

December 2018

DIGEST
of legal regulation of procurement
in Russian legislation

Brief news

We bring to your attention the next digest of legal regulation of procurement in Russian legislation for December 2018, prepared by the Law Firm “BRACE”

Amendments to the Federal Law of April 05, 2013 N 44-FZ “On the contract system in the field of procurement of goods, works, services for state and municipal needs” were approved. The changes relate to the enforcement of the contract, the possibility of changing the contract price and making procurements from a single supplier. Cases are allowed when it is possible to change the contract price by agreement of the parties.

Administrative and criminal liability measures have been introduced for the giving of a deliberately false expert opinion in the procurement of goods, works, services for state and municipal needs.

The Government of the Russia has adopted resolutions that approve the procedure and rules for maintaining the register of legal entities that are subject to the Federal Law of July 18, 2011 N 223-FZ “On the procurement of goods, works, services by certain types of legal entities”, and also establishes the specifics of document circulation during tender, closed auction, closed request for quotations, closed request for proposals or other competitive procurement.

The Federal Treasury has developed a draft order approving the forms and procedures for confirming the delivery of goods, performing works, rendering services, sending information on identified deficiencies in the supply of goods, performing works, rendering services, and confirming the elimination of identified deficiencies in the supply of goods, performance of works, rendering services in the implementation of centralized procurement of software for budget accounting.

Among legislative initiatives should be noted a proposal to establish additional requirements for procurement participants, the subject of which is the provision of services by private security organizations for the protection of objects and (or) property, as well as the provision of intra-facility and access control at facilities on the territory of which there are more than fifty people at the same time, and for which mandatory for meet the requirements for anti-terrorism security.

1. Laws, by-laws, legal news

1.1. Important changes were adopted to the Federal Law of 05 April 2013 N 44-FZ “On the contract system in the field of procurement of goods, works and services for state and municipal needs” regarding the enforcement of the contract, the possibility of changing the contract price and purchasing from a single supplier.

Federal Law of December 27, 2018 N 502-FZ “On Amendments to the Federal Law “On the contract system in the field of procurement of goods, works, services for state and municipal needs”

This legal act introduced amendments to the Federal Law of 05 April 2013 N 44-FZ “On the contract system in the field of procurement of goods, works, services for state and municipal needs” (hereinafter – the Law on the contract system) and settled the case of recall in accordance with the legislation of the Russian Federation from the bank that provided the bank guarantee as a security for the execution of the contract, the license to conduct banking operations. In this situation, the supplier undertakes to provide new security for the execution of the contract no later than one month from the date of proper notification by the customer of the supplier of the need to provide appropriate security. In this case, if the contract provides for security, the customer is obliged to include in the contract the above conditions.

The list of cases when the procurement can be made from a single supplier is supplemented by the case of providing services for the production of blank documents certifying the identity of a citizen of Russia on the territory of Russia and outside the territory of Russia, certifying the identity of a foreign citizen or stateless person, forms of certificates of state registration of acts civil status, forms of temporary documents certifying the identity of a citizen of the Russian Federation and guides him right of entry (returning) to the Russian Federation, as well as forms of documents for entry into the Russian Federation and exit from the Russian Federation, foreign citizens and persons without citizenship.

It is important to note that now, before October 1, 2019, within the framework of the contract period, it is allowed by agreement of the parties to change the price of the contract concluded until January 1, 2019 to increase the value-added tax rate for goods, works, services, which are accepted after January 01, 2019, if the increased amount of the value added tax rate is not stipulated by the terms of the contract.

1.2. Amendments have been made to the Law on the contract system in terms of the procedure for conducting procurements from a single supplier, as defined by a decree or decree of the President of Russia, effective on March 28, 2019

Federal Law of December 27, 2018 N 518-FZ “On Amendment to Article 93 of the Federal Law “On the contract system in the field of procurement of goods, works, services for state and municipal needs”

According to the adopted changes in the implementation of procurement for state needs from a single supplier, determined by decree or order of the President of the Russian Federation, the decree or order should include the obligation of a single supplier to fulfill its contractual obligations personally or the ability to involve subcontractors, subcontractors and contractors to fulfill the contract sole supplier of their obligations under the contract in person. Now the procedure for drafting such legal acts and instructions and a list of documents attached to the preparation of these projects, including the justification of the contract price determined by the legal act of the President of the Russia.

