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Public procurement in Russia: concept and content

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Abstract. Based on the analysis of foreign and national legal acts, scientific works and research of domestic and foreign scientists, the article substantiates the relevance of the concept “public procurement” and reveals its content. The outcome of the research on public procurement as a system of legal relations allows the author to verbalize its definition. Public procurement should be understood as a system of legal relations where one party is an authorized representative of public authority who purchases goods, works, and/or services at the expense of the relevant budget in order to realize public interest. The characteristic features of public procurement are highlighted, and the most significant functions of public procurement are substantiated, including social, regulatory, reproductive, innovative, stimulating, and cost optimization. The author offers classification of the main subjects of public procurement, involving authorized representatives of public authorities (entities authorized to regulate and control public procurement, to centralize and conduct joint bidding, as well as all customers), business entities (suppliers, contractors) and derivative entities (banks and credit organizations, electronic trading platforms, specialized organizations). It is emphasized that in order to increase the efficiency of budget spending and optimize the financial support of public procurement, a number of derivative entities may be abolished. The article sustains that legal relations in public procurement are subject to regulation by the norms of financial, administrative, and civil law. It notes that legal relations in public procurement regulated by the norms of civil law (contractual legal relations) arise exclusively after the relations regulated by the norms of public law. It outlines the legal characteristic of the revealed legal relations and justifies the necessity of considering the priority of the norms of public law.

Key word: public procurement, public authorities, authorized representatives of public authorities, public and private interests, state order, state and municipal procurement, financial law, economic and derivative entities

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Публичные закупки в России: понятие и содержание

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Аннотация. На основании анализа зарубежных и российских правовых актов, научных трудов и исследований широкого круга ученых обоснована значимость использования понятия «публичные закупки», раскрыто его содержание. По итогам рассмотрения публичных закупок как системы правоотношений предложено авторское определение публичных закупок, под которыми следует понимать систему правоотношений, в которых одной стороной выступает уполномоченный представитель публичной власти, осуществляющий приобретение товаров, работ, услуг за счет средств соответствующего бюджета в целях реализации публичного интереса. Выделены характерные признаки публичных закупок и обоснованы наиболее значимые функции публичных закупок, среди которых: социальная, регулятивная, воспроизводственная, инновационная, стимулирующая, оптимизации расходов. Представлена авторская классификация основных субъектов публичных закупок, предусматривающая уполномоченных представителей публичной власти (субъекты, уполномоченные на регулирование и контроль публичных закупок, на централизацию и проведение совместных торгов, а также все заказчики), хозяйствующих субъектов (поставщики, подрядчики, исполнители) и производных субъектов (банки и кредитные организации, электронные торговые площадки, специализированные организации). Акцентируется, что для повышения эффективности расходования бюджетных средств и оптимизации финансового обеспечения публичных закупок ряд производных субъектов может быть упразднен. Доказано, что правоотношения в публичных закупках подлежат регулированию нормами финансового, административного, гражданского права. Отмечено, что правоотношения в публичных закупках, регулируемые нормами гражданского права (контрактные правоотношения), возникают исключительно после отношений, урегулированных нормами публичного права. Дана правовая характеристика выявленным правоотношениям, обоснована необходимость учета приоритета норм публичного права.

Ключевые слова: публичные закупки, публичная власть, уполномоченные представители публичной власти, публичные и частные интересы, государственный заказ, государственные и муниципальные закупки, финансовое право, хозяйствующие и производные субъекты

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Introduction

The relevance of the article is due to a number of specifics in regulation of legal relations regarding the financial support of public procurement in modern conditions. Public procurement plays a significant role in ensuring the need for goods, works, and services, therefore they need sufficient funding from the relevant budgets of the Russian Federation. At the same time, various terms describing the sphere of procurement are currently used in national and foreign literature: *state and municipal procurement, state order, public procurement, government procurement*, etc. This does not contribute to the uniformity of understanding of the financial support of public procurement and requires a more thorough analysis of existing approaches to institutional definitions legitimately established and presented in scientific doctrine.

The need to analyze the concept of public procurement, as well as the legal regulation of financial support for public procurement, is directly related to the proper goal setting, which is both a form to articulate an issue and a way to achieve public interest expressed by public need for certain goods, works and services. For example, if goal setting is not required in civil law — it is enough only to establish rules of a procedural nature, and the issue of goal setting itself is solved by the participants of transactions independently — then the approach when the civil law method of regulating legal relations is transferred to the public legal environment seems counterproductive.

The concept of “procurement” in foreign legislation and scientific research

The analysis of the international practice of forming the categorical apparatus of the contract procurement system allows to generalize the concepts used in this system. The UNISTRAL Model Law operates with the concept of “public procurement”, understanding it as procurement by authorities, institutions, organizations and their structural divisions¹. The Organization for Economic Cooperation and Development (OECD) uses a similar concept, describing public procurement as the procurement of goods, works and services by governments and state organizations². In European Union regulatory legal acts, the term “public procurement” means the procurement by authorities of any level, as well as legal entities regulated by public law³. In the legislation of the European Union member states, the concept of “public procurement” has been

¹ Model Law of the United Nations Commission on International Trade Law on Public Procurement / approved by UN General Assembly Resolution 66/95 of 09.12.2011. Available at: <https://uncitral.un.org> [Accessed 30th July 2022].

