the customer for satisfaction of public and municipal needs in terms of the proposed deal. The maximum starting price of the public contract may be paid to the procurement winner in full amount in terms of real transaction, if the procurement procedure was declared void, due to the fact that by

the expiry of the period for application, only one procurement procedure participant expressed a wish to become a party to the contract [1, p. 16, p. 66].

Content of appraisal object cost is revealed separately from the term "price" in FVS No.1. Value is the most probable calculation value, set for the specific date of appraisal with the respective type of value that includes: market, investment, liquidation, and cadastral [10]. It should be noted that the need for actualization of the cost of goods, work, or service for the current date is not directly specified in terms of No. 44-FZ. According to methodical recommendations of the Ministry of Economic Development and Trade of the Russian Federation on application of the methods for setting the starting price of the public and municipal contract, price information, obtained by the customer more than six months ago before the procurement procedure start date, shall be subject to actualization [3]. Consumer price indices are used for this purpose. For the time being, in procureent of construction work, according to the requirements of the Ministry of Construction, Housing and Utilities of the Russian Federation, it is required to use the anticipated inflation index for bringing the current value of contract to conformity with the level of prices by the end of fulfilling the contract obligations.

The final value in terms of valuation activities is defined at the use of totality and sequence of procedures. They are united with common methodology, and allow establishing the market value of object based on material information. In forming the maximum price of contract in the public and municipal order placement system, the law enforcement practice, and results of checks by control and supervisory authorities, bind the customers to use several justification methods. The market analysis method and the design and estimate method (for example, in case of permanent repair, not providing that estimate documents should be subject to mandatory state or private appraisal) are used the most often simultaneously, together with the rate of return method and the market analysis method (for example, when setting the maximum price of contract for security, cleaning, catering services, etc.). Therein, materiality of information is limited to the specifics and rules of use of price sources and reference information, according to the regulation requirements. In terms of valuation activities, market value of object is established based on the totality of factors that are variative and finite in case of attracting all material sources of information, based on professional justified opinions and calculations of the appraisal object.

In terms of valuation activities, the certain date for defining the market value of object should be specified. This allows taking into account the impact of events and trends of the appraisal object value. The public order placement system has no requirements for specification of the date of determination of the maximum price of public contract. Methodical recommendation of the Ministry of Economic Development and Trade of the Russian Federation specify only the need for bringing prices of previous periods, since the date of which more than six months passed, to the current level of prices [8, cl. 13.4].

Therein, both in the field of public and municipal procurement, and in valuation activities, it is permissible to use objects with the similar economic, material, technical, functional and operation indicators with an object that is a subject of appraisal or procurement. The comparative approach, applied in valuation activities, provides, partially, the same methods for the object value definition that are used in justification of the maximum value of the contract by method of comparative market prices, i.e., by the market analysis. These methods are used in conditions of adequacy and reliability of information on prices and characteristics of the object. It should be noted that the quantitative indicator of pricing information sufficiency is fixed in the field of legal regulation of the contractual system, in distinction from the appraisal. For example, the customer may send at least five inquiries to suppliers of identical goods, and in their absence, study the market of uniform goods. At least three price offers should be applied for justification of the maximum price of public contract. At this, the same as in valuation activities, it is allowed to use prices for consummated deals, that are placed in the contract registry. In valuation activities, the quantitative indicator of pricing sufficiency is formed from business practice.

However, in the field of placing the public order for the contractual price justification by market analysis, neither methodical recommendations of the Ministry of Economic Development and Trade of the Russian Federation, nor the Law No. 44-FZ itself provides for the analysis of statistical data, there is no possibility to adjust for differences of uniform goods in relation to the procurement object, that are used by a professional appraiser before determining the appraisal object value.