1.3. Amendments have been made to Article 41 of the Law on the contract system regarding the execution of examination results

Federal Law of 27.12.2018 N 512-FZ “On Amendments to Articles 41 and 94 of the Federal Law “On the contract system in the field of procurement of goods, works, services for state and municipal needs”

For the introduction of uniform requirements for the formulation of the results of examinations in the field of procurement, a requirement is established that the results of the examination are issued in the form of a conclusion, which is signed by an expert authorized by the representative of the expert organization and must be objective, reasonable and comply with the legislation of Russia. In connection with the introduction of changes to this article, similar provisions contained in Article 94 of the Law on the contract system are excluded.

Recall that in accordance with Article 58 of the Law on the contract system during tenders in order to ensure expert evaluation of tender documentation, applications for participation in tenders carried out during the prequalification selection of tender participants, conformity assessment of tender participants to additional requirements, the customer has the right to involve experts and expert organizations.

1.4. Established administrative responsibility for a false expert opinion in the field of public procurement.

Federal Law of 27.12.2018 N 510-FZ “On Amendments to the Code of administrative offences of the Russian Federation”

Article 7.32.6 is introduced into the Code of administrative offences of the Russian Federation, which establishes the penalty of imposing an administrative fine on officials in the amount of thirty thousand to fifty thousand rubles or disqualification for six months to one year; for legal entities - from one hundred thousand to one hundred and fifty thousand rubles for a summer residence by an expert and / or expert organization authorized by a representative of an expert organization of a deliberately false expert opinion in the field of procurement for state and municipal needs. Administrative responsibility is imposed when the act does not contain a criminal offense.

1.5. Criminal liability has been introduced for deliberately false expert opinion in the procurement of goods, works, services for state and municipal needs.

Federal Law of 27.12.2018 N 520-FZ “On Amendments to the Criminal Code of the Russian Federation and Article 151 of the Criminal Procedure Code of the Russian Federation”

The main qualifying sign of a crime is causing major damage (amounting to more than 2 250 000 rubles). Such an act shall be punished with a fine of up to three hundred thousand rubles, or in the amount of the salary or other income of the convicted person for a period of up to one year with the deprivation of the right to occupy certain positions or engage in certain activities for up to three years or without such, or forced labor for up to one year with the deprivation of the right to hold certain positions or engage in certain activities for up to three years without it, or imprisonment for up to one year with deprivation of the right to occupy certain positions or engage in certain activities for up to three years or without it. In this case, more severe punishment is provided for if the same act negligently caused serious bodily harm or death, or the death of two or more persons.

1.6. The Government of the Russian Federation approved the procedure and rules for maintaining the register of legal entities to which the Federal Law of July 18, 2011 N 223-FZ “On Procurement of Goods, Work, and Services by Certain Types of Legal Entities” applies, effective from March 01, 2019.

Decree of the Government of the Russian Federation of December 28, 2018 N 1711 “On the procedure for keeping the register of legal entities specified in part 2 of article 1 of the Federal Law “On procurement of goods, work, services by certain types of legal entities” registered in the unified information system in the field of procurement of goods of works and services to meet state and municipal needs” (together with the “Rules for maintaining the register of legal entities referred to in paragraph 2 of Article 1 of the Federal Law “On the procurement of goods, works, services by certain types of legal entities”, in the unified information system in the field of procurement of goods, works, services for state and municipal needs”)

The duty to keep a register of customers is assigned to the Federal Treasury. Such a register is maintained electronically by creating or modifying registry entries that include information and documents generated, placed in a single information system and signed by a reinforced qualified electronic signature authorized to place information and documents of the customer in accordance with the order of registration of customers. The Federal Treasury is instructed to ensure the inclusion in the register of legal entities registered before March 01, 2019 in a unified information system in the field of procurement of goods, works, and services for state and municipal needs by March 15, 2019.

1.7. The Government of the Russian Federation has established the specifics of document circulation during a closed tender, a closed auction, a closed request for quotations, a closed request for proposals or another competitive procurement, which will take effect on January 04, 2019.

Decree of the Government of the Russian Federation of December 25, 2018 N 1663 “On Approval of the Regulation on the features of document circulation in closed competitive procurements in electronic form and accreditation procedure on electronic platforms for closed competitive procurements”

The specified decree of the Government of the Russian Federation establishes that all documents and information related to the implementation of closed electronic procurement are sent by the customer, the procurement participant and the site operator in the form of electronic documents using the site operator’s hardware and software.

Participation in closed electronic procurement is possible only in the case of accreditation at the site, as well as the cryptographic connection of the site to the network, if such procurement involves the transfer of information constituting state secrets. Participation in a procurement electronic procurement participant that is not accredited at the site is not allowed.

