

CHALLENGING ASPECTS OF PROCUREMENT OF MATERIALS AND RESOURCES BY ENERGY COMPANIES IN ACCORDANCE WITH FEDERAL LAW NO. 223-Φ3 OF JULY 18, 2011

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In 2014, after the introduction of mutual sanctions by Russia and the Western countries, Russia declared a course towards import substitution. In that context, energy companies with state participation are developing a number of measures to support it. That said, energy companies come across a situation when some measures cannot be carried out due to the contradiction between local acts and the applicable laws. At the same time, local acts of companies with state participation are adopted based on the need to ensure safety during the construction, design and operation of energy industry facilities. To achieve these goals, energy companies with state participation introduce a variety of mechanisms for verification of compliance of the contractors' production with the requirements of the company itself and various technical standards. However, the application of all mechanisms is extremely difficult without amending the applicable laws. The article reviews problem solution options that provide for the possibility of maintaining a balance of interests of all energy market players.

Keywords: energy law; legal position of energy companies; legal regulation of procurement; register of materials and resources; local acts of energy companies.

Despite the fact that the subject of legal research is various aspects of the legal regulation of procurement by certain types of legal entities, many issues rightfully continue to arouse interest, and the current

state of legal regulation requires improvement. [1]

Since September 2014, the Government of the Russian Federation has been implementing an industrial import substitution program.

By the present day, several regulatory acts have been adopted for the implementation of this program at the federal level and at the level of economic entities.

Energy companies with state participation are putting a lot of effort in the study of markets and the current state of industrial production of equipment, materials, and resources. Let us review the said measures on the example of Gazprom, PJSC, and analyze the problems that the company faces during their implementation.

By Order No. 88 of February 25, 2020, Gazprom, PJSC, approved a list of the most important types of products for import substitution and local content in manufacturing for the purpose of technological development of Gazprom, PJSC, [2] and developed a unified Register of Materials and Resources (hereinafter referred to as the «M&R») Approved for Use at the Company's Facilities and Complying with the Requirements of Gazprom, PJSC (hereinafter referred to as the «Register of M&R of Gazprom, PJSC»). The mentioned register is continuously updated and supplemented. [3]

Maintaining the said Register of M&R of Gazprom, PJSC, is primarily conditioned by the need to ensure safety during construction, repairs and reconstruction of facilities of the unified gas supply system. For the purposes of procurement, Gazprom, PJSC, studies to the greatest possible extent the markets of materials and resources, the latest technologies and scientific achievements in the industry, and also conducts surveys of the industrial capacities of the suppliers' equipment for compatibility with the existing unified gas supply system.

The aim of such market study is to exclude cases of conclusion of agreements with suppliers whose manufacturing process does not comply with the requirements of the applicable laws of the Russian Federation in terms of technical regulation and the standards of Gazprom, PJSC. The above-mentioned

register is maintained to accumulate and systematize all the information obtained. It should be mentioned that any organization can submit an application for inclusion in the Register of M&R of Gazprom, PJSC, and undergo the appropriate approval procedure. All the information on the procedure for inclusion and the set of provided documents is available on publicly available Internet resources, including the website of Gazprom, PJSC [4].

The inclusion of enterprises is carried out on the basis of the methodology for the preliminary assessment of the readiness of enterprises to manufacture products for the needs of Gazprom, PJSC, approved by the Deputy Chairman of the Board of Gazprom, PJSC, on April 16, 2016. [5]

According to this methodology, any enterprise planning to organize mass production and supply of products critical for Gazprom, PJSC, has the right to collect the necessary package of documents and send it to the appropriate Department of Gazprom, PJSC, for consideration.

When the documents are received, employees of the corresponding Department of Gazprom, PJSC, analyze the submitted documents and conduct a comprehensive audit of the enterprise. The methodology allows the involvement of an independent expert organization to conduct an appropriate analysis of documents and a comprehensive audit of the enterprise. Expert examination services are rendered by expert organizations based on civil law agreements concluded based on the results of tender procedures carried out in accordance with the Provision on the Procurement of Goods, Works, Services by Gazprom, PJSC, and the Companies of the Gazprom Group [6] (hereinafter referred to as the «Provision on Procurement of Gazprom, PJSC»). Thus, an independent expert organization with highly professional specialists is involved.

A special expert group is created in the company to conduct an expert assessment and

determine the index of readiness of enterprises for the manufacture of import substituting products for the needs of Gazprom, PJSC. Upon completion of the assessment of the enterprise, each expert documents the values of the following indicators:

- The availability of a production facility necessary for the manufacture of products;
- The availability of the technical groundwork;
- The degree of local manufacturing content in the territory of the Russian Federation;
- The degree of criticality of imported components, raw stock, materials for the manufacture of products;
- The legality of the use of technical, technological documentation, intellectual property deliverables;
- Product quality assurance;
- Business reputation;
- Completeness of presentation of information on project feasibility;
- The share of encumbered assets in the balance sheet currency as of the last reporting date;
- The current liquidity ratio for the last three reporting years;
- Financial independence of the enterprise.

