

February 22, 2019

**DIGEST OF
the most significant changes in the legislation on
procurement for 2018 and changes that come into
force in 2019**

Dear Colleagues!

In 2018, there were many legislative changes in Russian law in the sphere of legal regulation of state and corporate procurement, to highlight the main ones of which are not an easy task. We bring to your attention the Digest of the most significant changes in the legislation on procurement for 2018 and changes that come into force in 2019 prepared by us.

Among them, the electronization of most types of public procurement, including an open tender, limited participation tender, a two-stage tender, a request for quotations and a request for proposals, which is a significant step forward in the direction of transparency of public procurement, but at the same time caused certain difficulties for customers. In the same direction, it is planned to start the work of the State information system (GIS) "Independent Registrar", scheduled for October 1, 2019, which is designed to monitor and record the actions and inactions of participants in the Unified procurement information system and on electronic platforms, and therefore provide evidence for conducting procurement controls and fixing violations. Of course, at this stage, there are a lot of questions about how these institutions will work, but there is a certain trend towards an increase in procurement transparency.

In addition to these changes, from March 1, 2019, the volume of procurements that federal customers will carry out with the help of the Unified Trade Aggregator "Berezka" will expand, which emphasize the large role of this marketplace for small procurements.

The ordering of procurement participants is intended to introduce the registration of procurement participants in the Unified procurement information system from January 1, 2019. At the same time, until December 31, 2019, persons accredited before January 1, 2019, on an electronic platform inclusive can apply for participation in electronic procedures and participate in such procedures.

A certain improvement for procurement participants can be considered the entry into force from July 1, 2019, of the rules for reducing collateral in case of partial execution of the contract, as well as the possibility from July 1, 2019, to again provide bank guarantees for bids.

At first glance, a number of these innovations in Russian legislation seem to be aimed at improving the regulation of the procurement system, but there are a number of others that raise serious questions, so how the changes of 2018 will actually work in practice will be shown by time.

Faithfully,

BRACE Law Firm

1. **Electronization of most types of procurement from January 1, 2019.**

Federal Law of December 31, 2017 N 504-FZ “On Amendments to the Federal Law “On the contractual system in the field of procurement of goods, work, services for state and municipal needs”

From January 1, 2019, customers are obliged to conduct purchases only in electronic form. Electronic procurement applies to open tender, limited participation tender, two-stage tender, request for quotations, request for proposals. In this case, to carry out these purchases in electronic form is prohibited.

Exceptions are provided in the case of the following procurements:

- procurement from a single supplier (contractor, contractor);
- closed methods for identifying suppliers (contractors, contractors);
- planning and implementation of procurement on the territory of a foreign state to support the activities of customers operating on the territory of a foreign state.
- conducting a request for quotations to ensure the activities of the customer in a foreign country;
- request for quotations for the provision of emergency, including emergency, specialized medical care in emergency or urgent form and the normal livelihood of citizens;
- filing applications for participation in the preliminary selection of procurement participants in order to provide humanitarian assistance or eliminate the consequences of natural or man-made emergencies;
- request for quotations in order to provide humanitarian assistance or eliminate the consequences of natural or man-made emergencies;
- procurement in accordance with the decree of the Government of the Russian Federation.

Recall that earlier (from July 1, 2018), the conduct of procurement in electronic form was the right of customers, and from January 1, 2019, this became their responsibility.

In connection with the electronization of procurement, it is necessary to bring procurement documents, including orders for the creation of a commission, regulations for contractual services and a number of others in accordance with current legislation.

2. **Registration of procurement participants in the Unified Procurement Information System.**

Federal Law of December 31, 2017 N 504-FZ “On Amendments to the Federal Law “On the contractual system in the field of procurement of goods, work, services for state and municipal needs”

By December 31, 2019, inclusively, applications for participation in electronic procedures and participation in such procedures are carried out, including by persons accredited before January 1, 2019, on an electronic platform, information and documents about which are included in the Register. Registration in the Unified procurement information system, in this case, is not required.

Suppliers who already have accreditation on trading floors are entitled to continue to participate in procurement in the same manner until the end of 2019.

Registration of procurement participants in the Unified procurement information system is carried out in electronic form in the manner determined by the Government of the Russian Federation. Information and documents about procurement participants registered in the Unified Procurement Information System are entered into the unified register of procurement participants.

It is not allowed to require the provision of other information and documents for registration of procurement participants in the Unified Procurement Information System that is not provided for by the Government of the Russian Federation.

It is not allowed to charge a registration fee to the participants of the procurement in the Unified Procurement Information System in the field of procurement, accreditation on the electronic platform.