When making a closed electronic procurement the customer sends an invitation to the site operator to take part in the closed electronic procurement to procurement participants who have received accreditation at the site, as well as a list of procurement participants who have received such accreditation.

Within one hour of receiving the invitation, the site operator sends such an invitation to the procurement participants.

In order to familiarize with the documentation on the closed electronic procurement, the customer simultaneously sends an invitation to the operator of the site to take part in the closed

electronic procurement to such an operator the documentation on the closed electronic procurement. Any procurement participant who received the invitation has the right to send a request to the site operator for the submission of documentation on the closed electronic procurement.

A procurement participant is entitled to apply for participation in a closed electronic procurement at any time from the moment of sending the invitation. At the same time, the site operator is obliged to assign an identification number to this application and send a notification to the procurement participant that submitted the specified application, indicating its receipt with an indication of the assigned number, within one hour from the receipt of the application.

The contract based on the results of closed electronic procurement is concluded using the software and hardware of the site and must be signed with a reinforced qualified electronic signature. In the event of disagreement on the draft contract submitted by the customer, the procurement participant draws up a protocol of disagreements indicating remarks to the provisions of the draft contract that do not correspond to the closed electronic procurement documentation and its application, and the relevant provisions of these documents.

2. Drafts of legal acts

2.1. The Federal Treasury has developed a draft order approving the forms and procedures for confirming the delivery of goods, performing work (their results), providing services, sending information on identified deficiencies in the supply of goods, performing works (their results), providing services, and confirming the elimination of the identified deficiencies in the supply of goods, the performance of work (their results), the provision of services in the implementation of centralized procurement of software for budget accounting.

The draft order of the Federal Treasury "On approving the forms and procedure for confirming the delivery of goods, performing work (their results), providing services, sending information about the identified deficiencies in the supply of goods, performing works (their results), providing services, and confirming the elimination of the identified deficiencies in delivery of goods, performance of work (their results), provision of services in the implementation of centralized procurement of software for budget accounting"

The draft order establishes the forms for confirming to the Federal Treasury the supply of goods, the performance of works (their results), the provision of services, information on the identified deficiencies in the supply of goods, the performance of works (their results), the provision of services, and confirmation of the elimination of the identified deficiencies in the supply of goods (their results), the provision of services in the implementation of centralized procurement of software for budget accounting, to be applied by federal authorities and their subordinate state institutions, as well as the appropriate procedure for their interaction with the Federal Treasury.

Federal state institutions send them to the Federal Treasury information on the confirmation of the delivery of goods, the performance of works (their results) within 5 (five) days from the date of delivery of goods, completion of works, provision of services or the end of a separate stage of delivery of goods, performance of works, rendering services.

The form must be filled out on paper. The completed form is signed by the official and sent on paper or through the interdepartmental electronic document management system.

2.2. The Government of Russia proposes to supplement the requirements for participants in the procurement of certain types of goods, works, services, cases of attributing goods, works, services to goods, works, services that, due to their technical and (or)

technological complexity, innovative, high-tech or specialized nature, are able to supply, execute, render only suppliers (contractors, performers) having the required qualification level, as well as documents confirming the compliance of the procurement participants with the specified additional requirements.

Draft Resolution of the Government of the Russian Federation on Amendments to Annex N 1 to the Resolution of the Government of the Russian Federation N 99 of February 4, 2015 "On Establishing Additional Requirements for participants in the procurement of certain types of goods, works, services, cases of reference of goods, works, services to goods, works, services that, due to their technical and (or) technological complexity, innovative, high-tech or specialized nature, are capable of supplying, executing, rendering only suppliers (contractors, performers), which have the necessary qualifications, as well as documents confirming the compliance of the procurement participants with the specified additional requirements"

The project proposes the following additional requirements for the provision of services by private security organizations for the protection of objects and (or) property, as well as the provision of intra-facility and access control at facilities in which more than fifty people are located at the same time, and for which mandatory anti-terrorism security. Such as: experience in executing (taking into account succession) contracts (contracts) for the provision of security services for facilities and / or property, as well as for ensuring intra-facility and access control at facilities for the last 3 years prior to the filing date of the application for participation in procurement. At the same time, the total value of previously executed contracts (agreements) is at least 20 percent of the initial (maximum) contract price, the contract (lot price), for the right to conclude which procurement is made.

2.3. Public discussions on the draft amendments to the procedure for amending the Law on the contract system proposed by the Ministry of Finance of Russia were completed.

