



Правовой энергетический форум 2013-2024

ISSN 2079-8784

URL - <http://ras.jes.su>

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Выпуск №4 Том . 2022

Legal Regulation of the Further Development of Procurement Digitalization in the Energy Sector

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Аннотация

Large energy companies are also actively introducing new digital technologies in their companies' activities, which facilitates rapid information exchange, document review, and approval not only within a company but also between a holding's branches and subsidiaries. The process of digital transformation is very complicated and time-consuming; in fact, this process involves the reorganization of the company's business model. Procurement digitalization helps to improve the quality of process management and the transparency of decision-making when determining the competitive procurement winner, to adjust the company's budget, and to facilitate planning processes. The article analyzes the current state of legal regulation of procurement digitalization in companies of the fuel and energy complex, identifies problems and gaps in legal regulation, and formulates proposals on how to develop legal regulation of procurement in the energy sector.

Ключевые слова: energy law, contractual regulation, legal regulation of procurement activities in companies of the fuel and energy complex

Дата публикации: 27.12.2022

Ссылка для цитирования:

Саушкина С. М. Legal Regulation of the Further Development of Procurement Digitalization in the Energy Sector // Правовой энергетический форум – 2022. – Выпуск №4 С. 24-29 [Электронный ресурс]. URL:

¹ The global pandemic has shown the significance of digitalization for modern society nowadays. It not only minimizes risks in the current epidemiological situation but also speeds up many processes by making them more transparent and allows handling only those processes “manually” that require intellectual control.

² The Strategy for the Development of the Information Society in the Russian Federation for 2017 – 2030 (hereinafter referred to as the Strategy) was approved by Order of the President of the Russian Federation No. 203 dd. May 9, 2017 [1].

³ This Strategy stipulates that digitalization should gradually become a part of the everyday life of Russians and facilitate a gradual transition to digital technology that will solve a number of production problems. It helps to accumulate a large amount of data necessary to optimize and improve processes and forecast future situations. For example, in 2016, more than 80 million people became users of the Russian segment of the Internet. Mobile technologies, numerous communication networks, and wireless technologies are becoming more widespread throughout Russia.

⁴ The system for rendering state and municipal services electronically has been created, making it possible to send citizens’ requests to central and local authorities in an electronic form.

⁵ Such trends require changes in the current laws, new laws adoption, and new technologies implementation. At the same time, we cannot rule out the existing procedures completely. This concerns, first of all, the older generation, who will not be able to master new technologies. Therefore, the legislator needs to make provisions for equal legal force for all procedures and allow citizens to exercise their rights the way they like.

⁶ In this respect, new terms have been introduced into the Civil Code of the Russian Federation. For example, Article 141.1 of the Civil Code of the Russian Federation defines “digital rights”: “Digital rights are the rights of obligation and other rights so referred in the law, the content and terms and conditions of exercising whereof are determined in compliance with the rules of an information system meeting the criteria established by law. The exercise, disposal, including transfer, pledge, encumbrance of a digital right in any other way or the limitation of disposal of a digital right is only possible in the information system without addressing a third party.”

⁷ It should be noted that additions and amendments to legal acts already in force were made in various branches of law obliging to apply the procedure for interaction between parties to legal relations using the Internet and the automation of existing processes.

⁸ As an example, we can mention the following provisions:

⁹ - Art. 3.1 of Federal Law No. 218-Φ3 on State Registration of Real Estate dd. July 13, 2015, requires that organizations engaged in cadastral registration and the registration of titles convert documents contained in register files and stored (previously) in hard copy into electronic images of such documents as well as develop and introduce

electronic services needed to provide the services of state cadastral registration, state registration of titles, and provision of information contained in the Unified State Register of Real Estate (including a property owner's personal account);

¹⁰ - Art. 4 of Federal Law No. 129-Φ3 on State Registration of Legal Entities and Individual Entrepreneurs dd. August 8, 2001, requires that state registers be kept on electronic media and the compatibility and interaction of state registers with other federal information systems and networks be ensured;

¹¹ - Art. 4 of Federal Law No. 44-Φ3 on the Contract System of the Federal and Municipal Procurement of Goods, Works, and Services dd. April 5, 2013, requires that a unified information system be created to post all procurement information using electronic means.

