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PROBLEMS OF LAW ENFORCEMENT IN TOWN PLANNING
ACTIVITY: THE CONTRACT WORK

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Abstract

The relevance of the publication is due to the state need for construction work and the need for clear legal regulation of this area. The article examines Russian legislation governing the signing and execution of state (municipal) contracts for the performance of construction work for state needs, considers their characteristics, requirements for the participants in procurement. The practical value of the study is due to significant changes in town planning legislation, including the field of contract work for state needs, and the increased volume of construction work at the expense of the federal (municipal) budget. The purpose of the study is to analyze the legal regulation of contract work for state (municipal) needs. The following results were obtained: the requirements to participants in public procurement are clarified, attention is drawn to the fact that for the fulfilment of a number of works for state needs, membership in a self-regulating organization of builders is no longer necessary, and the possibility to conclude a contract depends on the created compensation fund for the enforcement of contractual obligations, the subject of the analysis is the launch of the Federal State Information System for Pricing in Construction, methodology for applying estimates; a list of works that the customer must perform independently.

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Keywords: Compensation fund, construction, enforcement of contractual obligations, membership in SRO, procurement for state (municipal) needs, SRO certificate on admission to certain types of work.



1. Introduction

The application of town planning legislation is based, first of all, on the Constitution of the Russian Federation, one of the principles of which is the assertion of universal right to favorable environment (Article 42), secondly - to a number of federal laws containing civil law norms, the application of which regulates town planning relations (Shchukin, 2008; Mamedova & Baykova, 2015).

Some works of Shchukin (2008), Arrowsmith (1990), Allen (2005), Davies (2009), Mamedova and Baykova (2015), Terman and Feiock (2016), Gordon (1994), Wang, Zhang, and Lu (2018), Guseva (Guseva, Astafichev, & Sizov, 2017), Pargendler (2017) are devoted to problems of town planning and other branches of legislation.

2. Problem Statement

Analysis of legal norms and regulation of the order and levels of lawmaking in town planning (Arrowsmith, 1990; Allen, 2005; Davies, 2009; Terman & Feiock, 2016; Guseva, Astafichev, & Sizov, 2017; Pargendler, 2017; Wang, Zhang, & Lu, 2018) led to the need to identify new requirements for customers and participants in procurement in town planning development and the subsequent elimination of gaps in legislation and existing conflicts of law.

3. Research Questions

- 3.1.** To make an analysis of changes in construction legislation for state (municipal) needs, of the provisions of Federal Law № 44-FL of April 5, 2013 "On the contract system in the procurement of goods, works, services to ensure state and municipal needs".
- 3.2.** To identify the conditions for admission to construction work.
- 3.3.** To consider the problems of law enforcement of the current legislation.

4. Purpose of the Study

Reforms of legislation in town planning activity concern the sphere of construction, architecture and construction design, engineering surveys, are applied to purchases carried out according to:

- 1) Federal Law № 44-FL of April 5, 2013 "On the Contract System in the Sphere of Procurement of Goods, Works, Services for Ensuring State and Municipal Needs" (Federal'nyj zakon ot 5 aprelya 2013 g. № 44-FZ) (hereinafter 44-FZ);
- 2) Federal Law № 223-FL of July 18, 2011 "On Procurement of Goods, Works, Services by Individual Types of Legal Entities" (Federal'nyj zakon ot 18 iyulya 2011 g. № 223-FZ) (hereinafter referred to as 223-FL);
- 3) Decree of the Government of the Russian Federation № 615 of July 1, 2016 "On the procedure for attracting contractors for the provision of services and (or) performing capital repairs of common property in a block of flats and the procedure for the procurement of goods, works, services for the purpose of performing specialized functions of a non-profit organization that carries out activities aimed

at ensuring capital repairs of common property in blocks of flats " (Postanovlenie Pravitel'stva RF ot 1 iyulya 2016 g. № 615) (hereinafter DGRF № 615).

The right of the procurement participant to perform the relevant types of work (engineering surveys, preparation of design documentation, construction, reconstruction, capital repairs) arises from the participant from the moment of joining the self-regulatory organization. This rule is based on Article 3.3. Federal Law № 191 of December 29, 2004 "On the Enactment of the Town Planning Code of the Russian Federation". Initial changes are related to the fact that the procurement participant does not provide a copy of the certificate of the self-regulating organization of builders (hereinafter - SRO) on the admission to the relevant types of work.

In connection with the cancellation of the SRO certificates from July 1, 2017 for admission to a certain type of work, the substitution of the SRO certificate is an extract from the register of members of the self-regulating organization, which the procurement participant must submit as part of the application for participation in the procurement procedure.