When forming the maximum price of public contract, the use of the rate of return method often raises questions from control and supervisory authorities due to the need to justify expenses included into the price of goods, work, or service. In addition, exclusiveness of application of the rate of

return method in the contractual system is established in the Law No. 44-FZ, and is expressed in its use as an additional, but not an independent, method. Therein, it is recommended to separate total expenses into direct and indirect. In addition, common income for the specific field of activity is taken into account. Sources of information about regular income are the registry of contracts, other public sources, including information and pricing agencies, and public market research findings. It should be noted that in justification of the maximum starting price of public contract by the rate of return method, no possibility of using the price information by identical or uniform goods is specified. In terms of valuation activities, the rate of return approach allows for the item cost definition not only on the basis of expenses related to creation of its identical copy, but also the object with similar useful qualities. Criteria of the object recognition as an identical copy, confirmation of comparability of useful properties are established by federal valuation standards. In addition, when defining the appraisal object value, the rate of return method provides for taking factors of wear and tear and functional and economic obsolescence into account [11].

Due to the fact that the considerable deviation of deal price from market price can result in the contract legitimacy contestation through judicial procedures. During the object valuation, the appraiser can use all the three approaches, or reasonably select one or two approaches to appraisal. When calculating total value, calculation results of the approach that demonstrates the largest deviation from the other results (as a rule, over 30%), can be excluded from calculations.

Valuation activities also use the correlation and regression analysis, which requires solving the issue of forming the representative sample of analogues (comparable items). They are used for establishing the cost of the appraisal object in case of comparing market data. To build an econometric model, the market data sample equal to 5–7-fold number of independent factorial variables is used.

5 CONCLUSION

Thus, the use of the correlation and regression analysis can be justified and feasible for definition of the maximum price of contract in the public and municipal order placement system. The procedure of justification of the maximum price of the contract is accompanied by explanation of the order of its formation, and specification of price factors. The list of such factors may depend on the procurement

procedure specifics, and count for both production, state, fiscal, and customer criteria of the procurement item. Therefore, the customer almost always specifies the structure of price factors in procurement documentation, but is not always aware of the share of each variable in the contractual price structure.

The public and municipal order placement system does not provide for application of money flow discounting and money income capitalization methods. However, their use would allow establishing the fair maximum starting price of the procurement object when conducting, for example, an auction sale for the contract value increase, enabling a participant, who offered the highest price, to enter into the agreement.

To reduce the level of precedents of incorrect justification of the maximum starting price of the public and municipal contract, revealed by control and supervisory authorities, in connection with selective application of one of pricing methods by the customers, it would be reasonable to fix indication at the need of complex application of methods of forming the maximum price of contract in recommendations of the Ministry of Economic Development and Trade of the Russian Federation, or the Federal Law No. 44-FZ.

REFERENCES

- Federal'nyj zakon ot 05.04.2013 No. 44-FZ "O kontraktnoj sisteme v sfere zakupok tovarov, rabot, uslug dlya obespecheniya gosudarstvennyh i municipal'nyh nuzhd". "Rossijskaya gazeta", No. 80, 12.04.2013.
- Federal'nyj zakon ot 29.07.1998 No. 135-FZ (red. ot 31.07.2020) "Ob ocennoj deyatelnosti v Rossijskoj Federacii". "Sobranie zakonodatel'stva RF", 03.08.1998, No. 31, st. 3813, "Rossijskaya gazeta", No. 148-149, 06.08.1998.
- Proekt Prikaza Minfina Rossii «Ob utverzhenii Metodicheskikh rekomendacij po primenenyu metodov opredeleniya nachal'noj (maksimal'noj) ceny kontrakta, ceny kontrakta, zaklyuchaemogo s edinstvennym postavshchikom (podryadchikom, ispolnitelem), nachal'noj ceny edinicy tovara, raboty, uslugi» (po sostoyaniyu na 05.08.2020) (podgotovlen Minfinom Rossii, ID proekta 01/02/02-19/00088851).
- Pis'mo Ministerstva stroitel'stva i zhilishchno-kommunal'nogo hozyajstva RF ot 18 marta 2020 g. No.8323-OG/09 «Ob opredelenii nachal'noj (maksimal'noj) ceny kontrakta».
- Pis'mo FNS Rossii ot 18.06.2019 No. AS-4-16/11709 "Obzor narushenij i nedostatkov, vyyavlenykh v 2 polugodii 2018 goda Federal'nym kaznachejstvom".
- Pis'mo Kaznachejstva Rossii ot 28.05.2019 No. 07-04-05/21-10665 "O napravlenii obobshchennoj informacii po rezul'tatam kontrol'nyh meropriyatij".

