

November 2018

DIGEST
of legal regulation of procurement

Brief news

The rules for determining the requirements for procurements of federal state bodies, government bodies of state extrabudgetary funds of the Russian Federation, their territorial bodies and state and state institutions subordinate to them, federal state unitary enterprises to certain types of goods, works and services approved by Government Decree of 02 September 2015 N 927 extend to the most significant institutions of science, education, culture and health, as well as the State Rosatom State Nuclear Energy Corporation, Roscosmos State Corporation for Space Activities and their subordinate organizations.

The Ministry of Finance of the Russian Federation gave an explanation regarding the absence of statutory restrictions for replenishing special accounts with funds received by participants in credit, as well as restrictions for opening special accounts for individuals. In addition, the Ministry provided important clarifications on the use of special accounts.

On November 5, 2018, new requirements for admission of goods originating from foreign countries came into force according to the Order of the Ministry of Finance of Russia "On the conditions for admission of goods originating from a foreign state or a group of foreign countries for the purpose of procuring goods for state and municipal needs".

For organizations of the military-industrial complex, it was proposed to provide benefits as well as for small businesses (government purchases from organizations of the military-industrial complex in terms of civilian products in the amount of not less than fifteen percent of the total annual volume of purchases) if these organizations produce civilian goods .

1. Laws, by-laws, legal news

1.1. The Government of the Russian Federation expanded the scope of the Rules for determining requirements for procurements of federal government bodies, government bodies of state extra-budgetary funds of the Russian Federation, their territorial bodies and state and budget institutions under their jurisdiction, federal state unitary enterprises for certain types of goods, works and services.

Resolution of the Government of the Russian Federation of November 26, 2018 N 1419 "On Amendments to the Resolution of the Government of the Russian Federation of September 2, 2015 N 927"

The Government of the Russian Federation made changes to the Rules for determining requirements for procurements of federal government bodies, state bodies of state extra-budgetary funds of the Russian Federation, their territorial bodies and state and budget institutions under their jurisdiction, federal state unitary enterprises for certain types of goods, works, services approved by the Decree of the Government of the Russian Federation of September 2, 2015 N 927. Now, these Rules apply to those who identified in accordance with the Budget Code of the Russian Federation by the most important institutions of science, education, culture and health, as well as the State Atomic Energy Corporation "Rosatom", the State Corporation for Space Activity "Roskosmos" and their subordinate organizations.

In connection with the above changes, technical changes were made to the form of a list of certain types of goods, works and services.

1.2. The Government of the Russian Federation canceled the requirements of banks in which participants of procurement open special accounts to which funds are deposited, intended to secure applications for participation in procurement.

Government Decree of 03 November 2018 N 1320 "On Amendments to the Requirements for Banks (including Requirements for Their Financial Stability), in which procurement participants open special accounts for which funds are made to secure applications for participation in the procurement of goods, works, services"

Now, banks do not have to comply with the requirements for the credit organization's own funds (capital) in the amount of at least 100 billion rubles and to be under the direct or indirect control of the Central Bank of the Russian Federation or the Russian Federation, and a credit rating not lower is not required "A- (RU)" level according to the national rating scale for the Russian Federation of a credit rating agency Analytical Credit Rating Agency.

1.3. The Ministry of Finance explained the issues that arise during the procurement in electronic form.

Letter of the Ministry of Finance of Russia of November 6, 2018 N 24-06-08/79659

The letter provides explanations about the inadmissibility of debiting, on the basis of executive documents, funds that are posted on special accounts opened to ensure the applications filed by participants in the procurement. Since according to Article 44 of the Federal Law of April 5, 2013 N 44-FZ "On the contract system in the field of procurement of goods, works and services for state and municipal needs" (hereinafter the Law on the Contract System), the use of a special account should provide for the implementation of the bank Based on information received from the electronic platform operator, blocking and stopping the blocking of funds. Such blocking consists in limiting the rights of

the procurement participant to dispose at his own discretion of the funds in his special account in the amount of the corresponding application security.

The Ministry explains that there are no statutory limitations on the replenishment of special accounts using funds received by participants in the purchase on credit, as well as restrictions on opening special accounts for individuals.

In addition, the termination of a bank account agreement does not entail stopping the blocking of funds in the special account of the procurement participant, in connection with which such termination does not affect the security of the application for participation in the procurement, for which, until the termination of the bank account contract, the required amount of funds was blocked.

1.4. The Ministry of Finance explained how to deal with prices in contracts concluded on the basis of the Federal Law of July 18, 2011 N 223-FZ “On the procurement of goods, works, services by certain types of legal entities” in connection with the increase in VAT rates.

Information letter of the Ministry of Finance of Russia of November 29, 2018 N 24-01-07/86352 “Concerning the change in the price of contracts concluded in accordance with the Federal Law of July 18, 2011 N 223-FZ“ On the procurement of goods, works, services by certain types of legal entities”, after increasing the value-added tax rate”

According to the Ministry of Finance of Russia, by agreement of the parties to the contract concluded in accordance with the Federal Law of July 18, 2011 N 223-FZ “On the procurement of goods, works, services by certain types of legal entities”, after the increase in the value-added tax rate change in the price of the contract of communication with an increase in the interest rate of VAT, if such a change is provided for by the provision on procurement. The Treasury of Russia published information on typical violations of the requirements of the Law on the contract system, identified in the framework of the control measures.

