

October 2018

DIGEST
of legal regulation of procurement

Brief news

Amendments have been made that exclude relations connected with the acquisition of shares in the authorized (share) capital of business partnerships, companies and shares in share funds of production cooperatives, as well as joint investment activities carried out on the basis of an investment partnership agreement in the scope of the Federal Law of April 05, 2013 N 44-FZ.

Due to the changes made, the procurement from a single supplier can be carried out by a state or municipal scientific organization for an amount not exceeding 400 thousand rubles. At the same time, the annual volume of purchases that the customer is entitled to make on the basis of this paragraph should not exceed 50% of the total annual volume of customer purchases and should not be more than 25 million rubles.

The Ministry of Finance recommends that procurement participants familiarize themselves with information on the banks authorized to open special accounts, which electronic site operators are required to post on their websites no later than October 02, 2018.

Since October 22, 2018, the catalog of goods, works, services was replenished with a number of new positions.

The Government of the Russian Federation is proposing to toughen the responsibility for violating the requirements of the law when concluding contracts on state defense orders.

On October 09, 2018, the State Duma of the Russian Federation adopted in the first reading a draft law on amending the Law on the contract system in terms of establishing the requirements for expert opinion.

Public discussions are held on the Regulations for conducting departmental control in the field of procurement to meet federal needs by the Federal Bail Service of Russia and the Ministry of Construction of Russia.

1. Laws, by-laws, legal news

1.1. Officially, new types of relations are fixed, which are not covered by Federal Law N 44-FZ of April 5, 2013, and the procurement possibilities of a single supplier and relations that are not regulated by this law are specified.

Federal Law of 30.10.2018 N 391-FZ "On Amendments to Article 1 of the Federal Law "On Procurement of Goods, Work, Services by Certain Types of Legal Entities", Federal Law of October, 30, 2018 N 393-FZ "On Introducing Amendments to Article 93 Federal Law "On the contract system in the field of procurement of goods, works, services for state and municipal needs"

These Federal Laws establish that the Federal Law dated 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) does not apply to relations with the acquisition of shares in the authorized (share) capital of business partnerships, companies and shares in the share funds of production cooperatives, as well as joint investment activities carried out on the basis of an investment agreement partnership, providing for the return to the partner the value of his contribution to the total property of the partners (in cash). These changes actually confirmed the position of the Ministry of Economic Development of Russia, previously expressed in a letter dated May 27, 2016 N D28i-1376, containing explanations about the application of procurement legislation by participants of an investment partnership, according to which customers subject to the Law on a Contract System cannot be parties to an investment partnership agreement .

Due to the changes made, the procurement from a single supplier can be carried out by a state or municipal scientific organization for an amount not exceeding 400 thousand rubles. At the same time, the annual volume of purchases that the customer is entitled to make on the basis of this paragraph should not exceed 50% of the total annual volume of customer purchases and should not be more than 25 million rubles.

According to Article 5 of the Federal Law "On Science and State Scientific and Technical Policy" of August 23, 1996 N 127-FZ, a scientific organization is a legal entity, regardless of an organizational-legal form and form of ownership, public association of scientists engaged in scientific and (or) scientific and technical activities. Scientific organizations are recognized as a legal entity, regardless of the organizational and legal form and form of ownership, a public association of scientists engaged in scientific and (or) scientific and technical activities as their main activity. We believe that the above changes will have a positive impact on the activities of these organizations.

1.2. The Ministry of Finance of Russia has given a number of explanations regarding the commencement of operation of electronic platforms from October 01, 2018, the conduct of closed electronic procedures, and the introduction of security for applications for participation in procurement.

Information letter of the Ministry of Finance of Russia of October 02, 2018 N 24-06-08 / 70718

From October 01, 2018, electronic procedures whose implementation notices are posted after a specified date are conducted on electronic platforms whose operators are included in the list, which is the Annex to the Order of the Government of the Russian Federation of July 12, 2018 N 1447-r. The Government Decree approved the lists of operators of electronic platforms and specialized electronic platforms provided for by the Law on the contract system and the Federal Law of July 18, 2011 N 223-FZ "On procurement of goods, works, services by certain types of legal entities".

