PROBLEMS OF LEGAL REGULATION OF ACTIVITIES OF ENERGY COMPANIES IN THE PROCUREMENT AT SMALL- AND MEDIUM-SIZE ENTERPRISES

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In accordance with the Provisions On Peculiarities of Participation of Small-size Enterprises in Procurement of the Goods, Work, and Services by Legal Entities of Individual Types, Annual Volume of This Procurement and the Procedure for Calculation of This Volume approved by Decree No. 1352 of the Government of the Russian Federation dated December 11, 2014, major energy companies shall purchase some goods, work (services) from the small- and medium-size enterprises.

The work studies amendments to Decree No. 1352 of the Government of the Russian Federation dated December 11, 2014, prepared by the Ministry of Finance of the Russian Federation, as related to increase in percentage of purchases from small and medium-size enterprises up to 20% (instead of the current 18%) of the total annual volume of contract for purchases from small and medium-size enterprises in terms of value and 18% (instead of the current 15%) of purchases arranged only for small and medium-size enterprises. The article examines the conditions of the current legal regulation of purchases of energy corporations from small and medium-size enterprises with due account for possible legal risks, the specific nature of activities of the energy companies, and suggests possible options for minimizing legal risks and improvement of current models of legal regulation of the procurement activities of energy companies.

Keywords: *energy law, energy law order, subjects of energy law, small- and medium-size enterprises, procedure for conclusion of contracts, contractual regulation in the energy sector, procurement of the goods, work, services.*

Along with the consumers, the energy companies are key subjects of energy law. [1] The most important element of legal regulation in the energy sector is contractual regulation, the distinctive feature of which is significant influence of the state on the contractual relations. [2] Considering legal framework for contractual regulation in the energy sector as one of the major elements forming energy law order, V.V. Romanova rightly notes that contractual regulation in various branches of the power industry is currently characterized by detailed setting of both the procedure and the terms and conditions of the contract, including significant ones, in the relevant federal laws and subordinate regulations. [3] Legal research of peculiarities of contractual regulation are performed [4-8], however, many aspects deserve to be the subject of separate legal study. It particularly concerns peculiarities of the procedure for conclusion of

contracts to be concluded by energy companies with the small- and medium-size enterprises. To develop competition and maintain business in Russia, Federal Law No. 223-ФЗ dated July 18, 2011, *On Procurement of the Goods, Work, Services by Certain Types of Legal Entities* (hereinafter referred to as Federal Law 223-ФЗ) was adopted. To support the small- and medium-size enterprises in the Russian Federation, Decree No. 1352 of the Government of the Russian Federation dated December 11, 2014, *On Peculiarities of Participation of Small- and Medium-Size Enterprises in Procurement of Goods, Work, and Services by Legal Entities of Individual Types* approved the Provisions *On Peculiarities of Participation of Small-Size Enterprises in Procurement of the Goods, Work, and Services by Legal Entities of Individual Types, Annual Volume of This Procurement and the Procedure for Calculation of This Volume* (hereinafter referred to as Provisions No. 1352), according to which the legal entities specified in clause 2 of Provisions No. 1352 shall have not less than 18 percent of the total annual volume of contracts for procurement in terms of value with the small- and medium-size enterprises, herewith, not less than 15 percent of the total annual volume of contracts in terms of value should be concluded following the results of procurement procedures implemented only for small- and medium-size enterprises.

In accordance with Article 4 of Federal Law of the Russian Federation No. 209-ФЗ dated July 24, 2007 *On Development of Small- and Medium-Size Enterprises in the Russian Federation*, to the small-size enterprises shall include business entities, business partnerships, economic partnerships, cooperatives, consumer cooperatives, owner-operated farms, and individual entrepreneurs meeting the following criteria:

First, the average number of employees of the contractor should not exceed 15 people for microenterprises, 100,000 people for small-size enterprises, and 250,000 people for medium-size enterprises.

Second, the legislator has established the limits of income of the mentioned entities. In accordance with Decree No. 265 of the Government of the Russian Federation dated April 4, 2016 *On the Limit Values of Income Received from Entrepreneurial Activities per Category of Small- and Medium-size Enterprises*, the amount of income should not exceed 120 million Rubles in case of a microenterprise, 800 million Rubles in case of a small-size enterprise and 2 billion Rubles in case of a medium-size enterprise.