1.5. New requirements for admission of goods originating from foreign countries came into force.

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 procuring goods for state and municipal needs”

This document came into force on November 5, 2018 and found that the goods specified in the approved list and not listed in it can not be the subject of one contract (one lot).

The principles of granting preferences to procurement participants are specified. Namely, the contract price is subject to decrease by 15%, if the application of such a winner contains a proposal for the supply of goods, the country of origin of at least one of which is a foreign country. The contract shall be concluded at the price offered by the winner, if his application contains a proposal for the supply of goods specified in the Annex, and originating exclusively from the member states of the Eurasian Economic Union.

1.6. Approved additional forms of providing information in the procurement process for the implementation of investment projects.

Order of the Ministry of Industry and Trade of Russia of October 30, 2018 N 4348

Approved documents such as:

- the form for submitting information on the implementation of procurement of engineering products included in the lists of prospective needs for engineering products in accordance with paragraph 2 of Part 6 of Art. 3.1 of the Law of July 18, 2011 N 223-FZ “On the procurement of goods,

works, services by certain types of legal entities” necessary for the implementation of investment projects included in the register of investment projects, including information on the implementation of procurement of engineering products, which, by decision of the Government Commission on import substitution and in accordance with paragraph. 3 of Part 8 of Art. 3.1 of this law shall not be placed in the Unified Information System;

- form of notification of the inclusion of the investment project in the register of investment projects.

2. Drafts of legal acts

2.1. The Ministry of Industry and Trade of Russia has proposed to amend the Law on the Contract System in part in order to diversify the products of organizations of the defense industry complex.

Draft Federal Law “On Amendments to the Federal Law “On the Procurement of Goods, Work, Services by Certain Types of Legal Entities” and the Federal Law “On the Contract system in the field of procurement of goods, work, services for state and municipal needs”

It is proposed to provide benefits in accordance with Art. 30 of the Law on the Contract System to organizations of the military-industrial complex in terms of civilian products. Namely, it is proposed to introduce the obligation for government customers to purchase from organizations of the military-industrial complex in terms of civilian products in the amount of not less than fifteen percent of the total annual volume of purchases. The nomenclature and size of the share produced by the organizations of the military-industrial complex of civilian products subject to procurement by state and municipal customers are entitled to approve the Government of the Russian Federation.

The explanatory note to this draft law states that the significant funds allocated for the re-equipment of defense enterprises should also contribute to increasing the production of high-tech competitive civilian products. However, the activities of most organizations of the military-industrial complex are characterized by the lack of the necessary economic incentives for their work in civilian industries under conditions of aggressive competition.

2.2. The Treasury developed a procedure for the formation of the identifier of the state contract with the treasury accompaniment for 2019.

The draft order of the Federal Treasury "On approval of the procedure for the formation of the identifier of the state contract, the contract of the institution, the agreement, the capital investment agreement, the contract on capital repairs for treasury support of funds in the currency of the Russian Federation in cases provided for by the Federal Law "On the federal budget for 2019 and for the planning period 2020 and 2021"

In the draft order of the Treasury, the general rules for identifier formation are not changed. Paragraph 9 of the Rules was supplemented by the need to include the identifier in the overhaul contracts in the presence of treasury escort. Responsibility for the formation of the identifier assigned to the customer. For an agreement on the provision of a subsidy to the capital repair fund, the industrial development fund provides for the formation of an identifier by the territorial body of the Federal Treasury or by the financial body of a constituent entity of the Russian Federation in which a personal account is opened to the main manager of the budget funds of a constituent entity of the Russian Federation that provides a capital repair grant from the budget of a constituent entity of the Russian Federation, industry development fund.

2.3. The Law of July 18, 2011 N 223-FZ “On the procurement of goods, works,

services by certain types of legal entities” may introduce provisions on conflicts of interest.

Draft Federal Law “On Amendments to Article 3 of the Federal Law “On Procurement of Goods, Work, Services by Certain Types of Legal Entities of July 18, 2011 N 223-FZ”

In the first reading, a bill proposed by the Ministry of Finance of Russia was reviewed. It is proposed that the head of the customer, members of the commission and participants in the procurement will be required to verify and take measures to prevent the emergence of a conflict of interest.

The bill proposes measures to avoid conflicts of interest:

- determine the list of persons who cannot be members of the procurement commission;
- introduction of the obligation of a member of the procurement commission to immediately inform the customer about the occurrence of circumstances that prevent such a member of the commission from performing its functions in accordance with the provisions of the draft law;
- provide for the obligation of the customer to replace a member of the procurement commission, in the event that such a person is identified in the procurement commission;
- establish the obligation of the procurement participant to take measures to prevent conflicts of interest by providing the customer with information about personal interest that the customer’s manager has, which leads or may lead to a conflict of interest in connection with participation in the procurement participant’s procurement.