The Ministry of Finance of Russia notes that, despite informing the participants of the contract system about the need to conclude agreements on cooperation with each of the authorized banks in order for these banks to open special accounts, in some cases the actual information interaction is not carried out. However, the establishment of such an interaction is at the final stage.

In this information letter, recommendations are made to procurement participants to familiarize themselves with information on authorized banks, which operators of electronic platforms must post on their websites no later than October 2, 2018.

The Ministry of Finance additionally explains the rules on the rights and obligations of customers in terms of establishing the requirements for securing applications for participation in tenders and auctions held under the Law on the Contract System. In accordance with the Decree of the Government of the Russian Federation of 12.04.2018 N 439 "On Approval of the Initial (maximum) contract price, above which the customer is obliged to establish the requirement for securing applications for participation in tenders and auctions" the customer is obliged to establish the requirement for providing applications in tenders and auctions if the initial (maximum) contract price exceeds one million rubles. This draws attention to the fact that if the initial (maximum) price of the contract does not exceed the specified amount, the establishment of a requirement for the security of applications is a right and not a duty of the customer.

The information letter of the Ministry of Finance of Russia contains explanations that the use of closed electronic procedures until the Government of the Russian Federation establishes the order and peculiarities of the specifics of conducting closed electronic procedures.

1.3. Since October 22, 2018, the Catalog of goods, works, and services has been replenished.

Part 4 of Art. 23 of the Law on the Contract System establishes the obligation of customers to indicate the name of the object of purchase in accordance with the Catalog of goods, works, services in cases when this is established by this law.

The formation and maintenance of the Catalog of goods, works, services on the official website of the Unified Information System is provided by the Ministry of Finance of the Russian Federation or the Ministry of Finance for short.

October 22, 2018 on the official website of the Unified Information System, information was provided on replenishing the Catalog of goods, works, services with such items as: iodized salt; fresh eggs in shell; jam; jelly; refined sunflower oil; cocoa powder; black tea (fermented); processed vanilla; canned peas without vinegar or acetic acid (except ready-made vegetable dishes).

1.4. The Federal Antimonopoly Service of Russia drew attention to the need for customers to comply with the requirements of Articles 94 and 103 of the Law on the contract system.

Letter of the Federal Antimonopoly Service of Russia dated 03 October 2018 N SP / 79644/18 "On violations of the provisions of the Federal Law of 05.04.2013 N 44 – FZ "On the contractual system in the field of procurement of goods, works, services for state and municipal needs"

The controlling body informs that, according to the information of the Prosecutor General's Office of the Russian Federation, as a result of the control measures, numerous violations of the requirements of Articles 94, 103 of the Law on the Contract System were identified.

These violations were expressed in the non-posting in UIS of reports on the results of a separate stage of contract execution in the event that the subject of a contract is construction, reconstruction, overhaul of capital construction, preservation of cultural heritage objects or the

contract price exceeds one billion rubles. In addition, there were violations in terms of the direction or the late submission by customers to the federal executive body that performs law-enforcement functions in cash servicing the execution of the budgets of the budget system of the Russian Federation for information specified in paragraphs 1-7, 9, 12, 14 of part 2 of Article 103 of the Law on the contract system (to the specified information include: name of the customer; source of financing; definition of the supplier; date of summing up the results of the determination of the supplier; date concluded of the contract; the object of purchase; the price of the contract and the term of its execution, etc.).

This letter, the supervisory authority additionally draws attention to the need to comply with the requirements of the Law on the contract system and reports on the risks of administrative liability for the revealed facts of non-compliance with the statutory requirements.

1.5. The Treasury of Russia has published information on typical violations of the requirements of the Law on the contract system, identified in the framework of the control measures.