² Government at a Glance 2015. Paris, OECD Publishing. 2015, p. 136.

³ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on Public Procurement. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0024> [Accessed 29th July 2022].

used since 2016 when the norms of the pan-European directive regulating procurement were implemented into the national legal acts of the European states.

The World Trade Organization (WTO) also uses the term “government procurement” in its acts; it defines it as purchases by public authorities and other institutions working in the interests of the state⁴. A similar concept is adopted in the practice of procurement activities in a number of countries. In fact, in the procurement practice of the People’s Republic of China, the term “government procurement” is defined as activities carried out at the expense of budgetary funds by government departments, institutions and public legal entities of all levels.⁵

A number of foreign scientists understand public procurement as a type of federal and local authorities’ expenditure to purchase goods, works, services, and production resources (Linders, Jones & Flynn, 2007:535—536).

Considering the content of the General Agreement on Tariffs and Trade (GATT), G.I. Martynenko emphasizes that clause 8a of Article III of the document defines public procurement as procurement by state agencies for state needs of products that are not intended for commercial resale or use in the production of goods for commercial sale (Martynenko, 2006).

Scientists from Ukraine consider public procurement as a set of step-by-step actions that form an integral procedure regulated by the Law On Public Procurement, whose purpose is to implement the functions of public administration (Altsyvanovych & Tsybalenko, 2018).

Polish scholars have determined that the conditions of public procurement are interrelated and cover various requirements: determine the qualifications of participants in the procurement procedure, their access to the procurement market, the key values of the contract, as well as the basic principles of public procurement (Kowalczyk, 2021).

Having studied various approaches to the terminology of public procurement, American researchers R. Lloyd and K. McCue failed to clearly formulate the concept due to the peculiarities of procurement’s nature and the role of actors engaged in this sphere. The scientists noted that uncertainty and ambiguity of definitions, create certain misunderstanding and difficulties (Lloyd & McCue, 2004:1—29).

The analysis allows to conclude that, considering the existence of the variety of terms, it is essential to be guided by legally constituted concepts, including the level of international organizations, where the concept of “public procurement” is commonly used; it should be noted though that its content may have some differences.

The concept of “procurement” in Russian legislation and scientific research

In the legislation of the Russian Federation, the concepts of “state order”, “government procurement”, “public procurement” are not legally formalized. From the

⁴ Agreement on Government Procurement (as amended on 30 March 2012). Available at: https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm [Accessed 29th July 2022].

⁵ The Government Procurement Law of the People’s Republic of China (2002). Available at: http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/14/content_21917023.htm [Accessed 29th July 2022].

meaning of paragraph 1 of Article 527 of the Civil Code of the Russian Federation, it can be established that a state order is the basis for concluding a state contract. The essence and content of the concept of “state order” can be defined through the concept of “state needs” described in Law No. 94-FZ which was abolished on January 1, 2014; it indicates the source of payment for the needs of the Russian Federation or a constituency of the Russian Federation⁶.

Previously, Soviet law understood the state order as an individual planning act included in the plan of the enterprise and guaranteeing its independence in the formation of a common production program regarding consumer orders (Nozdrachev, 1990:46).

The analysis of the concept “state order” has shown its application in various meanings in both economic and legal literature. In the definition of the state order, A.B. Barikhin⁷, I.I. Smotritskaya (Smotritskaya, 2009:22), as well as A.A. Khramkin (Khramkin, 2008:187) indicate the mandatory presence of retribution, V.S. Gladkov (Gladkov, 2008:16—17) and L.M. Davletshina (Davletshina, 2007:48) emphasize satisfaction of state needs, and V.V. Melnikov (Melnikov, 2005:7), T.F. Ryabova (Riabova, 1996:88) and V.E. Belov (Belov, 2005:7—9) believe that the state order is realization of a specified state need for products. E.A. Zvonova clarifies that this need is met at the expense of budgets and extra-budgetary funds, that is, at the expense of taxpayers’ funds that are accumulated in the relevant budgets and extra-budgetary funds (the principle of “source of funds”) (Zvonova, 2009: 48—49).

T.V. Fryberg describes “state order” as a form of organization of budget financing, which has specific features, principles, classifications and historical stages of development in the Russian Federation (Freiberg, 2006:66). A number of scientists also focus attention on the financial component of the state order (payment from the budget)⁸.

The most complete definition of the state order, from our point of view, was formulated by V.I. Kuznetsov. He defined it as public law institution to implement the Constitution of the Russian Federation, laws and functions of the state in the form of administrative regime of relations between the state and subjects of private law, containing the substantive and procedural norms of constitutional, administrative, budgetary and civil law and implementing the legal status and the process of implementing the institution of public need (Kuznetsov, 2005:86). Despite the voluminous definition, the author considers the state order as a certain process of implementing legal norms through the prism of various branches of law.

In the scientific doctrine, public procurement is considered from various points of view: economic and legal (including with financial and legal, administrative and legal, business and legal or civil context). The most common concept is “government procurement”, which is well developed in domestic science.

⁶ Commentary to Federal Law No. 94-FZ of July 21, 2005. On Placement of Orders to Supply Goods, Carry out Works and Render Services for Meeting State and Municipal Needs. Moscow, Jurisprudence, 2008, p. 9. (in Russian).