2.4. The National Guard of the Russian Federation proposed a draft order, which defines the Procedure for interaction of the federal state-owned state institution “1 center of customer-developer of troops of the National Guard of the Russian Federation (military unit 6888, Moscow)” with customers under the jurisdiction of the Federal Service of National Guard of the Russian Federation.

The draft order of the Rosgvardi “On the implementation of the powers of the customer by the Federal Service of the National Guard of the Russian Federation, its territorial bodies, its subordinate institutions and the approval of the procedure for interaction of the federal state official institution” 1 center of the customer-developer of the National Guard of the Russian Federation (military unit 6888, Moscow) “With subordinate customers of the Federal Service of the National Guard of the Russian Federation in the implementation of centralized procurement”

Customer to the consideration and evaluation of applications for participation, the customer must submit to the authorized institution a document confirming the receipt of funds (bank guarantee) as security for applications for participation if the procurement documentation provides for securing an application for participation.

All protocols signed by the authorized institution when identifying suppliers are sent by the authorized institution to the customer no later than the next working day after they are signed.

Procurement are to be carried out at the request of customers, prepared in accordance with the form set out in the annex to this draft order.

3. Judicial and law enforcement practice

3.1. The Supreme Court of the Russian Federation confirmed that the state customer has the right to preserve telephone numbers when purchasing mobile communication services.

Determination of the Supreme Court of the Russian Federation of November 22, 2018 in case N A27-21030/2017

The indication in the auction documentation of the requirement for the provision of services according to the number 8-800-200-60-68, which is part of the numbering resource allocated to Rostelecom, that is, in fact, the requirement to save the current number to the subscriber is recognized by the controlling authority as an obstacle to filing an application for participation in an electronic auction by another telecom operator, which limits the number of procurement participants and violates the requirements of clause 1 of part 1 of article 33 of the Law on the Contract System.

The Supreme Court did not agree with the opinion of the controlling authority and the conclusions of the lower courts. Since according to paragraph 120 of the Rules for the provision of telephone services, approved by the Government of the Russian Federation dated December 9, 2015 N 1342 (hereinafter referred to as the Rules), the subscriber who wants to keep the subscriber number when concluding a new agreement on the provision of mobile radio telephone services with the recipient operator, Appeals to the recipient operator or a third party, provided for by paragraph 13 of the Rules, with a written statement on termination of the contract for the provision of mobile radiotelephone services and the transfer of subscriber rooms. The court decided that if the subscriber retains the old number when concluding a new telephone service contract with the new telecom operator, the stored subscriber number is not transferred as numbering capacity from one operator to another and does not drop out of the numbering resource of such operator, but is entered into the database transferred subscriber numbers. Based on the above, it follows that the fulfillment of the requirements of the technical specification of the electronic auction documentation on maintaining the current telephone numbering is not legally or technologically impossible and restricting the right of participants to participate in the electronic auction to provide communication services.

3.2. The Office of the Federal Antimonopoly Service in the Kursk region supported the position of the prosecutor's office on the violation of antitrust laws, which resulted in the implementation of the anti-competitive agreement between the customer and the contractor.

The decision of Office of the Federal Antimonopoly Service in the Kursk region dated November 02, 2018 in case N 02/08-84-2018

On April 23, 2018, the contract was concluded between the customer and the contractor for the performance of work specified in the auction documentation at the price of 9,456,177 rubles proposed by this procurement participant during the bidding process.

The day after the contract was concluded, the contractor sent a letter to the customer with a proposal to terminate the contract by agreement of the parties.

On April 26, 2018, the contract was terminated "by mutual agreement of the parties".

The supervisory authority agreed with the opinion of the prosecutor's office about the presence of such signs of an anticompetitive agreement as:

- The short period during which the parties implemented the actions to terminate the contract concluded at the auction (1 day from the date of the contract) indicates the presence of a pre-agreed position of the customer and the contractor regarding their actions in a situation where the contractor's performance on the terms of the auction is unprofitable .

- The contractor made a proposal to reduce the contract price by 50% of the initial (maximum) price. This implies making a transaction on extremely risky conditions. According to the contractor's explanations, the price offered at the auction is unprofitable for him, which does not allow making a profit from the execution of the contract. However, the existence of an agreement with the customer allowed the contractor to avoid the above negative effects of dumping price reduction and led to the creation of special exceptional conditions for him.

- The case file established that in May 2018, the customer held a repeated auction. The only participant in this auction is the same contractor with whom the contract was previously terminated. However, the contract was concluded at a price of 18,817,792.23 rubles, i.e. with a decrease in the price of the lowest possible at the auction value of 0.5% of the initial (maximum) price of the contract.

The court decided that as a result of the termination of the contract of April 23, 2018, by agreement of the parties and holding a repeated auction in respect of the works that were its subject, the contractor received business advantages. The advantages were expressed in avoiding the negative consequences of actually refusing to perform the contract and in providing the opportunity to conclude and execute the contract at a much higher price.