

September 2018

DIGEST
of legal regulation of procurement

1. Laws, by-laws, legal news

1.1. Procurement for the provision of state and municipal needs of certain types of weapons of foreign origin is limited.

Decree of the Government of the Russian Federation of 20.09.2018 N 1119 "On restrictions on the admission of sports firearms with rifled barrels, firearm cartridges and other ammunition and their parts originating from foreign countries for the purpose of procurement for state and municipal needs"

When purchasing sports firearms with rifled barrels, other ammunition and ammunition and their parts, the customer rejects all applications from foreign countries (except for Eurasian Economic Union Eurasian Economic Union Member States), provided that at least 2 applications are submitted for participation in the supplier definition on the supply of sports weapons, ammunition, ammunition and their parts, the country of origin of which are the member states of the Eurasian Economic Union and do not contain proposals for the supply of sports weapons, firearm cartridges, ammunition and their parts the same, manufacturer or manufacturer belonging to the same group of persons. To confirm the country of origin of sports weapons, firearm cartridges, ammunition and parts, participants will be able to provide a conclusion issued by the Ministry of Industry and Trade of the Russian Federation or a certificate of origin of goods issued by an authorized body (organization) of the Eurasian Economic Union Member State.

1.2. The Federal Antitrust Service of Russia, in coordination with the Ministry of Finance, will establish the procedure for determining the initial (maximum) contract price for the supply of motor fuel and motor gasoline.

Decree of the Government of the Russian Federation of 08.08.2018 N 1074

The Government of the Russian Federation has authorized the Federal Antitrust Service of Russia, in coordination with the Ministry of Finance, to establish the procedure for determining the initial (maximum) contract price, as well as the price of a contract concluded with a single supplier, when purchasing motor fuel and motor gasoline.

As indicated in some sources, such innovations will have a positive effect on preventing cartelization in this market segment.

1.3. Limited fees for banking support contracts.

Decree of the Government of the Russian Federation N 1117 of September 20, 2018 "On Amendments to the Resolution of the Government of the Russian Federation N 963 of September 20, 2014"

The size of fees for extended banking support is limited: with a contract price ranging from 500 million to 1 billion rubles. - 1.15% of the specified price; with a contract price of 1 to 5 billion rubles. - 1.12% of the specified price. Banking support included contracts with suppliers, which are subject to restrictive measures, which are established by a foreign country.

1.4. Evaluation of public easement is no longer subject to the Federal Law dated July 18, 2011 N 223-FZ.

Federal Law of 03.08.2018 N 341-FZ "On Amendments to the Land Code of the Russian Federation and certain legislative acts of the Russian Federation in terms of simplifying the placement of linear objects"

From September 01, 2018, customers who make purchases under Federal Law N 223-FZ of July 18, 2011 "On Procurement of Goods, Work, Services by Certain Types of Legal Entities" may

enter into agreements for assessing the amount of payment for public easement without conducting procurement in accordance with 223-FZ.

2. Drafts of legal acts

2.1. Adopted a draft standard terms of contracts for the execution of works on the creation of computer programs.

Draft Order of the Ministry of Digital Development, Telecommunications and Mass Communications of the Russian Federation “On Approval of Model terms of contracts for the execution of work on the creation (development) of programs for electronic computers and software documentation to them”

Standard conditions are intended for contracts that include the performance of work as a result of which programs for electronic computers and software documentation for them must be created (upgraded). These conditions contain all the requirements established by the Federal Law from April 5, 2013 N 44-FZ “On the contract system in the field of procurement of goods, works, services for state and municipal needs”.

According to clauses 4.1, 4.4 of the draft standard conditions, in case of violation by the parties of the obligations stipulated by the contract, the penalty is charged. The amount of the penalty is established in the amount of one three hundred percent of the refinancing rate of the Central Bank of the Russian Federation effective at the date of payment of the penalty interest. However, on July 1, amendments to the law on procurements N 44-FZ came into force, which the wording “refinancing rate” was replaced with “key rate”. Presumably, such changes will be made to the draft standard terms of contracts for the execution of work on the creation (development) of programs for electronic computers and software documentation to them.

2.2. Federal Antitrust Service of Russia will give opinions on changing the types of economic activities of state-owned enterprises.

Draft Federal Law “On Amendments to Certain Legislative Acts of the Russian Federation (regarding the prohibition on the establishment and activities of unitary enterprises)”.

On September 17, 2018, the Commission on Legislative Activities approved a draft that obliges state or municipal unitary enterprises to submit an opinion of 2.2. Federal Antitrust Service of Russia for change of codes economic activities. Also, the creation of such organizations is again carried out only in accordance with federal laws, acts of the President or the Government of the Russian Federation, federal executive bodies that implement the defense policy, as well as the activities of natural monopolies.