Draft Federal Law "On Amendments to the Federal Law of April 5, 2013 N 44-FZ "On the contractual system in the field of procurement of goods, work, services for state and municipal needs"

It is proposed to introduce a norm according to which Federal laws amending this Federal Law in part of the provisions of chapter 2, 3 in the introduction of new ways of identifying a supplier (contractor, performer), and also chapters 4 and 5 (regulating procurement monitoring and control in the field of procurement) of the Law on the contract system shall come into force on January 1 of the next fiscal year following the year of their adoption, except when they are adopted after October 1 of the current fiscal year, when such laws enter into effective from January 1 of the year following the next financial year. According to the explanatory note to the draft law, the purpose of the proposed changes is to ensure systematic preparation of the procurement system participants in the field of procurement to implement changes in planning, regulation, introducing new methods for determining the supplier (contractor, performer), monitoring, auditing and controlling procurement, as well as ensuring the possibility of timely development of the unified procurement information system functionality.

2.4. Some ministries and departments have developed draft regulations for the implementation of departmental control over compliance with the requirements of the Federal Law of July 18, 2011 N 223-FZ "On the procurement of goods, works, services by certain types of legal entities"

According to the official website of the federal portal of draft legal acts, such regulations are posted by the Main Directorate for Special Programs of the President of Russia, the Federal Tax Service of the Russia, the Federal Penitentiary Service of Russia, the Ministry of Industry and Trade of the Russia, the Ministry of Internal Affairs of the Russia, etc.

3. Judicial and law enforcement practice

3.1. The Supreme Court of the Russia explained the position regarding the arbitration clause included in agreements concluded on the basis of the Federal Law “On the procurement of goods, works, services by certain types of legal entities” dated July 18, 2011 N 223-FZ.

Review of the practice of courts hearing cases related to the performance of assistance and control functions in relation to arbitration courts and international commercial arbitration, approved by the Presidium of the Supreme Court of the Russia on December 26, 2018

According to Part 1 of Art. 2 of the Federal Law “On the procurement of goods, works, services by certain types of legal entities” of July 18, 2011 N 223-FZ. The legal basis for the procurement of goods, works, services, except for the law and procurement rules approved in accordance with the provisions of this law, is the Constitution of Russia, the Civil Code of the Russia, other federal laws and other regulatory legal acts of the Russia.

Thus, the totality of these signs indicates that disputes arising from contracts concluded as a result of procurement under the Federal Law "On the procurement of goods, works, services by certain types of legal entities" dated July 18, 2011 N 223-FZ, are generally civil law.

By virtue of paragraph 2 of Art. 1 of the Federal Law N 102-FZ of July 24, 2002 “On Arbitration Courts in the Russian Federation”, by agreement of the parties to the arbitration proceedings, any dispute arising from civil law relations could be referred to an arbitration court, unless otherwise provided by federal law.

At the same time, civil law relations may be complicated by the public element, and this fact, in turn, raises the question of the effect of such complication on the conclusions about the competence of the arbitration court. However, disputes arising from relations regulated by the legislation on the procurement of goods by certain types of legal entities are not specified in this list, there are no other laws enshrining the rules on the absence of competence of arbitration courts to consider such disputes, and they are not named as conditional to competence of arbitration courts.

The judiciary is entitled to establish a balance in relations in order to protect public order in the presence of an element of public order in the Russian Federation. There was no such element of public order of the Russian Federation as the impossibility of the arbitration court considering disputes arising from relations regulated by the Federal Law “On the procurement of goods, works, services by certain types of legal entities” of July 18, 2011 N 223-FZ, and no evidence of violation other elements of public order, for example, the cost of budget funds, the company has not submitted.

3.2. The Branch of the Federal Antimonopoly Service revealed violations in terms of designation by government customers of the percentage of involvement of small businesses in the execution of a state contract.

The decision of the Office of the Federal Antimonopoly Service of Russia dated November 23, 2018 in case N 18/44/105/1777, the Decision of the Office of the Federal Antimonopoly Service of Russia dated November 23, 2018 in case N 18/44/105/1791

The auction documentation contains, among other things, the following requirements for procurement participants: *“Mandatory involvement of subcontractors, co-contractors from among small businesses, socially-oriented non-profit organizations in the amount of 15% of the contract price”*. At the same time, the draft contract provides that: *“... the annual cost of the work must be at least 15% of the planned scope of work performed by the Contractor for the year”*.

In both decisions of the Office of the Federal Antimonopoly Service of the Russian Federation, it was concluded that these provisions do not allow to establish a specific amount of involvement in the execution of contracts of subcontractors, co-contractors from among small businesses, socially oriented non-profit organizations.