3. From October 1, 2019, the State information system “Independent registrar” should start working in accordance with the Rules for fixing actions of participants in the contract system.

Federal Law of December 31, 2017 N 504-FZ “On Amendments to the Federal Law “On the contractual system in the field of procurement of goods, work, services for state and municipal needs”

Decree of the Government of the Russian Federation of July 28, 2018 N 883 “On Approval of the fixing rules, including video recording, in real-time actions, inactions of participants in the procurement system in the procurement information system, on an electronic platform”

The state information system "Independent registrar" will provide monitoring and recording of actions, as well as participants' inactions in the Unified information system and on the Electronic trading platform, including:

- Monitor and store information about the health of the Unified information system and the Electronic trading platform.
- To ensure the fixation of actions and omissions of participants on the Electronic trading platform and in a single information system.
- Provide storage of information on actions/inactions of procurement participants, as well as on the generated documents.

The Government of the Russian Federation establishes a federal body responsible for the State information system, the procedure for maintaining this system, and establishes technical requirements for its functioning and interaction with the Unified information system.

It is assumed that the use of the State information system "Independent registrar" will increase the transparency of procurement and reduce the number of violations during the procurement procedures.

At the same time, on October 01, 2019, the Rules for fixing real-time actions, inactions of participants in the procurement system in the field of procurement in a single information system in the field of procurement, on an electronic platform, come into force. Such fixation is carried out using information tools that meet the requirements established in accordance with the legislation of the Russian Federation, as well as other information protection means certified in accordance with the procedure established by the legislation of the Russian Federation, ensuring the integrity of information.

4. From March 1, 2019, the number of procurements that federal customers will conduct with the help of the single aggregator of trade “Berezka” will expand.

Order of the Government of the Russian Federation of April 28, 2018 N 824-p “On the creation of a Single aggregator of trade”

From March 1, 2019, most federal authorities and state institutions subordinate to them will procure from a single supplier through the “Berezka” Single aggregator of commerce for small purchases or purchasing medicines as decided by the medical board:

- up to 100 thousand rubles;

- up to 400 thousand rubles (in accordance with paragraph 5 of part 1 of article 93 of 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" (hereinafter - the Law on the contract system));

- for the supply of drugs by a decision of the medical commission.

However, the Single trade aggregator will not be used in cases where:

- procurement is carried out on the territory of foreign countries for the needs of customers operating abroad;

- services are provided by individuals without IP registration;

- information on procurement constitutes a state secret;

- goods, works or services are absent in the Classifier or in the Catalog of offers. At the same time, it is possible to submit an application so that the goods are added to the Classifier (clause 1, section 7 of the Regulations of the Single trade aggregator).

Apply the Single trade aggregator will be the federal executive bodies and state institutions subordinate to them.

The bodies responsible for developing and implementing state policy in the field of defense and security of the Russian Federation, and their public institutions, as well as the procurement authorities for the presidential administration and the government office of the Russian Federation, are exempted from this duty.

Regional authorities and local governments can independently make decisions on the necessity or absence of the need to use the Single trade aggregator.

Clause 3 of Section 7 of the Regulations of the Single trade aggregator established that to participate in procurement through the Single trade aggregator, registration is required by filling out the form in your account. At the same time, when registering with the Unified information system, most of the information is duplicated from the specified system automatically.

5. Procurement regulations must be brought into 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", approved and placed in the Unified Information System no later than January 01, 2019.

Federal Law of December 31, 2017 N 505-FZ "On Amendments to Certain Legislative Acts of the Russian Federation"

According to part 1 of article 2 of the Federal Law of July 18, 2011 N 223-FZ "On the procurement of goods, works, services by certain types of legal entities" (hereinafter, the Law on Procurement by certain types of legal entities), the legal act regulating the procurement rules is

In accordance with part 3 of article 4 of Law N 505-FZ:

- 1) procurement regulations must be brought into compliance with the requirements of Law N 223-FZ, approved and placed in the Unified information system no later than January 1, 2019;

- 2) procurement provisions that do not comply with the Procurement Law by certain types of legal entities (as amended by Law N 505-FZ), after January 1, 2019, are considered not located in the Unified information system.

Procurements whose implementation notifications were placed in the Unified information system prior to the date of placement of the procurement regulations, brought in line with the requirements of the Procurement Law by certain types of legal entities, are completed according to the rules that were in force on the date of placement of such notification.

6. Authorized authorities provided explanations regarding the increase in the price

of contracts and contracts during the procurement process related to the increase in VAT rates.