2.3. Public discussions are held on the form for submitting information on the implementation of procurement of engineering products.

The draft Order of the Ministry of Industry and Trade of Russia “On approving the form for submitting information on the implementation of procurement of engineering products included in the lists of prospective needs in engineering products in accordance with clause 2 of part 6 of article 31 of the Federal Law on Procurement of Goods, Work, Services by Certain Legal Entities” for the implementation of investment projects, including information on the implementation of the procurement of engineering products, which, by decision of the Governmental Commission for Import Substitution and in accordance with clause 3 of Part 3 of Article 31 of this Federal Law, they are not subject to placement in a unified information system in the field of procurement of goods, works and

services to meet state and municipal needs and the notification form regarding the inclusion of an investment project in the register of investment projects”.

This document intends to approve the form of notification of the inclusion of an investment project in the register of investment projects.

2.4. Purchases of certain types of wines may be limited.

Draft Decree of the Government of the Russian Federation “On Amendments to the List of Certain Types of Food Products Originating from Foreign States, in respect of which restrictions are set on admission for the purposes of procurement to meet state and municipal needs”

This project proposes to add to the list of certain types of food products originating from foreign countries, in respect of which restrictions are imposed on admission for the purposes of procurement to meet state and municipal needs, approved by the Government of the Russian Federation August 22, 2016 N 832 “On restrictions on the admission of certain types of food originating from foreign countries for the purpose of procuring for the provision of state and municipal needs "with certain kinds of wines (wine and sparkling wines, liqueur wines, wines with fruit (fruit).

3. Judicial and law enforcement practice

3.1. The Federal Antitrust Service of Russia decided that the right of the customer to send a request for clarification of the submitted applications to the participants creates unequal conditions for the procurement participants in accordance with Law N 223-FZ.

The decision of the Antitrust Service of Russia of September 03, 2018 N 223FZ-642/18

The Federal Antitrust Service of Russia ruled that the terms of the procurement documentation cannot make the procurement participants dependent on the will of the customer. Procurement documentation provides that the customer has the right to send procurement participants The Federal Antitrust Service of Russia ruled that the possibility of participating in the procurement in accordance with these provisions of the documentation depends on the will of the customer, as well as the customer’s right to request additional information, the documents may not apply equally to the procurement participants.

In addition, the procurement documentation does not establish the procedure for preparing and sending such a request for additional information, which makes such a request for a particular participant dependent on the decision of the customer, which may be different for different participants.

Thus, the actions of the customer, who established this requirement in the Documentation, limit the number of procurement participants and are recognized as illegal.

3.2. When making a purchase, it is possible to require from the customers only those documents that may be in their possession.

The decision of The Federal Antitrust Service of Russia of 12.09.2018 N 223FZ-668/18

The customer does not have the right to demand documents confirming the conformity of the goods, which the participant in the procurement procedure cannot possess, without purchasing the relevant goods, upon delivery of which the relevant documents are transmitted, such as: passport, instruction manual, certificate of conformity, technical conditions, etc. In connection with, the customer’s requirement to submit a certificate for products and product test reports as part of the participant’s application is illegal.

3.3. Requirements to the procurement participants that there were no previously

established facts of breach of obligations under contracts concluded with the customer's corporation were recognized as illegal.

The decision of the Antitrust Service of Russia of 17.09.2018 N 223FZ-683/18

According to the bidding documentation, the bidder should not have the following facts and cases in the past 2 years in the framework of procurement conducted by the State Atomic Energy Corporation "Rosatom" and its organizations:

- cases of evasion from concluding an agreement on the basis of the results of procurement, not signing the draft agreement within the prescribed period;
- non-submission of documents required to provide prior to the conclusion of the contract;
- cases of refusal of a foreign participant to sign the contract on the terms proposed during the procurement;
- cases of termination of the contract by a court decision or by agreement of the parties due to a material breach of the terms of the contract.

The Federal Antitrust Service of Russia decided that this requirement could not be applied equally to the procurement participants, since a procurement participant with legal proceedings with another business entity could be allowed to participate in the procurement, while the participant having litigations with the customer, is subject to rejection.

3.4. Not in all cases it is legitimate to demand from the participant of the procurement the approval of a "major transaction".

The definition of the Supreme Court of the Russian Federation of 11.09.2018 N 305-KG18-13595

The awards of subordinate arbitration courts in the case N A40-86574 / 2017 were left in force, which recognized as unlawful the rejection of an application by a procurement participant due to the failure to provide information on the approval of a major transaction. The court decided that the provisions on interested-party transactions and major transactions are not applicable to the procurement participant, since the procurement participant in its organizational and legal form is a limited liability company consisting of one participant, which is also the only person with the authority of the sole executive body - the general the director. In this regard, the court decided that there is no need to approve the transaction.