The form of the extract from the register of members of the SRO is currently established by the order of Rostekhnadzor of February 16, 2017 № 58, it is provided only at the request of the interested person and has a validity period of not more than one month (Prikaz Federal'noj sluzhby po ehkologicheskomu, tekhnologicheskomu i atomnomu nadzoru ot 16 fevralya 2017 g. № 58).

For works in the spheres of construction, architectural and construction design, engineering surveys do not require mandatory membership in the SRO in a number of cases:

- 1) when contracts are concluded not within the framework of 44-FL, 223-FL, DG № 615,
- 2) the cost of works does not exceed 3 million rubles,
- 3) during the current repair or maintenance of the capital construction project,
- 4) work on construction, reconstruction, capital repairs is carried out at facilities that are not related to capital construction projects,
- 5) membership in the SRO is not required for certain types of legal entities established by public legal entities.

If on the territory of a constituent entity of the Russian Federation in which an individual entrepreneur or legal entity is registered, there is no registered self-regulating organization, then the individual entrepreneur or legal entity has the right to apply for membership in a self-regulatory organization registered on the territory of any constituent entity of the Russian Federation that has a common border with this subject of the Russian Federation.

The purpose of the study is the analysis of the legal regulation of contract work for state (municipal) needs for the formation of a unified system of legal regulation of national interests, innovative economic development that affects the efficiency of spending budget funds.

5. Research Methods

The methodological basis of the research was both general scientific (dialectical, historical, system-structural, logical, analysis and synthesis, and others) and private-science (comparative legal, formal-legal, intersectoral and other) methods of cognition (Guseva et al., 2017).

The intersectoral method of research allows to formulate a conclusion on the interbranch character of the legal regulation of the contract system in the sphere of procurement of goods, works and services to ensure state and municipal needs, its impact on the economy, effective spending of budget funds, protection of national interests, integration processes in the Eurasian Economic Union (Gordon, 1994).

The use of the dialectical method allows analyzing various doctrinal approaches to solving problematic issues in the topic under consideration.

The method of historical analysis allows considering the genesis of the institution of the contract system in the sphere of procurement of goods, works and services to ensure state and municipal needs.

The formal legal method was applied in analyzing the current legislation of the Russian Federation on the contract system in the sphere of procurement of goods, works, services, to ensure state and municipal needs.

6. Findings

From July 1, 2017 to participate in competitive procurement procedures, a special compensation fund for the enforcement of contractual obligations under contracts, concluded on the basis of competitive procurement procedures should be established with the SRO of the procurement participant.

From July 1, 2017 the SRO, its members bear subsidiary responsibility for contracts concluded by customers within the framework of 44-FL, 223-FL, DG RF № 615 using competitive methods of concluding contracts. The amount of subsidiary liability is set at ¼ of the compensation fund.

We will quote the amount of contributions to the compensation fund for the provision of contractual obligations for SRO members in the field of construction, reconstruction, overhaul of capital construction projects:

the 1st level of responsibility: cost (total liabilities) does not exceed 60 million rubles - contribution to the CF – 200 000 rubles;

the 2nd level of responsibility: cost (total liabilities) does not exceed 500 million rubles - contribution to the CF - 2 500 000 rubles;

the third level of responsibility: cost (total liabilities) does not exceed 3 billion rubles - contribution to the CF – 4 500 000 rubles;

the 4th level of responsibility: cost (total liabilities) does not exceed 10 billion rubles - contribution to the CF – 7 000 000 rubles;

the 5th level of responsibility: cost (total liabilities) does not exceed 10 billion rubles - contribution to the CF is 25 000 000 rubles.

If the SRO does not have a participant in the purchase of compensation fund to ensure the performance of contractual obligations, it is prohibited to conclude contracts with the help of competitive procurement procedures, and also if the aggregate amount of obligations under the contracts exceeds the limit of the obligations from which the person contributed to the CF, that is, procurement level of responsibility in its SRO.

As of 2017, 239 SROs were registered: the total amount of compensation funds according to data from SRO websites is more than 80 million rubles.

Since July 2017, there is a need for a compensation fund to secure contractual obligations with the SRO, whose members are the participants in procurement, only if the contract is concluded by the customer using competitive methods of contracting.

