

**January 2019**

**DIGEST  
of legal regulation of procurement  
in Russian legislation**

**Dear Colleagues!**

We bring to your attention the next digest of legal regulation of procurement **for January 2019**, prepared by the BRACE Law Firm

Since January 2019, a sufficiently large amount of changes in procurement legislation has entered into force. At the same time, the beginning of the year, as often happens, is characterized by a relatively weak rule-making activity of state bodies and an emphasis on declaring the plans of the Government of Russia for the current and subsequent years. For example, by 2020, the Government promises to increase to 18% the proportion of corporate procurements conducted by companies with state participation, whose participants will be only small and medium-sized businesses and develop mechanisms for "growing" suppliers, small and medium-sized businesses.

One of the important initiatives of the Ministry of Economic Development of Russia is associated with the proposal to entrust the Government of Russia with the function of establishing requirements for the criteria for classifying goods, works, services as innovative products and (or) high-tech products, as well as provisions on the procedure and rules for applying (introducing) goods, works, services that meet the criteria for classifying innovative products, high-tech products.

The Ministry of Finance of Russia proposes to somewhat mitigate the requirement for banks to have agreements on interaction with each of the operators of electronic platforms, having established that it applies to the bank sixty 60 days after the day following the day of its inclusion in the list. In addition, last month, the Ministry of Finance of Russia clarified its own order dated June 4, 2018 N 126n "On conditions for admitting goods originating from a foreign state or a group of foreign countries for the purpose of procuring goods for state and municipal needs".

Clause 12 of the Rules for the Evaluation of Applications, Final Proposals of Participants in Procurement of Goods, Work, and Services to Ensure State and Municipal Needs, has expired due to which the customer has the right not to apply a number of value and non-cost evaluation criteria when conducting a request for proposals.

Also among the legislative changes can be noted the introduction of a new type of inspections of procurement activities of credit institutions by the Central Bank of Russia. Of course, these types of audits will apply only to banks and other credit organizations.

The Federal Antimonopoly Service of Russia explained the time limits for the consideration of complaints filed during procurement under Federal Law of July 18, 2011, N 223-FZ "On Procurement of Goods, Work, Services by Certain Types of Legal Entities" with consideration of cases of redirection of such complaints.

Faithfully,

BRACE Law Firm

## 1. Laws, by-laws, legal news

### 1.1. The Russian government has approved a plan of transformation the business climate, which implies a number of procurement reforms.

*Decree of the Government of the Russian Federation of January 17, 2019 N 20-r "On approval of the plan "Transformation of the business climate" and recognition of acts of the Government of the Russian Federation as invalid"*

By 2020, it is planned to increase to 18% the share of procurements made by state-owned companies whose participants will be only small and medium-sized businesses.

It is proposed to develop mechanisms for the development ("cultivation") of suppliers, small and medium-sized businesses, with a view to their potential participation in procurements of goods, works, services of certain types of legal entities specified in paragraph 2 of the Decree of the Government of the Russian Federation N 1352 dated December 11, 2014.

### 1.2. The Finance Ministry of Russia clarified the conditions for admitting goods originating from a foreign state or a group of foreign states to participate in public procurement.

*Information Letter of the Ministry of Finance of Russia dated January 18, 2019 N 24-01-07/2281 "On the application of certain provisions of the Order of the Ministry of Finance of Russia dated June 4, 2018 N 126n "On the conditions for admission of goods originating from a foreign state or a group of foreign states for the purpose of purchasing goods for state and municipal needs"*

The Office clarifies that the customer's inclusion in the composition of one lot of goods listed in the List of goods listed in the Annex to the Order of the Ministry of Finance of Russia of June 4, 2018 N 126n "On the conditions for admission of goods originating from a foreign state or group of foreign states for the purpose of purchasing goods for the provision of state and municipal needs" will not meet the conditions for admission of goods provided for by the legislation on the contract system.

Let us remind that clause 3 of the above Order establishes that, for the purposes of applying for this order, the goods specified in the List and not listed in it cannot be the subject of one contract (one lot).