Federal Law of August 3, 2018 N 303-FZ "On Amendments to certain legislative acts of the Russian Federation on taxes and fees"

Information Letter of the Ministry of Finance of Russia of November 29, 2018 N 24-01-07/86352

Letter of the Ministry of Finance of Russia of August 28, 2018 N 24-03--07/80187 "Concerning the change in the price of contracts after the increase in the value-added tax rate"

From January 01, 2019 the VAT rate will be increased from 18 to 20 percent.

This will undoubtedly have an impact on the specifics of the conclusion on the results of the procurement of contracts and agreements. At the same time, there are some differences regarding contracts concluded on the basis of the Law on the contract System and contracts concluded in accordance with the Procurement Law by certain types of legal entities.

As a general rule, when entering into and executing a contract, changing its terms is not allowed, except in cases provided for in the Law on the Contract system.

According to the new edition of paragraph 13 of Art. 34 of the Law on the contract system, which entered into force on July 01, 2018, the state contract includes an obligatory condition on reducing the amount payable by the customer to a legal entity or an individual, including one registered as an individual entrepreneur, by the amount of taxes, fees, and other mandatory payments related to the payment of the contract, if, in accordance with the legislation of the Russian Federation on taxes and fees, such taxes, fees and other obligatory payments are payable to the budget budgets with Stem Russian customer. Regardless of whether the contract stipulates that the contract price includes 18% VAT, from January 1, 2019 the contract must be paid at the rate of 20%. At the same time, the replacement of the wording "VAT 18%" with "VAT 20%" used in the state contract without changing the condition of the contract price upwards will not contradict the requirements of the legislation on the contract system.

At the same time, in accordance with the new edition of the law on the contract system, due to an increase in the VAT rate up to 20%, it is allowed by agreement of the parties to change the price of contracts concluded until January 01, 2019 within the scope of the VAT increase for goods, works, services which are accepted after January 01, 2019. The specified condition will be valid until October 01, 2019. Mandatory condition - the increased amount of the VAT rate is not stipulated by the terms of the contract.

The Ministry of Finance of Russia in a letter dated November 8, 2018 N 24-03-07/80187 states that the size of the interest rate on VAT is not a condition of the contract regarding which the parties should reach an agreement, as well as a condition essential or necessary for the contract. Thus, the VAT rate is not an essential condition of a government contract and can be changed by entering into an additional agreement without changing the contract price.

Regarding the contracts concluded on the basis of the Procurement Law by certain types of legal entities, the situation is different. According to the Ministry of finance of Russia, it is possible to revise the price of the contract due to the increase in the VAT rate, if this is not prohibited by the provision on procurement.

In accordance with the information letter of the Ministry of Finance of Russia of November 29, 2018 N 24-01-07/86352, the provisions of Part 5 of Article 4 of the Law on Procurement by certain types of legal entities stipulate that, if the contract price changes, including the price of goods purchased, works, services in comparison with those specified in the final protocol, the relevant information is placed in the Unified information system.

Thus, the Law on Procurement by certain types of legal entities does not contain a prohibition on changing the contract price during its execution.

7. From July 1, 2019, the rules for reducing collateral with partial execution of the contract come into force.

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

If the state contract provides for certain stages of its execution and establishes the requirement to ensure the execution of the contract, during the execution of this contract the amount of this security shall be reduced.

The size of the contract enforcement is reduced by sending the customer information on the supplier’s performance (contractor, performer) of obligations to deliver the goods, perform the work (its results), provide a service or perform a separate stage of contract execution and the cost of fulfilled obligations for inclusion in the relevant register.

The reduction in the amount of the security for performance of the contract is made in proportion to the value of the obligations fulfilled, the acceptance and payment of which is effected in the manner and within the time period stipulated by the contract.

At the same time, the amount of security for the execution of a contract is reduced subject to the absence of unfulfilled by the supplier (contractor, performer) claims for the payment of penalties (fines, penalties) submitted by the customer.

The amount of collateral is possible to reduce in proportion to the cost of timely fulfillment of obligations. In this case, there are cases of refusal to reduce collateral. For example, execution of a contract for an amount less than the amount of the advance payment paid or failure to pay a penalty under a government contract.

If a bank guarantee has been submitted as collateral, the customer may be rejected from a part of the rights under this bank guarantee.

These provisions come into force on 01 July 2019, but may, by agreement of the parties, be valid for previously concluded contracts.

8. Limit fees have been established for the electronic procedure, the closed electronic procedure, and additional explanations have been given regarding purchases made in electronic form.