¹² Thus, the legislator ensures the implementation of the Strategy in terms of data processing technologies, which helps to reduce expenses on the production of goods and the provision of services.

¹³ Large energy companies are also actively introducing new digital technologies in their companies' activities, which facilitates rapid information exchange, document review, and approval not only within a company but also between a holding's branches and subsidiaries.

¹⁴ The process of digital transformation is very complicated and time-consuming; in fact, this process involves the reorganization of the company's business model.

¹⁵ All of the activities are aimed at data integration, information protection, labor quality, the implementation of digital solutions and corporate software or the development of the digital infrastructure, and organizational changes (including the development of staff and company competencies).

¹⁶ Legal regulation of digitalization in the fuel and energy sector more and more often becomes the subject of legal research.[2]

¹⁷ Let's consider digital transformation as part of the Strategy as exemplified by the organization of procurement activities in Gazprom, PJSC.

¹⁸ Article 4 of Federal Law No. 223-Φ3 on the Procurement of Goods, Works, and Services by Certain Types of Legal Entities dd. July 18, 2011, requires that customers post procurement information using the Internet, and open competitive methods of determining the supplier (contractor, responsible party), from planning to posting information on the conclusion and performance of contracts, be converted to electronic form.

¹⁹ Pursuant to this Law, Gazprom, PJSC, approved the Regulations on the Procurement of Goods, Works, and Services by Gazprom, PJSC, and Gazprom Group Companies (Resolution of the Board of Directors of Gazprom, PJSC, No. 3168 dd. October 19, 2018) (hereinafter referred to as the Procurement Regulations), which establish a number of provisions on the process digitalization within one company.

²⁰ Thus, as per cl. 1.2.1 of the Procurement Regulations, all procurement activities of Gazprom, PJSC, Group shall be performed in the Automated Electronic Procurement

System (hereinafter referred to as the AEPS). The AEPS is a system that supports the business processes of Gazprom Group's procurement activities and functions as a corporate procurement information system interacting with the unified information system (www.zakupki.gazprom.ru)[3].

²¹ The system makes it possible to promptly submit procurement for approval by the Central Procurement Management Body of Gazprom, PJSC, (hereinafter referred to as the CPMB) regardless of a subsidiary's region of location, and promptly exchange information if the submitted information is insufficient for procurement approval as well as receive information on procurement approval and its inclusion in the procurement plan. It should be noted that the AEPS also submits the information further to the unified information system for posting on the website, which eliminates the possibility of errors and provision of false information.

²² AEPS integration with the electronic platforms and the official website of the unified information system in procurements, zakupki.gov.ru, makes it possible to promptly exchange information with suppliers, receive bids from procurement participants in an electronic form, and quickly respond to requests for clarification of certain provisions of procurement documents. This helps suppliers to avoid misunderstandings regarding the timing and quality of services/works/goods delivery and consequently the scope of procurement. In the past, it took a long time to exchange correspondence on paper, which significantly lengthened the time frames for procurement.

²³ A system of signing documents (certificates, minutes, etc.) with an electronic signature has been implemented. Now it is possible to promptly sign documents and send them for publication (as stipulated by law) within the prescribed time limits. These time limits are often three days only, and failure to post on time entails administrative liability for the General Director and the Company itself.

²⁴ The AEPS also helps to monitor compliance with current regulations in terms of Decree of the Government of the Russian Federation No. 1352 on Specific Features of Participation of Small and Medium-Sized Businesses in the Procurement of Goods, Works, and Services by Certain Types of Legal Entities dd. December 11, 2014 (hereinafter referred to as Decree No. 1352) and Decree of the Government of the Russian Federation No. 2013 on the Minimum Share of the Procurement of Goods of Russian Origin dd. December 3, 2020 (hereinafter referred to as Decree No. 2013).

²⁵ Decree No. 1352 stipulates that small and medium-sized businesses' annual volume of procurement shall be at least 25 percent of the aggregate annual value of procurement-based contracts concluded by customers. At the same time, the aggregate annual value of contracts concluded by customers with small and medium-sized businesses based on procurement exclusively for small and medium-sized businesses shall be no less than 20 percent of the aggregate annual value of procurement-based contracts concluded by customers.