It should be noted that the above-mentioned income was set since August 1, 2016, and for many companies, it certainly made it possible to attract the required percentage of contracts with small- and medium-size enterprises. However, it should be taken into account that some energy companies are fairly large enterprises with relevant turnover and the cost of the contracts. These measures significantly improved the situation of 2014-1015, having expanded the range of small- and medium-size enterprises, but they have not settled the issue in full.

Conclusion of a contract with a major energy company for the whole volume of work/services/goods required for it may by itself increase the turnover of the contracting companies to such a level that it will no longer be deemed a small- and medium-size enterprise or increase the number of employees so that the company will exceed the required number of full-time positions. These facts do not allow it to take part in procurement available exclusively for the small- and medium-size enterprises next year even if it is a reliable company. Or vice versa, the Customer will have to arrange for procurement for any participants, including small- and medium-size enterprises, which will have a negative impact on the percentage of purchases from these entities exclusively.

Introduction of the rules obliging major energy companies to attract the contractors from among small- and medium-size enterprises certainly supports the economic situation at the national level. This state policy makes it possible for small firms to actively participate in the market, forces to create new working places and provides these companies with the opportunity to work with reliable solvent customers actually making possible to conduct business on the breakeven level.

However, in fact, the Customers faced the fact that small- and medium-size enterprises were not able to deliver the goods, services or work in the

volumes necessary for the Customer. Separation of volumes led to a large number of different suppliers/providers/contractors, which, in its turn, adversely affected the final result of work.

A supplier/contractor/provider often takes part in procurement procedures of major energy companies, while not having necessary resources for the time being, and hoping that in the near future it will be able to engage employees and purchase materials and even equipment required for performing the work. Otherwise, the supplier/contractor/provider is forced to urgently engage associate contractors for performance of the contracts.

In this situation, the customer is not only unable to influence the choice of associate contractors, but also receives the result of work/services of lower quality as compared to the expected.

Therefore, the customers are interested in the contractors possessing a good resource base and a developed logistics network allowing to immediately proceed to execution of the work/provision of the services.

Moreover, major reliable contractors are the most attractive at the labor market, which makes it possible to promptly increase the number of personnel, if needed, and/or to engage employees with the highest qualification. These companies often implement good HR policy implying continuous improvement of the employees' qualification, research and analysis of the market, relevant work/services, identification of new modern technologies, while small companies have no relevant financial opportunities.

As a result, the choice of an unfair contractor/provider from among the small- and medium-size enterprises leads to additional expenses of the Customer. It may be additional costs to eliminate defects of performed work/services, termination of the contract and performance of a new competitive procedure to complete execution of work/provision of services as well as expenses to provide qualified legal assistance.

While not having enough time "to search for the guilty", the customer usually attracts new contractors, and then applies to court to restore its rights. In this case, it must be established who bears the responsibility for the result of work in whole or violation of obligations by one contractor/provider/supplier. Sometimes, this leads to the impossibility for other contractors to proceed to execution of work.

Furthermore, considering complex mechanisms of funding within the energy companies, it is often more convenient for the small- and medium-size enterprises to act as the sub-contractors in major companies. In particular, it gives them the opportunity to work subject to the advance payment, which is usually not included in the contracts of major companies (as one of the methods to minimize the above risks), but the contractors agree with these conditions.

It is necessary to note that at present attempts to solve the indicated problems are already made. Thus, in accordance with clause 7 of Provisions No. 1352, certain contracts are excluded from the total annual volume of contracts in terms of value upon calculation of 18 and 15 percent of purchases from the small- and medium-size enterprises.

As a rule, this is work/service that obviously cannot be performed by the small- and medium-size enterprises due to specific nature of work/services or the counterparty.

First, these are contracts related to maintaining of the activities of the organization itself. For example, water removal, heat and gas supply contracts, purchases related to the scope of activity of the natural monopoly entities or state/municipal authorities.

In the Decree, the contracts with public authorities are mentioned as "procurement of work (services), which can be executed (provided) only by the executive authority in accordance with its powers or...".