Decree of the Government of the Russian Federation of 10 May 2018 N 564 “On the charging by operators of electronic platforms, by the operators of specialized electronic platforms of charge, when conducting an electronic procedure, a closed electronic procedure and establishing its maximum dimensions”

Letter of the Ministry of finance of Russia dated November 06, 2018 N 24-06-08/79659 “On Procurement in Electronic Form”

Operators of electronic platforms, operators of specialized electronic platforms have the right to charge a person with whom a contract is concluded on the results of an electronic procedure, a closed electronic procedure.

Approved limit fee:

- in the amount of 1% of the initial (maximum) contract price and not more than 5 thousand rubles excluding value-added tax;

• in the case of concluding a contract based on the results of the procurement in accordance with clause 1 of part 1 of article 30 of the Law on the contract system, the maximum amount of such fees may not exceed 1% of the initial (maximum) contract price and more than 2 thousand rubles.

When conducting a joint tender or auction, the fee is charged to the person with whom the contract is concluded as a result of the electronic procedure, the closed electronic procedure, once regardless of the number of contracts to be concluded by each customer.

According to the Ministry of Finance of Russia, if the fee for participation in a purchase from a small business or a socially oriented non-profit organization is set at the maximum amount (2,000 rubles), then it should include VAT. Resolution N 564 establishes precisely the maximum amount of payment. For most purchases, it amounts to 5,000 rubles excluding VAT, and for procurements under paragraph 1 part 1 of art. 30 of the Law on the contractual system - 2000 rubles without mentioning the tax. In this regard, the office concluded that the specified amount in the amount of 2,000 rubles was established including VAT.

At the same time, the operators of electronic platforms independently ensure the use of electronic signatures created in accordance with the legislation of the Republic of Belarus in pursuance of the Action Plan on the issue of the mutual recognition of electronic digital signatures made in accordance with the legislation of one Member State of the Customs Union and the Common Economic Space (Republic Belarus or the Russian Federation), approved by the Decision of the Board of the Eurasian Economic Commission on August 23, 2012 N144.

9. Provisions on the commencement of the use of special accounts for securing applications for participation in electronic procedures provided for by the Law on the contract system have entered into force, and additional requirements have been defined for banks issuing bank guarantees to secure applications for participation in public procurement.

Federal Law of December 31, 2017 N 504-FZ “On Amendments to the Federal Law “On the contractual system in the field of procurement of goods, work, services for state and municipal needs”

Decree of the Government of the Russian Federation of April 12, 2018 N 440 “On Requirements to Banks that are entitled to issue bank guarantees for securing applications and executing contracts”

The funds intended to secure the bids are deposited by the procurement participants to special accounts opened by them in banks, the list of which is established by the Government of the Russian Federation.

Recall that in accordance with the Letter of the Ministry of Finance of Russia dated October 02, 2018 N 24-06-08/70718, agreements were signed on October 01, 2018 on the operation of an electronic platform, a specialized electronic platform with all operators of electronic platforms (AGZRT corporation, EETP JSC), corporation “AHRF”, corporation “TEK-Torg”, corporation “ETS”, corporation “Sberbank-AST”, LLC “RTS-tender”, LLC ETP GPB), operator of a specialized electronic platform (LLC “AST GOZ”).

The requirements for a special account agreement, the procedure for using a bank account purchased by a participant as a special account, as well as requirements for agreements on the interaction of new electronic platforms with authorized banks entered into force on July 1, 2018, but apply to electronic procedures that have begun on new electronic platforms after the date of their commencement (from October 01, 2018).

In addition, from July 01, 2018, the provisions came into force, according to which banks issuing bank guarantees to customers for securing applications and executing contracts must simultaneously meet such requirements as:

- the bank has own funds (capital) in the amount of not less than 300 million rubles calculated according to the methodology of the Central Bank of the Russian Federation as of the last reporting date;
- the bank has a credit rating not lower than "BB- (RU)" according to the national rating scale of the credit rating agency Analytical Credit Rating Agency and (or) not lower than ruBB- according to the national rating scale of the credit rating agency corporation Rating Agency "Expert RA".

10. New requirements have been established for securing applications for participation in procurement carried out in accordance with the Law on the contract system.

Decree of the Government of the Russian Federation of April 12, 2018 N 439 "On Approval of the Initial (maximum) price of the contract, above which the customer is obliged to establish a requirement for securing applications for participation in competitions and auctions"

Letter of the Ministry of finance of Russia expressed in the information letter dated October 02, 2018 N 24-06-08/70718

According to Part 1 of Article 44 of the Law on the contract system, the customer is obliged to establish a requirement for securing applications for participation in tenders and auctions, provided that the initial (maximum) contract price exceeds 5 million rubles, unless otherwise specified by the Government of the Russian Federation.