²⁶ Decree No. 2013 establishes a minimum share of the procurement of goods of Russian origin as a percentage of the volume of procured goods (including goods supplied in the course of performing of works or rendering of services procured) of the respective type by the customer in the reporting year.

27 The AEPS settings allow the Company to control such figures throughout the year, timely adjust procurement planning, and prevent violations of laws.

28 New technologies implementation helps to increase labor efficiency and reduce operating expenses. To do so, it is necessary to take a number of managerial decisions that would synergize the work of all structural subdivisions, branches, and subsidiaries of a company. It is necessary to apply measures promoting new technologies such as training workshops, testing, and procurement inspections in subsidiaries to reveal weaknesses in the organization of the process. Failure to take such measures will make it harder to automate processes because all state corporations have a wide geographic span, and digital technology will just make up for the remoteness of subsidiaries.

29 The digitalization process makes it possible to quickly respond to legislative changes in the current context of hostile countries' sanctions policy.

30 We are talking about the forced adoption of such regulations as:

31 - Decree of the Government of the Russian Federation No. 417 on Amendments to Certain Acts of the Government of the Russian Federation on the State and Municipal Procurement of Goods, Works, and Services and the Procurement of Goods, Works, and Services by Certain Types of Legal Entities dd. March 21, 2022 (hereinafter referred to as Decree No. 417);

32 - Decree of the Government of the Russian Federation No. 301 on the Grounds for Failure to Provide Information on the Procurement of Goods, Works, and Services, Information on Suppliers (Contractors, Responsible Parties) Being Parties to Contracts to the Unified Information System for the State and Municipal Procurement of Goods, Works, and Services dd. March 6, 2022 (hereinafter referred to as Decree No. 301);

33 - Order of the President of the Russian Federation No. 166 on Measures to Ensure the Technological Independence and Security of the Critical Information Infrastructure of the Russian Federation dd. March 30, 2022 (hereinafter referred to as Order No. 166);

34 - Letter of the Ministry of Finance of the Russian Federation No. 24-03-08/18813 dd. March 14, 2022, on Forwarding Information on Procurement by Certain Types of Legal Entities in View of Decree of the Government of the Russian Federation No. 301 dd. March 6, 2022 (hereinafter referred to as Letter No. 24-03-08/18813), etc.

35 The adjustment of automated settings made it possible to promptly introduce mechanisms and implement the above provisions.

36 However, when applying Decree No. 301, the Customers noted that there were no official sources to establish a list of companies affected by hostile countries' sanctions.

37 The question now arises of whether the Canadian or U.S. government websites can be considered official sources. Will Russian companies be liable for failing to post procurement information if they are on the sanctions lists at the time of the failure and are not on the lists at the time of inspections? And how can they protect themselves in this situation?

38 Let's try to understand this situation.

39 Decree of the Government of the Russian Federation No. 301 prohibits posting any procurement information from March 7, 2022. However, the obligation to post procurement information is established by Article 4 of Federal Law No. 223-Φ3 dd. July 18, 2011, and the liability for failure to post such information is provided for by Code on Administrative Offences No. 195-Φ3 dd. December 30, 2001 (e.g., Art. 7.32.3). It is no wonder that practicing procurers have a question about whether or not to post information, and how to comply with all provisions of the current laws.

40 Let's find out whether or not the Decree of the Government actually cancels the Federal Law and whether or not it means the cancellation of Article 4 of Federal Law No. 223-Φ3 dd. July 18, 2011.

41 Establishing the obligation of the Customer to post procurement information, Art. 4 of Federal Law No. 223-Φ3 dd. July 18, 2011, however, does not determine the procedure for the same but stipulates that this aspect should be governed by certain regulations of the Government of the Russian Federation (cl. 18 of Art. 4 of Federal Law No. 223-Φ3). In this case, we are talking about the following Decrees:

42 - Decree of the Government of the Russian Federation No. 908 on Approval of the Regulations on Entering Procurement Information into the Unified Information System dd. September 10, 2012;

43 - Decree of the Government of the Russian Federation No. 932 on Approval of the Rules of Forming the Plan for Goods (Works, Services) Procurement and the Requirements for the Form of the Plan dd. September 17, 2012;

44 - Decree of the Government of the Russian Federation No. 1132 on the Procedure for Keeping the Register of Contracts Concluded by Customers as a Result of Procurement dd. October 31, 2014.