In addition, attention is drawn to the fact that clause 1 of the Decree of the Government of the Russian Federation of November 30, 2015 N 1289 "On the restrictions and conditions for the admission of drugs originating from foreign countries, included in the list of vital and essential drugs, for the purposes of procurement to ensure public and municipal needs" it has been established that the customer rejects all applications containing proposals for the supply of medicines that are x from foreign countries (with the exception of the member states of the Eurasian Economic Union), provided that at least 2 bids (final proposals) were submitted to participate in the supplier determination, which meets the requirements of the procurement notice, and/or procurement documentation and which comply with the conditions specified in this paragraph.

In addition, subclause 1.4 of clause 1 of Order N 126n of June 4, 2018 establishes that in case of rejection of bids (final proposals), the contract is concluded with the procurement participant at the proposed contract price under the following conditions:

- the application contains a proposal for the supply of medicines, all stages of production of which, including the synthesis of the active substance molecule in the production of pharmaceutical substances, are carried out in the territories of the EEU Member States, and information on such pharmaceutical substances is included in the state register of medicines;

- the application of such a procurement participant complies with the requirements of the procurement documentation;
- such a procurement participant has been offered the contract price, which is the lowest among the procurement participants (if there are such procurement participants), whose applications are not rejected in accordance with clause 1 of Regulation N 1289 and at the same time correspond to the set of conditions indicated above;
- such a procurement participant has proposed a contract price that does not exceed by more than 25 percent the smallest bid for the contract price in the event of its submission by the procurement participant (if such a procurement participant exists), the application of which is not rejected in accordance with clause 1 of Regulation N 1289, but not complies with the condition on the supply of medicines, all stages of production of which are carried out in the territories of the EEU Member States.

The Russian Ministry of Finance drew attention to the application of the provisions of paragraph 1 of Resolution N 1289, according to which the customer rejects all applications (final proposals) containing proposals for the supply of medicines originating from foreign countries (except for the member states of the Eurasian Economic Union), provided that participation in the determination of the supplier filed at least 2 applications that meet the requirements of the notice of compliance with the conditions of origin. The Ministry of Finance explained that these conditions do not apply in the absence of a procurement participant whose application meets the requirements of the procurement documentation and requirements for the origin of goods. In this case, the contract is concluded with the procurement participant, who offered the lowest contract price.

### **1.3. From January 1, 2019, a new type of inspection of the procurement activities of credit institutions by the Central Bank of Russia is being introduced.**

*Federal Law of July 29, 2018 N 263-FZ "On Amendments to Certain Legislative Acts of the Russian Federation"*

On January 1, 2019, Article 73.1-1 of the Federal Law of 10 July 2002 N 86-FZ "On the Central Bank of the Russian Federation (Bank of Russia)" comes into force, according to which, in case of a reasonable assumption that the activities of a credit institution may damage its creditors and depositors, revealing signs of a credit organization's violation of the requirements of the laws of the Russian Federation and Bank of Russia regulations and (or) signs of a violation by a credit organization of the rights of customers of the Bank of Russia when exercising banking supervision has the right to hold a control event. In the course of such an event, actions are taken to complete the transaction or create conditions for the transaction within the normal course of business of the credit institution in order to verify that the credit institution complies with the requirements for its activities. The control measure is held without prior notification of the credit organization.

The decision to hold a control event is taken by the Chairman of the Bank of Russia or the Deputy Chairman of the Bank of Russia.

### **1.4. The Federal Antimonopoly Service clarified the timing for the consideration of complaints filed when conducting the procurement under the Federal Law of July 18, 2011 N 223-FZ "On the procurement of goods, works, services by certain types of legal entities"**

*Letter of the Federal Antimonopoly Service of Russia of January 23, 2019 N IA/4073/19*

The letter states that in accordance with Part 10 of Article 3 of the Federal Law of July 18, 2011 N 223-FZ "On the procurement of goods, works, services by certain types of legal entities", any

procurement participant is entitled appeal to the anti-monopoly authority the actions (inaction) of the customer if they violate the rights and legitimate interests of the procurement participant.

