



# Summer harvest of laws

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**VEGAS LEX**



In the final days of the spring session of the State Duma of the Russian Federation, a number of important laws were adopted, relating to public procurement and regulation of competition. In this article, we analyse the key provisions of the said legislation.

### INCREASED LIABILITY FOR NON-FULFILMENT OF STATE CONTRACTS

FEDERAL LAW NO. 265-FZ "ON AMENDMENTS TO CERTAIN LEGISLATIVE ACTS OF THE RUSSIAN FEDERATION" (SIGNED ON 13 JULY 2015).

Provides for the imposition of administrative responsibility for the actions (inaction):

- resulting in failure to fulfil obligations stipulated in state/municipal contracts,
- causing significant harm to legally protected interests of society and the state. However, it is not defined as to what is understood under the term "significant harm", and it is assumed that in each case, the significance of the damage caused will be determined by the court.

For the commission of the indicated actions, quite strict liability measures are provided:

- for officials and entrepreneurs — a fine of 5 to 15 percent of the value of outstanding obligations, but not less than 30,000 roubles or disqualification for up to two years;
- for legal entities — a fine ranging from one-times to three-times the size of the value of outstanding obligations under the contract, but not less than 300,000 roubles.

Thus, the indicated amendments should encourage executors of government/municipal contracts to properly fulfil their obligations.

### EXPANSION OF THE CONCEPT OF "OFFICIAL"

FEDERAL LAW NO. 265-FZ "ON AMENDMENTS TO CERTAIN LEGISLATIVE ACTS OF THE RUSSIAN FEDERATION" (SIGNED ON 13 JULY 2015).

The list of persons who are considered officials, for the purposes of criminal prosecution for crimes against the state and the interests of public service, has been significantly expanded. Now, these are also considered the persons permanently, temporarily, or by special authority, exercising organizational, managerial, administrative and economic functions in:

- state-owned companies;
- state and municipal unitary enterprises;
- joint-stock companies, the controlling block of shares<sup>1</sup> of which belongs to the Russian Federation, subjects of the Russian Federation or municipalities.

These persons can now be prosecuted for abuse of office, misappropriation of budgetary funds, taking bribes, dereliction of duty, etc.

### THE PROHIBITION ON PARTICIPATION IN TENDERS BY OFFSHORE COMPANIES, ACCORDING TO LAW 44-FZ

FEDERAL LAW NO. 227-FZ "ON AMENDMENTS TO THE FEDERAL LAW — ON THE CONTRACT SYSTEM IN THE AREA OF PROCUREMENT OF GOODS, WORKS AND SERVICES FOR STATE AND MUNICIPAL NEEDS" (SIGNED ON 13 JULY 2015).

Forbidden to participate in the public procurement are legal entities registered in the country or territory included in the approved — in accordance with Subparagraph 1 of Paragraph 3 of Article 284 of the RF Tax

<sup>1</sup> In accordance with Subparagraph 1.1 of Paragraph 1 of the Decree of the President of the Russian Federation dated 16 November 1992 No. 1392 "On measures to implement the industrial policy in the privatization of state-owned enterprises" under "controlling interest", it is meant any form of participation in the capital of the company, which provides an unconditional right to accept or reject certain decisions by the general meeting of participants (shareholders, stakeholders) and its management bodies, including the existence of a "golden share" right of veto, direct appointment of directors, etc.

Code — list of countries and territories that provide preferential tax treatment of taxation and (or) not requiring the disclosure of information on financial operations by legal entities (offshore companies). Currently, this list includes 40 countries, including the British Virgin Islands, Hong Kong, Lichtenstein, and the United Arab Emirates.

In accordance with the amendments, legal entities registered in these countries cannot be accredited on an electronic platform, and hence, cannot participate in electronic auctions. In carrying out procurement procedures using other formats, they cannot be allowed to participate in the tender.

### REGULATION OF PROCEDURES FOR PURCHASING EQUIPMENT FOR INVESTMENT PROJECTS

FEDERAL LAW NO. 249-FZ "ON AMENDMENTS TO THE FEDERAL LAW — ON PROCUREMENT OF GOODS, WORKS AND SERVICES BY CERTAIN KINDS OF LEGAL ENTITIES" (SIGNED ON 13 JULY 2015).

According to the explanatory note, the indicated legislation is aimed at coordinating the procurement of foreign equipment customers and improves the participation of the domestic producers in purchases carried out in the implementation of major investment projects. They are established especially for procurement of machinery for the implementation of individual investment projects.

Subjects, implementing the relevant investment project, may not only be the subjects of Federal Law dated 18.07.2011 No. 223-FZ "On procurement of goods, works and services by certain kinds of legal entities" (hereinafter referred to as "Law 223-FZ"), but also any other legal entities, to which, in this case, will also be extended the special characteristics for procurement of engineering products.