The Letter of the Treasury of Russia of October 08, 2018 N 07-04-05 / 21-21405 "On the Direction of summary information on the results of control measures"

The Federal Treasury in carrying out control measures in the financial and budgetary sphere revealed the following violations of the requirements for the procurement of goods, works, services:

- Lack of substantiation of the initial (maximum) contract price, non-compliance of the initial (maximum) contract price, which is included in the schedule to the initial (maximum) contract price in the justification, justification of the initial (maximum) contract price is based on analytical data, dated after the inclusion of the procurement in the schedule, technical justification errors were made.

- For the justification of the initial (maximum) contract price, the prices indicated in the contracts that are not executed or for which penalties are imposed, or the use of information about them indicated in the commercial offers that are not public offers.

- In violation of the requirements established by paragraph 2 of part 18 of article 22 of the Law on the contractual system, individual customers used information sources, including commercial offers, which are not public offers, to justify the initial (maximum) contract price.

- Some customers have not carried out an examination of the results of the execution of contracts.

- No penalties or fines have been accrued and no claims have been sent to suppliers (contractors, performers) for non-compliance with contractual deadlines or fines underestimated, which violates the requirements of parts 34, 6, 7 of Article 34 of the Law on the contract system.

- Acceptance of work performed (their results) that do not meet the conditions of contracts without issuing requirements for elimination of these nonconformities.

- In violation of the requirements of the Regulation "On the Procedure for Preparing and placing a report on the execution of a state (municipal) contract and (or) on the results of a separate stage of its execution in the Unified Information System in procurement", approved by an order of the Government of the Russian Federation of November 28, 2013 N 1093, reports on the execution of government contracts, reflect inaccurate information (including information on the improper performance of the contract, the sanctions that are applied, and the changes in the contract during its execution).

This letter of the Treasury of Russia is aimed at ensuring that the above-mentioned common facts of violations of the Law on the contract system are minimized.

2. Drafts of legal acts

2.1. The government of the Russian Federation proposes to tighten the responsibility for violating the requirements of the law when concluding contracts on state defense orders.

Draft Federal Law "On Amendments to the Code of the Russian Federation on administrative offenses"

It is proposed to make additions to Article 7.32 of the Code of Administrative Offenses of the Russian Federation clause 4¹ of which establishes fines for officials in the amount of 50,000 rubles and for legal entities - 500,000 rubles for changing the conditions of a state contract for a state defense order, including an increase in the prices of goods, works, services, in the case when the possibility of such changes is not provided for by the current legislation on procurement.

2.2. On October 09, 2018, the State Duma of the Russian Federation adopted in first reading a draft law on amending the Law on the contract system in terms of establishing requirements for expert advice.

Draft Federal Law "On Amendments to Articles 41 and 94 of the Federal Law "On the contract system in the field of procurement of goods, work, services for state and municipal needs" N 495972 - 7

According to 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, evaluation of compliance of tender participants with additional requirements, the customer has the right to involve experts and expert organizations.

It is proposed to establish in article 41 of the said law that the results of the examination are issued in the form of a conclusion, which is signed by an expert, an authorized representative of the expert organization and must be objective, justified and comply with the legislation of the Russian Federation to establish uniform requirements for the registration of the results of examinations in the field of procurement. In connection with the introduction of changes to this article, it is proposed to exclude similar provisions contained in Article 94 of the Law on the contract system.

2.3. Public discussions are held on the Regulations for conducting departmental control in the field of procurement to meet federal needs by the Federal Bail Service of Russia and the Ministry of Construction of Russia.

Draft Order of the Federal Service of Bailiffs of Russia "On Approval of the Regulations for the Federal Service of Bailiffs of departmental control in the field of procurement to meet federal needs. Draft Order of the Ministry of Construction of Russia "On Approval of the regulations of the department of construction and housing and public utilities of the Russian Federation for departmental control in the field of procurement of goods, works, services"

The draft regulation of the Federal Service of Court Bailiffs of Russia proposes securing the rights of officials when carrying out verifications for unhindered access to the territory, premises, buildings of the control object, in case of an on-site inspection, requesting the necessary documents taking into account the requirements of the legislation of the Russian Federation on protecting state secrets explanations in writing, in the form of an electronic document and (or) orally on verification issues.