⁷ Barikhin, A.B. (2008) A large legal encyclopedic dictionary. 2nd ed., rev. and suppl. Moscow, Book World Publ. (in Russian).

⁸ Raisberg, B.A. (2008) Modern Economic Dictionary. Moscow, Infra-M Publ. (in Russian).

Representatives of economic science in most cases determine purchases through the mechanism of their implementation. In fact, I.I. Smotrinskaya considers government procurement as part of goods, works and services produced in the state and purchased by public authorities at the expense of budgetary funds (Smotrinskaya, 2009:28). V.T. Gadzhieva describes the Institute of State Orders and Procurement as totality of organizational and economic relations between the state and other entities regarding the acquisition of goods, services and works to meet state needs as part of the execution of a state order at the expense of budget funds (Gadzhieva, 2011:176—183).

N.V. Nesterovich and V.I. Smirnov understand procurement as acquisition by the state customer of goods, works and services at the expense of certain budgets and funds (Nesterovich & Smirnov, 2000:124). It should be noted that when defining government procurement in the economic literature, the emphasis is on the sources of their financing. This is confirmed by the position of K.V. Kuznetsov, who believes that most of the purchases are carried out at the expense of budgetary funds to ensure the vital activity of the state and functioning of its authorities (Kuznetsov, 2003:21).

L.I. Nemchenko points out that state (municipal) procurement is a mechanism for the state to implement its functions through a set of processes related to distribution and use of state and municipal funds by market participants to meet state and municipal needs (Nemchenko, 2017:19).

A number of authors use the term “procurement for state needs”, thus taking into account both state and municipal purchases since all purchases are aimed at meeting the public needs of the state and municipalities and are carried out at the expense of state and municipal budgets (Lopatnikov, Sokolova & Tazhetdinov, 2008:101).

From the point of view of legal science, procurement is a process or relationship. For example, M.V. Shmeleva understands public procurement as regulation of relations of economic entities performing the assigned functions to achieve certain goals, which is a fairly general characteristic of this term (Shmeleva, 2015:249—250).

From the point of view of S.A. Bordunova, government procurement is a process aimed at purchasing goods, works and services for public needs, which are financed from budget funds (Bordunova, 2011:23). T.G. Sheshukova looks at government procurement from the standpoint of a systematic approach, i.e., as a system of legal relations between customer and supplier regarding the purchased goods, works and services to meet state and municipal needs at the expense of budgetary funds in order to use them more effectively (Sheshukova, 2018:522—523).

The economic and managerial approach tends to equate the concepts of “government procurement”, “state order” and “state needs” since:

- there is a process of formation and formalization of state demand, so the main role of procurement is reduced to contracting (Arykbayev & Gadzhieva, 2010:22—23),
- they are considered as a single process of realizing the needs of society in goods, works and services (procurement is a mechanism necessary for the formation of budget funds with their subsequent redistribution between economic entities so that the state may carry out its own functions, including socially oriented, as well as innovative in economic development) (Razinkov & Evseeva, 2016:130—136),

— public procurement is the final stage of the state order implementation process, i.e., the purchase of goods, works and services for public needs (Smotrinskaya, 2009:7; Ilyukhin, 2006:25—26),

— a state order is legally executed state needs that are subject to satisfaction in the process of public procurement (Galanov, Grishina & Shibaev, 2012:11),

— the content of these concepts' functions is identical (Cheremukhin, 2010:31—36).

However, not all scholars share this position. K.V. Kichik points out that these categories do not coincide in content. The concept of “public procurement” is more voluminous and include the actions of customers on the part of the state, authorized bodies, as well as elements of contract implementation; the term “government procurement” absorbs the concept of “state order” (Kichik, 2012:17).

Similarly, M.V. Shmeleva does not equate these concepts. Under the state order she understands an administrative state act establishing the volume of budget funds allocated for procurement, permitted types of procurement without specifying the objects of procurement, as well as timing and other important conditions for realizing the allocated funds (Shmeleva, 2022:142). In her research, I.G. Yakovleva indicates that a state order forms the ground for such purchase (Yakovleva, 2017:26).

L.M. Davletshina, V.S. Gladkov believe that interpretation of the state order does not reflect the essence of this concept, and confusion of terms “state order” and “public procurement” negatively affects law enforcement practice (Davletshina, 2007:47; Gladkov, 2008:14).

From our point of view, the concepts of “state order” and “public procurement” are identical, given that most of the definitions contain features of public administration with a pronounced administrative character (Kikavets, 2010:23—25).

Recently, the term “public procurement” has been widely used in scientific literature. In fact, I.I. Smotrinskaya previously used the term “public procurement” in her works, but now referring to the situation in foreign countries she describes it as state and municipal, as well as procurement of enterprises and organizations of the state sector of the economy or public legal entities (Smotrinskaya & Shuvalov, 2017:110). It is also possible to come across the term “social procurement” (Zubkov, 2012:147—151), highlighting its intended purpose or within the incorrect translation of the concept of “public procurement”. Moreover, the ambiguity (variability) of translation of foreign terms has formed such a concept as “правительственные закупки” (government procurement) instead of the term “государственные закупки” (public procurement) (Melnikov, 2016:54—72).