As a general rule, the complaint is substantially processed within seven working days from the date it was received.

The Federal Antimonopoly Service draws attention to the fact that in the event of redirection of a complaint on jurisdiction for consideration essentially to the central office of the Federal Antimonopoly Service of Russia or the relevant territorial body of the Federal Antimonopoly Service, this period is calculated from the moment the complaint is received by the central office of the Federal Antimonopoly Service of the Federal Antimonopoly Service or the territorial body of the Federal Antimonopoly Service, complaint forwarding.

Taking into account the fact that within three working days the antimonopoly body must decide to return the complaint to the complainant, or to assign the complaint to consideration, the deadline for forwarding complaints should be no more than three working days.

## **1.5. Criminal Amendments have been made to the Rules for the evaluation of applications, final proposals of participants in the procurement of goods, works, and services for state and municipal needs.**

*Decree of the Government of the Russia of January 25, 2019 N 41 "On Amendments to the Rules for the Evaluation of Applications, Final Proposals of Participants in the Procurement of Goods, Works and Services for Providing State and Municipal Needs"*

Clause 12 of the Rules for the Evaluation of Applications, Final Proposals of Participants in the Procurement of Goods, Work, and Services to Ensure State and Municipal Needs, which the customer has the right not to apply such evaluation criteria as:

- Criteria characterized as cost: contract price; expenses for operation and repair of goods (objects), use of work results; life cycle cost of the product (object) created as a result of the work; a proposal for the amount of the relevant expenses of the customer that the customer will incur or incur under an energy service contract.

- Criteria characterized as non-cost: qualitative, functional and environmental characteristics of the object of purchase; the qualifications of the procurement participants, including the availability of financial resources, equipment and other material resources belonging to them by right of ownership or on other legal grounds, work experience related to the subject of the contract, and business reputation, professionals and other employees of a certain level of qualification.

## **1.6. Now information from the register of bad-faith suppliers (contractors, performers) can be obtained in the order of interdepartmental interaction.**

*Order of the Government of the Russian Federation of January 19, 2019 N 35-r "On Amendments to the List approved by the Order of the Government of the Russian Federation of April 19, 2016 N 724-r"*

The list of documents and (or) information requested and received within the framework of interdepartmental information interaction by state control (supervision) bodies and municipal control bodies when organizing and conducting inspections from other state bodies, bodies was supplemented by the Order of the Government of the Russian Federation dated April 19, 2016 N 724-r. local self-government or organizations subordinated to state bodies or local self-government bodies that possess these documents and (or) information.

In particular, in the Federal Antimonopoly Service of the Russian Federation, as part of interdepartmental cooperation, information may be requested from the register of bad-faith suppliers

(contractors, performers), which is maintained in accordance with the Procurement Law by certain types of legal entities, as well as in accordance with the Federal Law contractual system in the field of procurement of goods, works, services for the provision of state and municipal needs" of 05 April 2013 N 44-FZ.

**1.7. It is recommended to keep in mind the need to post information on the annual volume of purchases, as well as the annual report on the purchase of innovative products and high-tech products by February 1, 2019.**

*Federal Law of July 18, 2011 N 223-FZ "On the procurement of goods, works, services by certain types of legal entities" as amended by Federal Law of December 28, 2013 N 396-FZ "On Amendments to Certain Legislative Acts of the Russian Federation".*

Decree of the Government of the Russian Federation dated December 25, 2015 N 1442 "On procurement of innovative products, high-tech products by certain types of legal entities and amendments to certain acts of the Government of the Russian Federation"

Information on the annual volume of purchases that customers are required to make from small and medium-sized businesses should be placed in a unified information system no later than February 1 of the year following the previous calendar year.

The annual report on the purchase of innovative products, high-tech products, including from small and medium-sized businesses over the past year should also be placed in the Unified Information System at the time indicated above.