45 Cl. 15 of Art. 4 of Federal Law No. 223-Φ3 dd. July 18, 2011, establishes the terms and conditions, under which procurement information shall not be entered into the unified information system, but the Government of the Russian Federation may determine the procurement, the details of which may not be posted, or establish a list of services, goods, and works, the procurement details of which shall not be posted, or determine the range of customers, the procurement details of which are may not be posted, or determine additional grounds for non-posting.

46 In its turn, Decree of the Government of the Russian Federation No. 301 prohibits posting supplier (contractor, responsible party) information, if hostile countries impose political and economic sanctions on the Customer effecting procurement. Thus, it is clear that Decree of the Government of the Russian Federation No. 301 dd. March 6, 2022, does not contradict the current laws and was adopted in pursuance of existing provisions of federal laws.

47 However, in practice, another question arises: how do we find out whether or not a company is under sanctions? As of today, no state has sent any official document regarding sanctions imposed on a particular individual or legal entity.

⁴⁸ Currently, a sanctions list against Russian companies and citizens is posted at ruscifra.ru [4]. The source for this list is the official websites of the Governments of the US, the EU, Canada, and other countries that have joined political and economic sanctions to some extent. But can it be considered an official source for the purpose of implementing Decree of the Government of the Russian Federation No. 301 dd. March 6, 2022?

⁴⁹ Let's consider the difficulties of determining the legal validity of the information obtained on the example of Gazprom, PJSC.

⁵⁰ According to ruscifra.ru, Gazprom, PJSC, is not on the list of companies subject to economic sanctions imposed by the US.

⁵¹ However, as per OFAC's Directive 4 dd. September 12, 2014, adopted pursuant to Executive Order 13662 dd. March 20, 2014, Gazprom PJSC is on the SSI List in the sphere of technology since September 12, 2014. OFAC [5] explained that all restrictions imposed by the US also apply to entities owned, directly or indirectly, by 50% or more by the sanctioned persons. But neither the Directive nor the explanations are available for timely use by the Customers.

⁵² And it seems difficult to apply Decree of the Government of the Russian Federation No. 301 dd. March 6, 2022: the problem lies in the way to prove the good faith of the Customer, which does not post procurement information, because it is a 100% subsidiary of Gazprom, PJSC, although it is not directly mentioned on the publicly available Russian website ruscifra.ru [6].

⁵³ Besides, what legal force do the said US Directives have? Obviously, the explanations are not a source of law and have no legal force. At the same time, Decree No. 301 contains the prohibition and does not allow the Customer to choose whether or not to post procurement information.

⁵⁴ It is clear that today there is a need to adopt additional regulations and define which customers shall not post procurement information and which customers may carry out procurement activities as before.

⁵⁵ In general, to sum it up, we can say that digitalization helps to improve the quality of process management and the transparency of decision-making when determining the competitive procurement winner, to adjust a company's budget, and to facilitate planning processes. Proper integration of various automated processes (for example, tax software, 1C accounting software, logistics software, automated e-procurement system, etc.) will help to avoid company inventory or accounting errors or ensure timely procurement. All this requires enormous corporate work, proper communication with employees, and various training activities.

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Abstract

Large energy companies are also actively introducing new digital technologies in their companies' activities, which facilitates rapid information exchange, document review, and approval not only within a company but also between a holding's branches and subsidiaries. The process of digital transformation is very complicated and time-consuming; in fact, this process involves the reorganization of the company's business model. Procurement digitalization helps to improve the quality of process management and the transparency of decision-making when determining the competitive procurement winner, to adjust the company's budget, and to facilitate planning processes. The article analyzes the current state of legal regulation of procurement digitalization in companies of the fuel and energy complex, identifies problems and gaps in legal regulation, and formulates proposals on how to develop legal regulation of procurement in the energy sector.

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Publication date: 27.12.2022

Citation link:

Saushkina S. Legal Regulation of the Further Development of Procurement Digitalization in the Energy Sector // Energy law forum – 2022. – Issue 4 C. 24-29 [Electronic resource]. URL: <https://mlcjournal.ru/S231243500023570-5-1> (circulation date: 19.05.2024). DOI: 10.18254/S231243500023569-3