In addition to these terms, the term “procurement” is often used in special foreign literature in the sense of a set of various actions aimed at organizing purchases in order to maximize public needs for goods, works or services (Kalmykova, Alpeeva & Semenikhina, 2018:243). According to N.V. Nesterovich, procurement is a combination of various methods and techniques that allow ensuring the interests of the buyer in the bidding process (Nesterovich, 1998). K.V. Kuznetsov defines procurement as a system consisting of certain processes (procurement planning and justification, supplier identification, contract execution and control over its execution) (Kuznetsov, 2003:28).

In our opinion, the term “procurement” has not entered the domestic scientific circulation and it is more appropriate to use such concepts as “state (municipal) procurement” or “public procurement”.

There are not so many theoretical provisions on procurement activities in the legal literature since the analysis is mainly focused on its legal regulation or other terms accompanying procurement (bidding, needs, order, etc.), therefore, discussions regarding terminology are reduced to the use of terms established by law.

Nevertheless, when defining procurement as public, some aspects are considered: presence of public interest, organization of public authority and engagement of public law education in procurement activities.

According to L.M. Pakhomova, for a long period of time the term “public procurement” has not been associated with legislation on public procurement but was mainly used in civil legislation in the context of public auctions. Russia’s accession to the WTO predetermined the need to adopt documents regulating the concept of “government procurement” — primary in relation to public procurement, the concept of which was formulated in the optional agreement on government procurement (Pakhomova, 2019:189). Nevertheless, bringing the domestic procurement legislation in line with the requirements of international law contributed to formalizing public procurement and using this term in academic writing. In general, we note that quite a lot of modern legal scholars prefer using the concept “public procurement” (Kirpichev, 2021; Rodionova, 2020; Agapova & Belyayeva, 2020).

From the point of view of K.A. Pisenko, the federal law On the Contractual System in the Area of Procurement of Goods, Works and Services for Meeting State and Municipal Needs adopted in 2013 can be interpreted as a law on public procurement, which indicates the relevance of this concept (Pisenko, 2013).

Experts in the field of business law consider public procurement as procurement conducted publicly among an indefinite circle of potential participants using special electronic platforms; they classify public procurement into state (municipal), corporate and others (Gubin, 2020:477—478).

According to a number of experts, such understanding of public procurement is not entirely correct, since it indicates only the public nature of these purchases. L.M. Pakhomova suggests focusing on the targeted nature of procurement, that is, the conduct of competitive and non-competitive procurement procedures by state and municipal customers in the interests of the whole society and the state (Pakhomova, 2019:196—197).

From our point of view, the most correct way to characterize procurement activities is to use the term “публичные закупки” (public procurement), since this concept indicates implementation of public interest financed from state and local budgets.

It should be borne in mind that after the amendments introduced in the framework of improving regulation of certain issues of organization and functioning of public power⁹ in March 2020, the Constitution of the Russian Federation has legally formalized the

⁹ The Law of the Russian Federation on the Amendment to the Constitution of the Russian Federation No. 1-FKZ of 14.03.2020 On Improving the Regulation of Certain Aspects of the Organization and Functioning of Public Authority. Collection of Laws of the Russian Federation. 2020. No. 11. Article 1416.

concept of “public power”; it defines the term as a system consisting of local self-government bodies and state authorities that interact to effectively solve tasks and functions in the interests of population of the relevant territories.¹⁰

It is important that academic society has substantiated that a public law entity entering into contractual relations with counterparties as a special subject of civil law relations performing social functions acts as a party to the state contract (Andreeva, 1999; Andreeva, 2016:77).

Thus, public procurement should be understood as a system of legal relations where one party is an authorized representative of public authority who purchases goods, works and services at the expense of the relevant budget in order to realize public interest.

Features and main functions of public procurement

Summarizing the presented approaches to the concept of procurement, it is essential to outline its characteristic features:

- one party is the state or municipal entity represented by authorized representatives of public authorities (officials responsible for financial support and implementation of public procurement), as well as legal entities receiving budgetary funds for implementing public needs for goods, works and services,
- the source of financing is the funds of the state or municipal budget,
- the purpose of procurement is to realize the public interest expressed in the public need for goods, works and services,
- it is aimed at efficient spending of budget funds.

The importance of public procurement for society is manifested in the functions that they implement as an instrument of state regulation of the economy. The most significant, in our opinion, are the following: social, regulatory, reproductive, innovative, stimulating and cost optimizing.

The social function of public procurement is relative since the Russian Federation is a social state, and, therefore, it is necessary to maintain social stability by creating objects of social significance, as well as new jobs in regions with an unfavorable economic and industrial conditions especially during crisis, solving public problems and stimulating individual economic sectors through involving various segments of the population in the labor process. Through public procurement, goods are purchased to provide and support socially vulnerable groups of population.

The regulatory function of public procurement is substantially similar to the regulatory function of finance since it is expressed in the effective management of public expenditures, their most rational spending through indirect regulation of pricing and pricing policy by means of public procurement. It is expressed by granting the subjects of public authority the rule-making powers in the field of public procurement. It manifests itself both in adoption of subordinate regulatory legal acts specifying the processes of implementation and financial support of public procurement, and formation of mandatory instructions for customers, including due reporting.

¹⁰ Article 133 of the Constitution of the Russian Federation (adopted at national voting on 12.12.1993 with amendments approved during the all-Russian vote on 01.07.2020). Available at: <http://www.pravo.gov.ru/> [Accessed 30th July 2022].