This wording leads to the fact that not all subjects of the contracts can be positively attributed to this clause. How can it be distinguished what types of work (services) are performed only by the state agency and what work (service) may be performed together with them (public institution and state unitary enterprise subordinate to it) by legal persons, which are not within its jurisdiction.

The contract for execution of work (rendering of services) in the field of ensuring the unity of measurements may be mentioned as an example. Within the framework of this contract, work is executed/services are rendered in the

field of ensuring the unity of measurements: verification, calibration of the means of measurements, reference units (hereinafter referred to as the means of measurements), certification of test equipment, repair of this equipment, etc. Some means of measurements shall be certified only by the specialized public institutions (for example, the Federal Budgetary Institution State Regional Center for Standardization, Metrology and Testing in the Ryazan Region), but a small part of operations for verification, calibration and repair of the means of measurements, etc. may also be performed by a business entity with a full-time employee having the relevant qualification. It is difficult for a non-expert to understand technical intricacies of such contracts and determine accuracy of the report data under the said contracts.

To resolve such conflicts, it is enough to extend the specified rules and refer any purchase from executive bodies and subordinate institutions to these types of contracts. Therefore, major energy companies will be encouraged to use the services of state institutions and unitary enterprises, which, in its turn, is a source of replenishment of the state/municipal budget.

Second, the contracts between the parent company and its subsidiary and/or a company established by its subsidiary, the so-called "sub-subsidiary", are not taken into account in the total annual volume in terms of value.

Work (services) performed by such subsidiary/sub-subsidiary are required for uniformity in application of methods of repair or maintenance of the facilities, which primarily ensures safety of execution of work and operation of facilities in future.

Introduction of this rule into effect settled many issues of the energy companies. Many contracts are concluded within the group of companies of a corporation. This is due to the fact that the activities of the energy corporations are a single process divided into steps. Accordingly, maintenance of the entire complex requires the contractor/provider that will have information about organization of the entire chain of production as well as relevant technical knowledge. Only employees of energy companies and their subsidiaries usually have such qualification.

This is logical since a corporation trains its employees, conducts research in the relevant areas of work, the employees have the opportunity to evaluate the possibility of application of new developments in the production in practice. These facts in total do not allow engagement of third parties for performance of a wider range of work. Moreover, it gives an opportunity to disclose trade secrets, which include data on relevant researches and developments.

Moreover, legal entities (subsidiaries) within a corporation do not meet the requirements of Federal Law of the Russian Federation No. 209-ФЗ dated July 24, 2007, *On Development of Small- and Medium-size Enterprises in the Russian Federation*, which also made it almost impossible to comply with the requirements of the laws as related to engagement of the required number of companies from among the small- and medium-size enterprises.

Third, purchases from foreign counterparties are also excluded from the total volume provided that the contract is performed outside the Russian Federation. Herewith, an individual case of procurement of work (services) by the said entities to implement offshore projects is included, regardless of the territory, in which the services are rendered.

The legal entity established outside the Russian Federation may not meet the requirements of Decree No. 265 of the Government of the Russian Federation dated April 4, 2016, *On the Limit Values of Income Received from Entrepreneurial Activities per Category of Small- and Medium-Size Enterprises*. And given the fact that the powers of the Federal Tax Service in relation to such companies are limited, it is impossible to reliably establish whether or not the annual income of the company complies with the one specified in the Decree.

Fourth, state companies established in accordance with the federal law shall be entitled not to take into account contracts concluded for a period exceeding 5 years, which provide for co-financing, design and/or development of engineering documentation and construction (reconstruction and/or complex development), operation, including maintenance, repair (if needed, capital repair) of federal motor roads

(sections of motor roads) of general use and/or individual road facilities forming their technological part in the total volume.

It is quite logical that the contracts aimed at settlement of social problems should be excluded from the total volume of purchases.

It should be noted that rather high level of intra-corporate control of the energy corporations will make it possible to implement social projects using resources of state corporations as efficiently as possible. But it is not clear why social tasks are limited to construction of roads.

At present, state corporations are involved in construction/reconstruction of child daycare centers, health improvement centers, heat pipelines, boilers, etc. It is also advisable to exclude major contracts for implementation of these projects from the annual volume of purchases.