In accordance with the decree of the Government of the Russian Federation, the customer is obliged to establish a requirement for securing applications for participation in tenders and auctions if the initial (maximum) contract price exceeds 1 million rubles.

At the same time, in accordance with the position of the Ministry of Finance of Russia, expressed in the information letter dated October 02, 2018 N 24-06-08/70718, if the initial (maximum) contract price does not exceed 1 million rubles, the customer has the right to establish a requirement to secure bids, whereas, if this price is exceeded, such establishment becomes the responsibility of the customer.

Also, in the opinion of the Ministry of finance of Russia, given that the request for proposals, the request for proposals in electronic form are held due to the recognition of tenders and auctions as failed, when conducting such requests for proposals it seems reasonable and reasonable to establish requirements for the security of bids provided for in Article 44 of the Law on the contractual system relevant competition and auction, declared invalid and was the basis for the request for proposals.

11. From July 1, 2019, public procurement participants will again be able to provide bank guarantees for bids.

Federal Law of December 31, 2017 N 504-FZ "On Amendments to the Federal Law "On the contractual system in the field of procurement of goods, work, services for state and municipal needs"

From July 1, 2019, public procurement participants (such as an open tender in electronic form, a contest with limited participation in electronic form, a two-stage tender in electronic form, an electronic auction) will again be able to provide bank guarantees for bids. Information on the unique registry number of the received guarantee must be sent to the operator of the electronic platform simultaneously with the submission of the application for participation in the procurement.

The law resolves the case of revoking a license from a guarantor bank. In particular, the procurement contractor is obliged to provide new security for the execution of the contract no later than 1 month from the date of receipt of the notification from the customer. This provision is mandatory for inclusion in the terms of the contract. In this case, the amount of the security may be reduced by the amount of the fulfilled obligations under the contract.

12. From January 1, 2019, state customers are obliged to include in the terms of contracts for an advance payment, the procedure for calculating future payments.

Resolution of the Government of the Russian Federation of November 28, 2018 N 1430 "On Amendments to the regulations on measures to ensure the implementation of the federal budget"

When included in a government contract that does not contain conditions on the stages of its execution, conditions on subsequent payments after the advance payment, their amount is determined as the difference between the value of the obligations actually fulfilled and the amount of the advance payment previously paid.

If the state contract contains the stages of its execution, then, on the condition of an advance payment, the subsequent payments are calculated as the product of the amount of the advance payment in percentage terms and the value of the actual obligations fulfilled.

13. Changes in government procurement from small businesses.

Federal Law of 31 December 2017 N 504-FZ "On Amendments to the Federal Law "On the contractual system in the field of procurement of goods, work, services for state and municipal needs"

From January 1, 2019, the procedure for calculating the number of procurements from small businesses and socially oriented non-profit organizations is changing. The main change is that it will be allowed to include purchases from a single supplier in the total volume of purchases. However, this volume includes only those contracts concluded on the basis of procurement from a single supplier due to a failed procurement procedure, which was conducted with benefits for small businesses and socially oriented non-profit organizations.

This innovation will allow government customers to significantly more rapidly comply with the standard contracting with these entities and organizations.

14. Amendments to the procurement legislation regarding the procurement of communication devices.

Government Decision N 234 of March 07, 2018 "On Amendments to sub-paragraph a) of section 11 of the additional requirements for electronic computer programs and databases, details of which are included in the register of Russian software"

This document introduced the requirement for procurement participants for the supply of mobile radio subscriber devices in terms of the need to be under the control of a certified operating system, information about which is included in the unified register of Russian software.

15. Changes have been made to the procedure for the procurement of medical products from polyvinyl chloride plastics.

Resolution of the Government of the Russian Federation dated December 19, 2018 N 1590 "On Amendments to the Resolution of the Government of the Russian Federation dated February 05, 2015 N 102"

Resolution of the Government of the Russian Federation of December 19, 2018 N 1589 "On Amendments to the Resolution of the Government of the Russian Federation of October 14, 2017 N 967"

The register of suppliers of medical products made from polyvinyl chloride plastics, which previously existed in public procurement, was abolished. This change created preferences in the procurement of these goods for companies with the necessary level of localization of production.

At the same time, the rejection of applications that are offered for delivery of a foreign-made medical product made of polyvinyl chloride plastics is possible only if at least two applications are submitted whose country of origin is only the EEU member states. In this case, the requirements for achieving the level of localization of production, confirmed by the examination certificate of the Chamber of Commerce and Industry of the Russian Federation, as well as the requirements of the quality management system ISO 13485-2017 “Interstate standard. Medical products. Quality management systems. Requirements for regulatory purposes”.