The reproductive function of public procurement intersects with innovation since it allows not only to satisfy the public need of the state for goods, works and services necessary for its functioning, but also provides an opportunity to ensure conditions for national production by stimulating purchases of innovative, high-tech, unique and experimental products (Smotritskaya & Chernykh, 2016:140—141).

The special importance of the innovative function of public procurement is highlighted by I.I. Smotritskaya and S.I. Chernykh who argue that new technologies promote economic modernization of the state since public procurement contributes to the budget financing the innovative technologies (Smotritskaya & Chernykh, 2010:112—113). A number of Russian researchers who believe that public procurement is a complex innovation system also share such position. (Kolmykova, Merzlyakova & Artemyev, 2016; Kolmykova & Astapenko, 2017; Kolmykova, Alpeeva & Semenikhina, 2018:246).

The stimulating function of public procurement can be considered both within the regulatory framework and as an independent function that provides benefits and preferences in procurement to individual economic entities (for example: national producers, small business entities, socially oriented organizations, institutions of the penal enforcement system, etc.). Benefits and preferences are applied simultaneously with the establishment of restrictions and prohibitions on the purchase of products manufactured by foreign countries whose actions are defined as unfriendly towards the Russian Federation.

The cost optimization function is manifested in the ability to ensure the most appropriate use of available public funds allocated for the purchase of goods, works and services. Through government orders, it is possible to influence the pricing dynamics of their certain types. S.A. Cheremukhin pays great attention to this function, pointing out that public procurement is necessary for the state to perform certain tasks: to optimize expenditures of state and municipal budget funds, to minimize uncontrolled costs, etc. (Cheremukhin, 2010:33).

Types of legal relations in public procurement

Considering public procurement as a system of legal relations, it should be noted that it is regulated by the norms of financial law, administrative law and civil law.

Earlier, when considering the model structure of the state order, the essence of which is expressed by the content and specifics of public relations arising throughout all its sequentially related stages, we focused on the administrative and legal regulation of relations aimed primarily at protecting the public rights and legitimate interests of individuals entering into legal relations with public authorities in this sphere (Kikavets, 2010). At the same time, we highlighted the main challenge — insufficient regulation of planning and forming state orders with excessive procedural regulation.

From our point of view, the relations arising in the process of planning public needs, formation, distribution and redistribution of financial resources are governed by the rules of financial law, whereas planning of public procurement and preparation of necessary information and documentation for competitive and non—competitive procurement are

governed by the rules of administrative law. We would rather refer such relations to managerial intra-apparatus.

From our point of view the relations that arise between subjects of primarily governmental executive and administrative activities (authorized representatives of public authorities) and private individuals (procurement participants) in the process of determining the supplier (contractor) should be governed by administrative law, and the performance of contractual obligations and their payment should be regulated not only by the norms of civil, but also financial and administrative law. Implementation of all types of control in public procurement is subject to the norms of administrative and financial law. Thus, financial, administrative and civil laws are involved in regulating relations regarding public procurement.

Subjects of legal relations in public procurement

Let us look at the subjects of legal relations in public procurement. In accordance with Law No. 44-FZ, subjects of public procurement involve customers, including state and municipal, customer's contract service or contract manager, procurement commission, suppliers (contractors), including small business entities, socially oriented non-profit organizations, institutions and enterprises of the penitentiary system and enterprises of disabled people, electronic trading platforms and operators of electronic trading platforms, executive authorities empowered to control and regulate the contract system in the field of procurement, authorized bodies and organizations, specialized organizations, experts and expert organizations, banks and credit organizations.

Given the variety of subjects, it is essential to systematize them. We can classify them into three main groups; classification is based on their functionality and actions regulated by the rules of law, which are implemented at each of the successive stages of public procurement such as planning, determining the supplier (contractor), concluding, amending, executing (terminating) of contract, disposing the received benefit (for life cycle contracts).

Thus, the main subjects of public procurement, which will be discussed in more detail further on, include authorized representatives of public authorities, economic entities and derived entities.

Authorized representatives of public authorities involve entities that finance public procurement, entities authorized to exercise control and regulation of public procurement, entities authorized to centralize procurement and conduct joint bidding (authorized bodies and organizations), customers (chief managers and managers of budget funds, recipients of budget funds, budgetary and autonomous institutions, as well as state corporations directly specified in regulatory legal acts).

Economic entities or procurement participants at the stage of the competitive procurement procedure, and contractors or suppliers at the stage of fulfilling a contractual obligation form another category. In addition to legal entities, and individuals including individual entrepreneurs, small business entities and socially oriented public organizations, institutions and enterprises of the penitentiary system, organizations (societies) of the disabled are also included in this category forming a separate group.

To derivative entities we refer banks and credit organizations, electronic trading platforms and specialized organizations. We believe that the presence of these entities and their actions in public procurement invariably entail additional (indirect) budget expenses since they constitute a significant share of transaction costs, both of the customer and the business entity, thus increasing the final cost of goods, works and services. The costs of the customer involve the costs of equipping the workplaces of contract service employees and managers, members of the procurement commission, including the costs of their additional professional education, etc. The costs of economic entities involve expenses for interim measures (applications, contracts, guarantee obligations), operation of electronic signature, opening and maintaining special accounts, payment for services of electronic trading platform, administrative and judicial protection of violated rights and legitimate interests and some others.