Moreover, major energy corporations often pursue an active sponsorship policy, within which the energy corporations need to provide financial support for sports, social, cultural events held by professional sports clubs, social and cultural organizations through conclusion of relevant contracts, including sponsorship advertising, and/or contracts for construction, reconstruction, repair of "social" facilities not related to primary activities of the energy companies.

It should be noted that counterparties that receive sponsorship are not the small- and medium-size enterprises due to peculiarities of their operation and ongoing activities (sports clubs, social, scientific and cultural institutions, etc.).

At the same time, placement of advertisements as a result of sponsorship by Federal Law No. 38 dated March 13, 2006, *On Advertising* constitutes provision of funds or ensuring provision of funds for organization and/or holding of a sports, cultural or any other event, creation and/or broadcasting a television or radio program, or creation and/or use of another result of creative activity. Obviously, these relations are formed outside the business sphere, pursue non-profit goals, and cannot have any effect on the competitive environment.

Herewith, the specified contracts are not excluded from the total annual volume of contracts in terms of value in accordance with clause 7 of Provisions No. 1352, which reduces efficiency of application of these rules, the ability to achieve the required percentage of attraction of the small- and medium-size enterprises, and entails the risk of refusal of the corporations to conclude such contracts. Taking into account high social importance of sponsorship for implementation of socially significant projects, it is necessary to consider amending clause 7 of Provisions No. 1352 by supplementing its list with clause "purchase of sponsored advertising services".

Therefore, the draft Decree of the Government of the Russian Federation *On Introduction of Amendments into Decree No. 1352 of the Government of the Russian Federation dated December 11, 2014* prepared by the Ministry of Finance of the Russian Federation with regard to an increase in the percentage of purchases from the small- and medium-size enterprises up to 20% of the total annual volume of procurement contracts by value and 18% of the total annual volume of contracts should be concluded following the results of the procurement procedure implemented only for the small- and medium-size enterprises seems premature.

Support for the small- and medium-size business is definitely important. But while increasing percentage of attraction of such contractors, it is also necessary to review the annual volume of purchases, except for the contracts that cannot be concluded with these counterparties due to peculiarities of the subject contract and/or specificity of the suppliers/contractors/providers.

Summing up the outcome of this study, it can be said that to settle the outlined problems, it is acceptable to reduce the indicator of the annual volume of purchases by excluding from it:

- procurement of sponsorship advertising services;
- major contracts for construction/reconstruction of social projects not related to the activities of the Company and implemented in pursuance of the relevant federal acts/acts of the constituent entities of the Russian Federation/municipal acts;
- purchases from executive bodies and subordinated institutions.

It is required to perform a detailed analysis of the current situation whether or not many legal entities currently exceed the already

established percentage. Otherwise, prematurity of these amendments to the laws will entail additional problems in the activities of the energy corporations and, as a result, negative consequences in the sector of the economy, in which it operates.

Any changes should be implemented comprehensively after prior investigation of the potential possibility of their application. It is not improbable that the small- and medium-size enterprises work more effectively when they act as the subcontractors of major contractors.

Introduction of this rule may lead to the fact that in an attempt to achieve the required "percent", the Customer will divide the volume of the required work/services so that it will be of no interest to the major counterparties. At the same time, the "small" business will not be able to perform the required work/services in a quality and timely manner.

Therefore, in the regulation of the problem under consideration, it is necessary to ensure the balance, which will take into account the interests of all parties of legal relations. Forcing the energy companies to work with "small" businesses, it is necessary to evaluate capacities of this "small" businesses. There are many cases when the Customer announces purchases exclusively for the small and medium-size enterprises and then declares that the procurement procedure failed due to lack of bids of the participants. And next day, it announces a new purchase with the same subject, but already for an unlimited range of participants. It significantly complicates already difficult procedure for conclusion of contracts and execution of work. In regions where work is directly linked to the seasonal and/or climatic (weather) conditions, it results in serious problems for the customers.

All these issues require careful study and they shall be implemented in the course of preparation of such draft Decrees. It is also necessary to take into account the specific nature of activities of the companies, and peculiarities of the region where the rules of law will be applied. Given the large territory of our country, the rule of law cannot always be applied in an equally efficient manner. Therefore, tightening of the studied rules of law currently requires additional research and "counter" revision of the rules in force.

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