## **2. Drafts of legal acts**

**2.1. The Ministry of Economic Development of Russia proposes to introduce legislation on the procurement of companies with state participation of changes in terms of establishing requirements for the procedure and rules for applying (introducing) innovative products and high-tech products.**

*Draft Federal Law "On Amendments to Article 4 of the Federal Law "On Procurement of Goods, Work, Services by Certain Types of Legal Entities" (establishing requirements for the procedure and rules for applying (introducing) innovative products, high-tech products)"*

Public discussions and anti-corruption expertise are underway. A draft federal law is proposed to establish that the purchase plan for innovative products, high-tech products, and medicines is placed by the customer in a single information system for a period of at least one year, including the purchase of medicines for a period from five to seven years old. Let us remind that in this version of the law there is no indication for a period of at least one year.

The project stipulates that the requirements for the criteria for classifying goods, works, services to innovative products and (or) high-tech products, as well as provisions on the procedure and rules for applying (introducing) goods, works, services that meet the criteria for classifying innovative products, high-tech products should be determined by the Government of the Russian Federation.

The main purpose of such a draft of changes is to establish uniform requirements for the provisions on the procedure and rules for the application (implementation) of the above products, in order to increase the volume of purchases and application (implementation) of modern high-performance, including innovative, high-tech products produced domestically, including the number of small and medium enterprises.

**2.2. It is proposed to supplement the requirements for banks in which special accounts are opened by procurement participants.**

*The draft Decree of the Government of the Russian Federation "On Amendments to the Resolution of the Government of the Russian Federation of June 29, 2018 N 748 "On Requirements for Banks (including Requirements for Their Financial Sustainability), in which procurement participants open special accounts for which funds intended for securing applications for participation in the procurement of goods, works, services, and invalidation of certain acts of the Government of the Russian Federation"*

The project that the Ministry of Finance of Russia has done is proposed to establish that the requirement for banks to have agreements on interaction with each of the electronic platform operators applies to the bank 60 days from the day following the day of its inclusion in the list provided for by paragraph 10 of Article 44 of the Law on Contract System.

**2.3. It is proposed to supplement the List of certain types of engineering goods originating from foreign countries, in respect of which a ban on admission is established for the purposes of procurement to meet state and municipal needs.**

*Draft Decree of the Government of the Russian Federation "On Amendments to the Decree of the Government of the Russian Federation dated July 14, 2014 N 656 "On the Establishment of a Ban on the Admission of Certain Types of Mechanical Engineering Goods Occurring From foreign countries, for the purpose of procurement to meet state and municipal needs"*

It is proposed to make an addition that the confirmation of the conformity of the goods specified in paragraphs 1-13, 17-32, and 34-81 of the list of certain types of engineering goods originating from foreign countries, in respect of which the prohibition on admission for the purposes of procurement, the requirements for industrial products, imposed in order to refer them to products produced in Russia, is a conclusion issued in accordance with the aforementioned decree of the Government of the Russian Federation or an examination certificate issued by the Chamber of Commerce and Industry of the Russia in accordance with the procedure established by it in coordination with the Ministry of Industry and Trade of the Russian Federation.

It is also proposed to significantly supplement the list with 26 items, including refrigerated cabinets, gas stoves, dishwashers used in industry.

### **3. Judicial and law enforcement practice**

**3.1. The Supreme Court of the Russian Federation reverted a case concerning the application of the provisions of the Government Decree of February 5, 2015 N 102 "On restrictions and conditions for the admission of certain types of medical products originating from foreign states for the implementation of procurement for state and municipal needs"**

*Determination of the Supreme Court of the Russian Federation dated January 16, 2019 N 309-KG18-16754 in case N A60-54508/2017*

The interested party contested the decision of the antimonopoly authority, which had declared unreasonable a complaint about the actions of the state customer regarding the establishment in the auction documentation of restrictions on the admission of certain types of medical products, descriptions of the object of purchase, provisions of the draft contract contrary to the Law on the contract system.

The inferior courts refused to meet the stated requirements. However, when considering the case at the court of cassation, the court concluded that restrictions on the admission of goods originating from a foreign state, established by the Russian Federation Government Decree of 05.02.2015 N 102 apply not only to the goods, but also to the services provided.