Below is a graph featuring legal relations in public procurement.

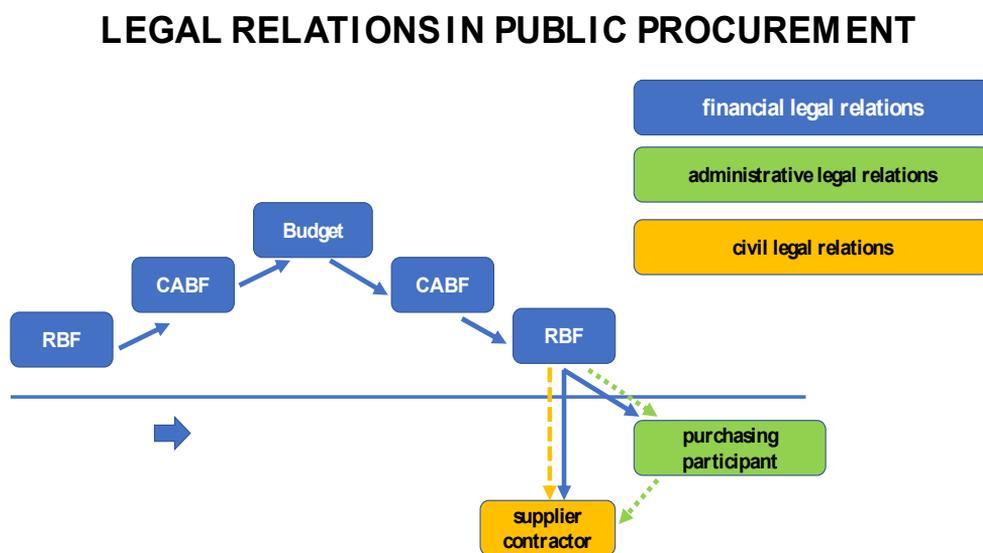


Figure 1. Legal relations in public procurement

Organizational legal relations between authorized representatives of public authorities (customer — recipient of budget funds — RBF) — authority (chief administrator of budget funds — CABF) as part of implementing budget process are mainly regulated by the norms of financial law. The legal relations formed between the authorized representative of the public authority (the customer) and the procurement participants, other subjects of the contract system interested in the process of implementing competitive and non-competitive procurement are regulated by the norms of administrative law. Contractual obligations are regulated mainly by the norms of civil law.

The content of the administrative and legal regulation of public procurement consists in adopting, adjusting and applying of legal norms by public authorities through establishing uniform rules, rights and obligations of subjects of public procurement. In

this case, rights can be considered as possible behavior, and obligations as necessary behavior of subjects of the public procurement. At the same time, these subjective rights and legal obligations are necessarily provided with state protection and possibility to apply administrative sanctions.

Public procurement regulation under the norms of administrative law helps to solve the administrative tasks of public authorities in terms of determining the public need followed by planning the procedure for its provision through legislative consolidation and realization of administrative rights and legal obligations by subjects of public procurement. Administrative and legal regulation not only establishes the most appropriate behavior of the subjects of this sphere but also guarantees state assistance, support and protection in order to achieve the desired result.

Taking into account the foregoing, regulation of public procurement by the norms of administrative law allows to create a legal mechanism for public authorities to develop this sphere in the interests of the whole society and each of its members, to ensure freedom of economic activity, growth of public production and development of fair competition and small business, to combat corruption, to strengthen economy and defense potential of the country.

Results

The analysis of lawmaking and law enforcement in public procurement has shown the strict administration of the counterparty selection process, which does not fully take into account the financial component of the process of ensuring public interest, including transaction costs of key procurement entities (Kikavets, 2020).

Legal relations regulated by financial law, despite the strife, have a pronounced power-property character, since they provide public interests (Karaseva, 2000:92; Karaseva, 2001:94; Zhuravleva, 2013:63—71). Consequently, the quintessence of financial and legal relations is the public interest, for which the public authority allocates funds and establishes the procedure for implementing public procurement.

In order to achieve the most effective result, the public authority constructs norms that contain various degrees of industry identification. Sometimes the same normative act can be attributed to different branches of law to varying degrees. On the other hand, in order to ensure effective regulation of public relations in general, and regulatory functions of the branch of law, in particular, it is essential to attract norms of a different industry affiliation. The most acute and contradictory approaches are formed in the sphere of interaction between public and private law since they are formed on different ways of influencing regulated public relations (Tsindeliani, 2012:364—379). Financial relations, being not only initiated, but also directly generated by the state as a special participant in civil turnover, are legally governed by the entire complex of funds held by public authorities, not only under financial law (Zapolsky, 2017:14).

Power and property relations are implemented both by legislative authorities (lawmaking, consideration and approval of the budget, reporting on its execution), and executive authorities (drafting the budget and reporting on budget execution, approving the state assignment to subordinate budgetary institutions). The position of the strong party provides a unilateral procedure for such implementation between the state body and

subordinate budgetary, state—owned and autonomous institutions, forming a linear dependence of the subjects of budgetary legal relations (the chief administrator of budgetary funds — the administrator of budgetary funds — the recipient of budgetary funds).