All these measures are aimed at ensuring safety of the production process and implementation of the state industrial import substitution program of the Russian Federation.

However, the Russian laws now provide that energy companies are obliged to carry out their procurement activities in accordance with Federal Law No. 223-Φ3 of July 18, 2011, *On the Procurement of Goods, Works, Services by Certain Types of Legal Entities* (hereinafter referred to as «Law 223-Φ3»). Based on the logic of the adoption of Law 223-Φ3, it is unacceptable to take any actions that may lead to restriction of competition including an unreasonable limitation of the number of

procurement participants, and the Company, when carrying out tender procedures, is obliged to admit all companies that have submitted applications for participation in a competitive procurement regardless of whether they are included in the Register of M&R of Gazprom, PJSC.

Rejection of an application for participation in a competitive procurement due to the non-inclusion of a participant in the Register of M&R of Gazprom, PJSC, is viewed by the regulatory authorities as a restriction of competition.

It is worth noticing, that we are talking about the supply of technology-intensive equipment that is supplied to facilities that are considered hazardous production facilities in accordance with Art. 2 of Federal Law No. 116-Φ3 of July 21, 1997, *On Industrial Safety of Hazardous Production Facilities*.

That is why Gazprom, PJSC, applies a multi-stage approval procedure for the inclusion of suppliers in the Register of M&R of Gazprom, PJSC.

In practice, there are cases when the procurement committee had to select suppliers not included in the Register of M&R of Gazprom, PJSC, and only after that to assess the readiness of enterprises to manufacture products for the needs of Gazprom, PJSC, that significantly increases the service rendering terms.

Taking into account that we are talking about hazardous production facilities, I believe it advisable to supplement Law 223-Φ3 with a provision stipulating that Gazprom, PJSC, has the right to approve a special procedure for selecting contractors for the supply of goods / performance of works / provision of services at the facilities of the unified gas supply system and hazardous production facilities owned by Gazprom, PJSC, and the Gazprom Group Companies.

In accordance with the Provision on Procurement of Gazprom, PJSC, the following companies and organizations are referred to the Gazprom Group Companies:

- Subsidiaries of Gazprom, PJSC;
- Subsidiaries of subsidiaries of Gazprom, PJSC;
- Companies and organizations in which Gazprom, PJSC, together with its subsidiaries and/or subsidiaries of subsidiaries of Gazprom, PJSC, holds more than 50% of shares in the authorized capital;
- Companies and organizations not being subsidiaries, the financial statements of which are included in the consolidated financial statements of Gazprom, PJSC, in accordance with the International Financial Reporting Standards (IFRS).

Perhaps, it would be better not to apply Law No. 223-Φ3 to the agreement conclusion procedure and the procedure for selecting contractors for the supply of goods / performance of works / provision of services at the facilities of the unified gas supply system and hazardous production facilities owned by Gazprom, PJSC, and the Gazprom Group Companies. This will prevent strategically important facilities of Gazprom, PJSC, from being accessed by participants whose manufacturing process does not meet the requirements of Gazprom, PJSC, and minimize the risks of delays in the work performance / service provision / supply terms and the occurrence of industrial accident.

In addition, I consider it advisable to include in Federal Law No. 69-Φ3 of March 31, 1999, *On Gas Supply in the Russian Federation* a provision that would grant Gazprom, PJSC, the right to:

Make proposals for the development of the state gas supply policy in the Russian Federation;

Approve a special procedure for selecting contractors for the supply of goods / performance of works / provision of services

at the facilities of the unified gas supply system and hazardous production facilities owned by Gazprom, PJSC, and the Gazprom Group Companies;

Carry out construction supervision during the construction and reconstruction of facilities of the unified gas supply system;

Select central research organizations, central design organizations and central project organizations according to the procedure established by Gazprom, PJSC;

Determine procurement not subject to publication in open sources.

Such supplements are consistent with the goals and objectives of Gazprom, PJSC, taking into account the legally recognized specifics of the legal status of this company. As V.V. Romanova correctly notes, the peculiarities of the legal position of parties to public relations in the energy industry are primarily conditioned by the need to ensure reliable and high-quality energy supply and uninterrupted functioning of energy systems. [7] Considering the key tasks of the energy law and order, V.V. Romanova emphasizes that the provisions recognizing the peculiarities of the legal position of parties to public relations in the energy industry are among the main elements of the system of legal regulation in the energy industry that form the energy law and order. [8]

Expansion of the powers of Gazprom, PJSC, proposed in this article are aimed at strengthening the energy law and order and will allow safe operation of the unified gas supply system.

It is understood that all of the above proposals require additional study and discussion. However, it is obvious that industry-specific laws in each energy law area need to be developed and detailed. ■

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