The draft regulation of the Ministry of Construction of Russia establishes that during the event of departmental control officials have the right to unimpeded access to the territory of the customer, as

well as to take photographs, videotapes, copy documents when they present official IDs, as well as to receive the necessary explanations in writing ongoing audit activities.

2.4. Minimum retail prices for some types of alcoholic products may be increased.

Draft Order of the Ministry of Finance of Russia "On Amendments to the Order of the Ministry of Finance of the Russian Federation of May 11, 2016 N 58n "On price setting, not lower than which purchases are made (except for imports), supplies (except for exports) and retail sale of alcoholic beverages by the fortress over 28 percent"

The stage of public discussions is underway. The draft order of the Ministry of Finance, which is proposed to increase in 2019 the minimum retail prices for cognac from 371 rubles to 388 rubles and for brandy from 293 rubles to 307 rubles.

3. Judicial and law enforcement practice

3.1. The actions of the customer to accept the execution of the contract recognized the consent to the continuation of the contractual relationship, despite the fact that they were sent to the counterparty notification of the termination of the contract.

Resolution of the Federal Arbitration Court of the East-Siberian District of September 17, 2018 in case N A19-11467/2017

The customer was handed a notice to the supplier about termination of the contract due to the delay in the delivery of goods. The court, making the decision, proceeded from the factual circumstances established by it, indicating the continuation of the parties' fulfillment of their obligations after the termination of the contract.

It should be noted that the adoption of this judicial act is related to the factual assessment by the court of the circumstances of this case, since the courts found that after the unilateral refusal of the customer to execute the contract and the counterparty to deliver the disputed consignment of goods, the customer sent a letter to the supplier issuance of technical means of rehabilitation in accordance with the terms of the contract (in relation to the consignment of goods delivered).

Despite the above court decision, it is not recommended for contractors under government contracts to continue carrying out works (rendering services) after receiving from the customer a notice of unilateral refusal to execute a contract.

3.2. The Lipetsk Department of the Federal Antimonopoly Service of Russia revealed violations by the customer of the requirements of the Federal Law of July 26, 2006 N 135-FZ "On Protection of Competition" in connection with the purchase from a single supplier instead of electing a competitive procedure for determining the contractor.

The decision of the Lipetsk Department of the Federal Antimonopoly Service of Russia from October, 10, 2018 in case N 26

According to the Regulation on procurement, purchase from a single supplier is carried out in the following cases: procurement of goods, works, services for the needs of the customer in an amount not exceeding 500 (five hundred) thousand rubles; the urgent need for procured goods, when the use of other types of procurement procedures is impossible due to lack of time; when exclusive rights in relation to the goods purchased belong to a particular supplier, if there is no equivalent replacement of such goods in a functioning market. However, in order to implement the re-equipment of the cinema hall, an agreement was signed on the supply and installation of equipment without a competitive procedure. The controlling authority established that there was no urgent need for the

goods to be purchased, and therefore the conduct of the purchase from a single supplier is not justified.

3.3. The Khakas Department of the Federal Antimonopoly Service of Russia recognized the right of a participant in a request for proposals to submit an application via e-mail if the procurement documentation does not contain provisions on the need to submit an application only through a certain electronic platform.

The decision of the Khakassky Department of the Federal Antimonopoly Service of Russia of October 08, 2018 in case N 26-A-18

Based on the results of consideration of the complaint, the Khakas Department of the Federal Antimonopoly Service of Russia concludes that the refusal to consider the application submitted via e-mail is unreasonable, since, according to paragraph 5 of the Documentation on the request for proposals, it was established that “the application for participation is submitted in Russian in electronic form in the prescribed form (Appendix 1 to the documentation for the request for proposals), certified by the signature of the head and seal of the company (scanned) by e-mail new address ”, despite the fact that the notice of the procurement indicated that the place of provision of documentation is the trading system Fabrikant.ru, since this contradicts clause 5 of the documentation.