Pointing to the dialectical relationship between the treasury and the interests of society, V.A. Lebedev drew attention to the fact that the main task of finance as a science is indispensable reconciliation of the interests of the treasury with the interests of society: “if the people are rich — they can give a lot; if the treasury is rich — it can do a lot to improve the national economy” (Lebedev, 1889:50—51).

The priority of regulating public procurement by the norms of public law (administrative and financial) is justified by its original essence: financing of public needs, determined in accordance with the functions and powers of public authorities, is carried out at the expense of the relevant budgets and state extra-budgetary funds. The volume of public procurement depends entirely and directly on the planned budget expenditures (Fig. 2, 3).

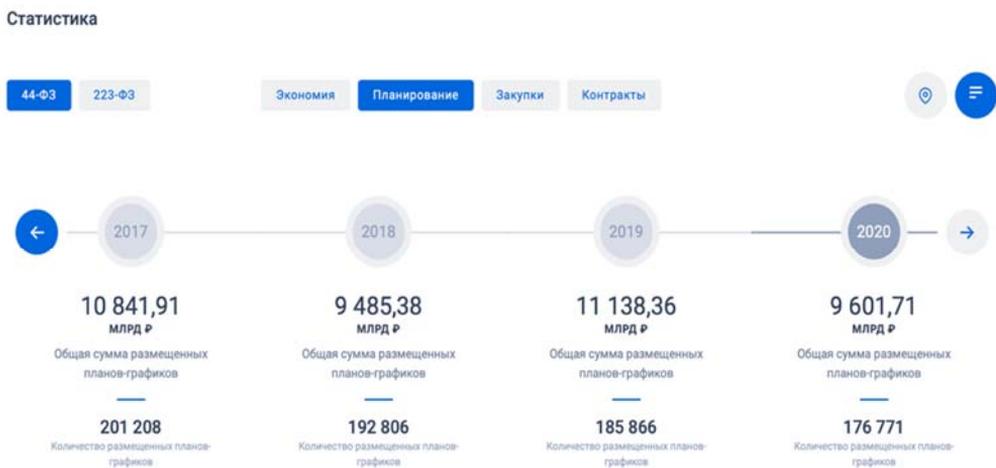


Figure 2. Amounts of planned expenditures of the federal budget, budgets of constituent entities of the Russian Federation, municipal budgets (statistical data of the Unified Information System. Available at: <https://zakupki.gov.ru/epz/main/public/home.html>). [Accessed 30th July 2022].

P.M. Godme asserts that “public finances are the part of state property that is subject to special legal regulation. The flexibility and turnover of this part of the property and associated possibility of abuse require that public finances be regulated by special legal norms” (Godme, 1978:38).

One of the actions of the Government of the Russian Federation in relation to the financial support of public procurement is the resolution on temporary (until 31.12.2020) permission to advance obligations (up to 50% of the contract price) for construction, reconstruction and overhaul of capital construction facilities¹¹.

¹¹ Decree of the Government of the Russian Federation No. 630 of 30.04.2020 On Amendments to the Decree of the Government of the Russian Federation No. 1803 of December 24, 2019 and on Suspension of Certain Provisions of Certain Acts of the Government of the Russian Federation. Legal reference system “ConsultantPlus”.

Статистика

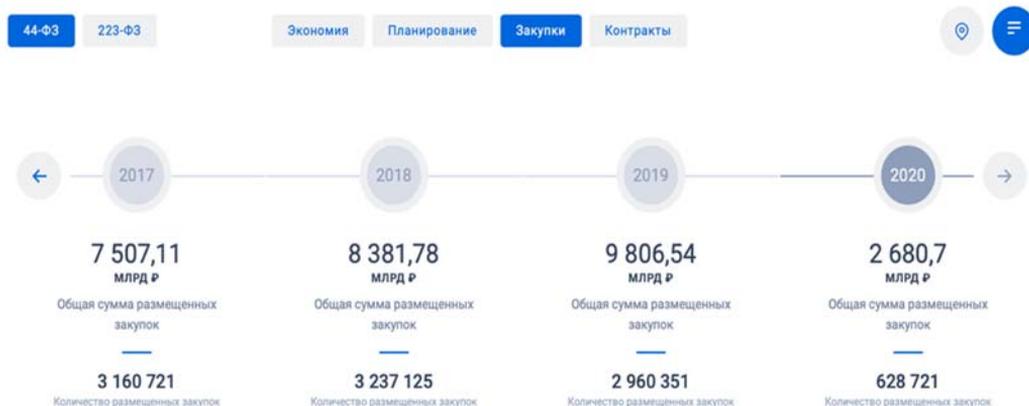


Figure 3. Amounts of expenses actually incurred by the federal budget, budgets of constituent entities of the Russian Federation, municipal budgets (statistical data of the Unified Information System. Available at: <https://zakupki.gov.ru/epz/main/public/home.html>). [Accessed 30th July 2022].

Administrative legal relations in public procurement, in addition to determining the public need for goods, works and services within the framework of solving administrative tasks (including strategic planning, national development, etc.) establish uniform rules, rights and obligations of subjects of the contract system, among which:

- procedure and timing of posting the necessary procurement information in the Unified Information System (UIS),
- functionality of the contract service (contract manager) of the customer, the procurement commission,
- competitive and non-competitive procedures for selecting a supplier (contractor),
- establishment of preferences, restrictions, prohibitions in the process of public procurement,
- requirements for procurement participants, for the description of the object of purchase,
- conflict of interest and anti-corruption measures,
- ability of the customer and the counterparty to change or terminate a contractual obligation,
- administrative (procedural) and departmental control,
- antimonopoly requirements for public procurement,
- procedure for protecting rights and legitimate interests in public procurement.