- Pis'mo Kaznachejstva Rossii ot 30.10.2019 No. 07-04-05/21-23295 «Obzor narushenij i nedostatkov, vyyavlenykh v 1 polugodii 2019 goda».
- Prikaz Ministerstva ekonomicheskogo razvitiya RF ot 2 oktyabrya 2013 g. No. 567 "Ob utverzhdenii Metodicheskikh rekomendacij po primeneniyu metodov opredeleniya nachal'noj (maksimal'noj) ceny kontrakta, ceny kontrakta, zaklyuchaemogo s edinstvennym postavshchikom (podryadchikom, ispolnitelem)". "ZHurnal rukovoditelya i glavnogo buhgaltera ZHKKH", N 1, yanvar', 2014 (chast' II) (Metodicheskie rekomendacii - nachalo), "ZHurnal rukovoditelya i glavnogo buhgaltera ZHKKH", No. 2, fevral', 2014 (chast' II) (Metodicheskie rekomendacii - okonchanie).
- Prikaz Minekonomrazvitiya Rossii ot 20.05.2015 No. 297 "Ob utverzhdenii Federal'nogo standarta ocenki "Obshchie ponyatiya ocenki, podhody i trebovaniya k provedeniyu ocenki (FSO N 1)".
- Prikaz Minekonomrazvitiya Rossii ot 20.05.2015 No. 298 "Ob utverzhdenii Federal'nogo standarta ocenki "Cel' ocenki i vidy stoimosti (FSO N 2)".
- Andreev, S.A., Brovko, S.I. (2018). Sovershenstvovanie mekhanizmov dosudebnogo (vnesudebnogo) razresheniya sporov, voznikayushchih po itogam rassmotreniya rezul'tatov kontrol'nykh meropriyatij v finansovo-byudzhethnoj sfere. *Finansovoe pravo*. 7. Pages 24-27.
- Ahmatov, H.A., Konovalov, O.A. (2021). Analiz vliyaniya izmenenij uslovij i poryadka provedeniya elektronnykh torgovykh procedur na metodologiyu obosnovaniya nachal'noj maksimal'noj ceny gosudarstvennogo kontrakta. *Izvestiya vysshih uchebnykh zavedenij. Ekonomika, finansy i upravlenie proizvodstvom*, 1 (47): 65-71.
- Vadreckij, I.S. (2020). Mekhanizm obrazovaniya tenevogo sektora v sfere gosudarstvennykh zakupok. *Vestnik ekonomicheskoy bezopasnosti*, 1. pages 244-249.
- Zdanovskaya, L.B., Tkachenko, V.V. Tkachenko, N.A. Analiz sistemy gosudarstvennykh zakupok i rassmotrenie prakticheskikh voprosov kontraktnoj sistemy po Federal'nomu zakonu No. 44-FZ. *Vestnik Akademii znaniy*, 2 (37): 117-123.
- Rudyh, S.N. (2019). Problemy obosnovaniya nachal'noj (maksimal'noj) ceny kontrakta v sfere zakupok tovarov, rabot, uslug dlya obespecheniya gosudarstvennykh i municipal'nykh nuzhd. *Evrazijskij yuridicheskij zhurnal*, 9 (136): 161-164.
- Ryutli, A.A., Larionov, M.U., Varlamov, B.A. (2020). Zakonodatel'nye osnovy zakupok v gosudarstvennykh uchrezhdeniyah. *CITISE*, 2 (24): 371-384.
- Akhmatov, Kh.A., Astrakhantseva, I.A., Kutuzova, A.S., Votchel, L.M., Vikulina, V.V. (2020). *Harmonization of banking business models with the needs of the economy by encouraging the exogenous social responsibility*. Quality - Access to Success. T. 21. No. 174. pages 81-87.
- Fedotov, D.A. (2018). Improvement of the mechanism of rationing the initial contract price in the field of public procurement on the example of econometric modelling of the price of laptop. *Research Result. Economic Research*. T. 4. No. 4. pages 53-65.
- Isikdag, U. (2019). An evaluation of barriers to E-Procurement in Turkish construction industry. *International Journal of Innovative Technology and Exploring Engineering*, 4 (8): 252-259.