The list of investment projects, which are subject to specific regulation, includes projects that meet the following conditions:

- cost of the investment project exceeds the value (at least 10 billion roubles) established by the Government of the Russian Federation;
- investment project is included in the list of investment projects, the manner for carrying out of which must be determined by the Government of the Russian Federation;
- projects being carried out by legal entities that are not subject to the Law 223-FZ, are required to comply with additional conditions – the investment project should be provided with state support. State support is considered as ensuring the fulfilment of obligations by the investor of the project, by a state guarantee of the Russian Federation or the provision of complete or partial (at least 10%) financial support to the project via:
  - funds from the federal budget provided in the form of public investment or subsidies;
  - funds from the National Welfare Fund;
  - funds from Vnesheconombank.

In the case of the realization of the above-mentioned investment project, the investor is obliged to form lists of machinery required for the investment project, which should contain:

- product information, unit price, which exceeds the amount established by the Government of the Russian Federation;
- product information (regardless of price), the development of production of which is recommended by the customer or investor.

This product information includes, among other things, the approximate price and quantity of products, information about prospective suppliers, as well as information about the origin of products coming from foreign countries.

The lists are submitted for review to the coordinating body of the Government of the Russian Federation, which should be composed in accordance with the legislation. The

lists are generated for a period of at least five years, or for the period of implementation of the investment project. Changes can be made to the lists, which are then again submitted to the coordinating body of the Government of the Russian Federation.

Requirements for compiling the lists of products shall not apply, if the investment project is being implemented outside the territory of the Russian Federation, or outside other territories under the jurisdiction of the Russian Federation, or in accordance with international/intergovernmental agreements of the Russian Federation.

Prior to the submission of the lists to the coordinating body of the Government of the Russian Federation, customers and legal entities are not entitled to purchase machinery that is to be included in the lists. In addition, the Government of the Russian Federation shall have the right to approve certain types of machinery, the purchase of which cannot be implemented without prior approval of performance characteristic of such products from the coordinating body of the Government of the Russian Federation. In addition, the Government of the Russian Federation can define certain types of machinery, the purchase of which cannot be performed outside the territory of the Russian Federation, without prior approval of the purchase from the coordinating body of the Government of the Russian Federation.

### POSSIBILITY TO APPEAL TO THE ANTIMONOPOLY AUTHORITY VIOLATIONS IN THE CONSTRUCTION SPHERE

FEDERAL LAW NO. 250-FZ "ON AMENDMENTS TO THE FEDERAL LAW — ON PROTECTION OF COMPETITION" (SIGNED ON 13 JULY, 2015).

The legislation provides for the possibility of filing a complaint to the antimonopoly authority:

**1.** for acts or actions of competent authorities, committed in the exercise of the procedures included in the exhaustive list of procedures in the fields of construction, in particular:

- violation of set deadlines for the procedure;
- the request to carry out a procedure that is not included in the exhaustive list of procedures in the relevant field of construction;

**2.** for actions of the territorial network organizations, organizations engaged in hot and cold water supply, gas distribution companies, heat supply organizations (hereinafter referred to as the "organization that operates a network") committed in the exercise of the procedures included in the exhaustive list of procedures in the fields of construction, in particular:

- unlawful refusal to accept documents;
- making requirements not stipulated by the legislation of the Russian Federation;
- violation of deadlines for carrying out procedures included in the exhaustive list of procedures;
- making demands to carry out a procedure that is not included in an exhaustive list.

The exhaustive lists of procedures in the fields of construction are approved by the Government of the Russian Federation. At present, the above list is approved only in respect of housing<sup>2</sup>.

The appeal of these actions to the antimonopoly authority does not hinder their subsequent judicial review.

These complaints shall be considered in the order specified in Article 18.1 of the Law on Protection of Competition (formerly this order applied only to the alleged violation of

<sup>2</sup> Decree of the Government of Russian Federation dated 30.04.2014 No. 403 "On the exhaustive list of procedures in the sphere of housing construction"

tender procedures conducted, in particular, in accordance with Law 223-FZ).

A complaint may be filed with the antimonopoly authority within three months from the date of adoption of the contested act, or the commission of the contested action. The complaint is considered within seven working days. Upon review of the complaint, the antimonopoly authority makes a decision on the recognition of it being justified or unjustified, and in the latter case, may issue an order to eliminate the violations of the order of carrying out procedures, included in the exhaustive list of procedures in the field of construction.

In addition, administrative liability is introduced for violation of the order of procedures included in the exhaustive list of procedures in the field of construction. Thus, Article 14.91 of the RF Administrative Code

provides for liability for officials in the form of a fine of up to 5,000 roubles, and upon repeated infringement – in the form of a fine of 30,000 to 50,000 roubles, or disqualification for up to two years.

An important innovation of the legislation is to eliminate the possibility of prosecution under Article 14.31 of the RF Administrative Code "Abuse of dominant position in the market" for violation of the rules of non-discriminatory access, the order of connection (technological connection)<sup>3</sup>. For these actions, liability may apply under Article 9.21 of the RF Administrative Code of the Russian Federation, in the form of penalty imposed on officials in the amount of 10,000 to 40,000 roubles; for legal entities – in the amount of 100,000 to 500,000 roubles. Thus, excluded is the possibility of applying working fines for these actions.

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<sup>3</sup> In addition to the subjects of natural monopolies, which can still be prosecuted under Part 2 of Article 14.31 of the RF Administrative Code.

## Contacts

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