Financial and legal relations in public procurement, from our point of view, fully correspond to the position of M.A. Gurvich, who previously identified the following groups of relations regulated by financial law:

- arising in connection with the budget process,

- arising with the establishment of the competence of state authorities and management bodies for distribution of national revenues and the state budget,
- arising with the expenditure of funds by state bodies,
- arising with voluntary attracting funds of organizations and citizens by the state,
- arising with regulation of relations within the unified system of financial and credit relations,
- arising with financial control implementation (Gurvich, 1952).

Civil law relations arising in public procurement are the result of consistent actions on the part of the customer, such as:

- identifying the public needs for goods, works, and services for the purposes of budget appropriation,
- drafting the roadmap, procurement schedule with justification and cost assessment of the need, placement in the EIS with reference to the Electronic budget system,
- carrying out the procedure for selecting a supplier (contractor) or concluding a contract with a single supplier (contractor).

Thus, legal relations in public procurement regulated by the norms of civil law (contractual relations) arise exclusively after relations regulated by the norms of public law (administrative and financial).

I.A. Tsindeliani emphasizes that “the interconnectedness and interpenetration of the norms of public and private law generate development of the convergence process as a sphere aimed at harmonization of legal instruments. The convergence process manifests itself in specific forms, namely in regulatory legal acts. Often the legislator follows the path of direct borrowing of private law structures to regulate relations in the field of public finance. For example, securing obligations involve such civil law institutions as surety, pledge and bank guarantee” (Tsindeliani, 2012:364—379).

Such approach demonstrates correlation of the norms of public and private law, including their interpenetration. Thus, E.D. Sokolova believes that civil law norms should play a secondary role in the process of regulating financial and legal relations (Sokolova, 2006:105). This is reflected both in regulatory acts (e.g., Article 239 Budget Immunity of the Budgetary Code of the Russian Federation) and in judicial acts¹².

It is worth noting that the legislator is gradually strengthening the priority of public law, for example, by removing the provision of Article 239 concerning underfunding and compensation of losses to individuals and legal entities as a result of illegal actions (inaction) of state bodies and their officials¹³ from the Budgetary Code.

¹² Resolution of the Constitutional Court of the Russian Federation No. 8-P of 14.07.2005 On Checking Constitutionality of Certain Provisions of Federal Laws on the Federal Budget for 2003, for 2004 and for 2005 and Decree of the Government of the Russian Federation On the Procedure for the Execution by the Ministry of Finance of the Russian Federation of Judicial Acts on Claims to the Treasury of the Russian Federation for Compensation for Damage Caused by Illegal Actions (Inaction) of Public Authorities or Officials of Public Authorities in Connection with Complaints of Citizens E.D. Zhukhovitsky, I.G. Poima, A.V. Poniatovsky, A.E. Cheslavsky and Khabarovsk Power, JSC. Bulletin of the Constitutional Court of the Russian Federation. 2005. No. 4.

¹³ Federal Law No. 197-FZ of 27.11.2005 On Amendments to the Budgetary Code of the Russian Federation, the Civil Procedure Code of the Russian Federation, the Arbitration Procedure Code of the Russian Federation

However, there is also an opposite point of view, which is expressed by S.V. Zapolsky, who believes that the use of civil law institutions in tax law should be a priority (Zapolsky, 2008:27).

On the one hand, the priority of civil law relations seems to guarantee equality of the parties in fulfilling contractual obligations and responsibilities, on the other hand, it does not contribute to the full-fledged timely provision of public interest by satisfying public needs for goods, works, and services, while increasing the risks of possible financial losses for the budget. Moreover, freedom of contract, which implements the principles of equality of the parties, openness, etc., also entails certain limits (imperative restrictions), such as restrictions within the framework of the legislation of the Russian Federation, the need to protect the “weaker party”, etc.

Conclusion

The study of the concept, content and essence of public procurement allows to determine that the term “public procurement” is the best to be used in terms of the norms of the Constitution of the Russian Federation and implementation of public interest funded from state and local budgets.

Public procurement should be understood as a system of legal relations where one party is an authorized representative of public authority who purchases goods, works, and services at the expense of the relevant budget in order to realize public interest.

The research highlights characteristic features of public procurement and its most significant functions; they are social, regulatory, reproductive, innovative, stimulating, and cost optimizing.

The classification of subjects of public procurement has been carried out by dividing them into authorized representatives of public authorities, economic and derivative entities. At the same time, in order to increase the efficiency of budget spending and optimize the management and financial support of public procurement, we recommend abolishing a number of derivative entities and transfer their functions to entities that provide financial support for public procurement.

Public procurement is regulated by the rules of financial law, administrative law and civil law. The priority of public law norms seems justified due to the fact that the volume of public procurement, as well as its financing, entirely and directly depends on the solution of administrative tasks to determine the public needs for goods, works, and services, as well as on planned budget expenditures. Moreover, legal relations in public procurement regulated by the norms of civil law (contractual relations) arise exclusively after the relations governed by the norms of public law.

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