

Finnish-Russian Chamber of Commerce Legal Digest

Participation of foreign companies in public procurement in Russia

The procurements are governed by 2 basic laws:

The Federal law of 05.04.2013 **N 44-FZ** "On contract system in procurement of goods, works, services for state and municipal needs",

where the **customers** are a **state body, ROSATOM, ROSCOSMOS, state institution, municipal body, municipal state-owned institution** and

The Federal law of 18.07.2011 **N 223-FZ** "On procurement of goods, works, services by separate types of legal entities",

where the **customers** are **state-owned corporations, public corporations, natural monopoly entities, their affiliated economic companies** in the charter capital of which their share is more than 50%, **public institutions**, state unitary enterprises (**GUP**), municipal unitary enterprises (**MUP**), other legal entities specified in the Law N 223-FZ.

The Federal law of 31.12.2014 N 488-FZ "On industrial policy in the Russian Federation" establishes for procurements the principle of priority of industrial products produced in the territory of the Russian Federation, on the continental shelf of the Russian Federation, in the exclusive economic zone of the Russian Federation, over industrial products produced in the territories of foreign states.

The law N 44-FZ stipulates that, in order to protect the constitutional order, national defense and state security, the domestic market of the Russian Federation, to ensure development of the national economy, support of Russian producers, the Government of the Russian Federation in the regulatory legal acts establishes a prohibition on the admission of goods originating from foreign states, of works, services, performed, rendered by foreign parties, and limits on the admission of the said goods, works, services for the purposes of procurements.

The law N 223-FZ establishes that the Government of the Russian Federation may establish the priority of commodities of Russian origin, works, services, performed, rendered by Russian parties, in relation to goods originating from foreign states, works, services performed, rendered by foreign parties.

Currently there are 2 priority mechanisms: "the third unnecessary" mechanism and the mechanism of preferences.

"The third unnecessary" mechanism applies to certain product groups and is set by the separate Resolutions of the Government of Russia in accordance with the Law **N 44-FZ**, in particular:

the Resolution of the RF Government of 05.02.2015 N 102 – in respect of certain types of **medical products** included in the list,

the Resolution of the RF Government of 30.11.2015 N 1289 – in respect of a medicine included in the list of vital and essential **medicines**,

the Resolution of the RF Government of 22.08.2016 N 832 – in respect of certain types of **food products** included in the list,

the Resolution of the RF Government of 26.09.2016 N 968 – in respect of certain types of **electronic products** included in the list.

"The third unnecessary" mechanism: the **customer rejects** all **bids** containing proposals for supply of goods originating **from foreign states**, provided that there are at least 2 bids submitted satisfying the requirements on the supply of goods, the country of origin of which is a member state of the Eurasian Economic Union (the Resolutions of the RF Government N 102, 1289, 832) or the Russian Federation (the Resolution of the RF Government N 968).

The mechanism of preferences works **regardless of product groups**, established by the Resolution of the RF Government of 16.09.2016 N 925 in accordance with the Law **N 223-FZ**: in case the winner of the procurement submitted an application for participation in the procurement, containing a proposal for supply of goods originating from a foreign state, or a proposal for performing works or rendering of services by foreign parties, the agreement with the winner is to be made at the **price reduced by 15 %** of the proposed contract price.

The Head of the Federal Antimonopoly Service of the Russian Federation (FAS) Mr. Igor Artemiev at the briefing at the Association of European Businesses in Moscow on 6 March, 2017 said that on the opinion of FAS "the third unnecessary" mechanism should be replaced by the mechanism of preferences and the increase of preferences rate up to 20% may be discussed.

In addition to the above limitations in accordance with the Resolutions of the Government of Russia on the basis of the Laws № 44-FZ and N 223-FZ there are **prohibitions** for foreign goods on access to procurement on the basis of the Law **N 44-FZ**, in particular:

Certain machinery goods originating from foreign states (except from EAEU member states), according to the established list, for example: cranes, timber carriers, trucks, snow throwers, other (the Resolution of the RF Government of 14.07.2014 N 656);

Light industry goods originating from foreign states (except from EAEU member states) and rent services of such goods (the Resolution of the RF Government of 11.08.2014 N 791);

Software originating from foreign states (the Resolution of the RF Government of 16.11.2015 N 1236);

Goods, works (services) for needs of **defense** and security of the state (the Resolution of the RF Government of 14.01.2017 N 9).

However, the above Resolutions of the Government of Russia established exceptions to the current prohibitions or limitations in favor of foreign goods.

For example, the following **exceptions**:

On machinery goods – participation in a special investment contract;

On light industry goods – cases when production of goods is absent in the territories of the member states of the Eurasian Economic Union;

On software – absence at the Russian software register of software of the corresponding class or the software available at the register is not suitable to the customer characteristics.

The law N 44-FZ establishes that, **in case of availability of the circumstances (exceptions), established at the Resolutions of the Government of Russia, the customers are obliged to place in the unified information system the substantiation of impossibility of compliance with the prohibition or limitations for foreign companies.**

Best regards,

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