For the procurement participant, as the only supplier, for any reasons, the participant of the SRO does not need a compensation fund to secure contractual obligations. In case if one application for participation in the electronic auction was submitted and one participant was admitted, at the stage of consideration of the second parts of applications, the procurement participant cannot be rejected by the commission for the discrepancy of the requirement for its SRO compensation fund for the provision of contractual obligations, because the result of this failed auction is not a contract. The basis for concluding a contract in this situation is an unsuccessful electronic auction on the grounds provided for in item 25.5 Part 1 of Article 93 of Law № 44-FL. In such situations the customer does not need to know the information on the level of responsibility within the framework of the compensation fund for the provision of contractual obligations to enter into an agreement (contract) with the procurement participant but requires information on the level of responsibility of the procurement participant within the compensation fund for compensation for damage.

An example of the amount of compensation for damage for members of the SRO in the field of construction, reconstruction, overhaul of capital construction facilities (hereinafter referred to as "CF"):

1) level of responsibility: cost (total liabilities) - does not exceed 60 million rubles - contribution to the CF of compensation for damages 100 000 rubles;

2) level of responsibility: cost (total liabilities) - does not exceed 500 million rubles - contribution to the CF of compensation for damage 500 000 rubles.

6.1. Features of making certain types of contracts

According to the contract system, Federal Law № 314-FL of 3 July 2016 "On Amending Article 1294 of Part Four of the Civil Code of the Russian Federation" and Federal Law "On the Contract System in the Sphere of Procurement of Goods, Works, Services for Ensuring State and Municipal Needs" (Federal'nyj zakon ot 3 iyulya 2016 g. № 314-FZ) the specifics of the conclusion and execution of 3 types of contracts are written. The first feature provides the creation of architecture work, town planning or landscape art and (or) the development of a project document on the basis of capital construction projects, the second one - execution of design and (or) survey works, the subject of the third one - is the construction, reconstruction of capital construction projects.

So, in the first case, the customer has the right to repeatedly use the project documentation of the capital construction object, developed on the basis of architecture work, town planning or landscape art, without the author's consent. The latter cannot demand design documentation from the customer granting the right to conclude a contract for its development without using competitive methods to identify suppliers (contractors, executors) (RF Government Decree of 12 November 2016 №1159) (Postanovlenie Pravitel'stva RF ot 12 noyabrya 2016 g. № 1159).

The contract, the subject of which is construction and (or) reconstruction, must contain a condition of the stage-by-stage payment for the works performed based on their volume and contract price. The

terms for sending the necessary documents to the bodies authorized to issue conclusions on the object and permission to put it into operation were established by the customer.

In accordance with the Federal Law of July 3, 2016 № 368-FL "On Amendments to the Town-Planning Code of the Russian Federation" (Federal'nyj zakon ot 3 iyulya 2016 g. № 368-FZ), the expertise of the modified design documentation for capital construction projects is not required in some cases.

The order of designing of capital construction objects is simplified:

First, when preparing project documentation for facilities that are constructed by authorities or companies with share of the state (municipality) more than 50%, it is necessary to use the economically effective project documentation of re-use (except for the construction of especially dangerous, technically complex facilities, reconstruction of cultural heritage sites). Criteria for the economic efficiency of such documentation are determined by the Government of the Russian Federation.

Secondly, the examination of the modified design documentation for capital construction objects is not carried out under the following conditions: before the modification the documentation received a positive expert opinion; the modification does not affect the structural and other safety characteristics of the facility. If the construction (reconstruction) of the facility is financed from the budget or is provided by companies with share of the state (municipality) more than 50%, the modification should not lead to an increase in the amount of the estimate.

Thirdly, there is a possibility to extend the deadline for making state expertise of project documentation at the request of the developer or technical customer.

6.2. Pricing in construction

When forming the initial (maximum) price of a contract, the price of a contract concluded with a single supplier (contractor, executor) in accordance with Art. 22 of the Law on the Contractual System, there should be taken into consideration some provisions of Federal Law № 369-FL of 3 July 2016 "On Amendments to the Town Planning Code of the Russian Federation" and Articles 11 and 14 of the Federal Law "On Investment Activities in the Russian Federation in the Form of Capital Investments", determining the pricing and estimated rationing in the field of town planning activity.

In particular, new powers of federal public authorities are registered. They are responsible for maintaining the federal register of estimates and the federal state information system for pricing in construction, establishing the procedure for monitoring the prices of construction resources, including the types and rules for providing information necessary for the formation of estimated prices for building resources, approving the calculation methods for the latter, and adopting estimates.

It is stipulated that the estimated norms included in the federal register and the estimated prices of construction resources should be applied in determining the estimated cost of construction of facilities financed with the involvement of budget funds and legal entities created by public entities, organizations in which the share of such entities is more than 50%. They also need to be taken into account when calculating the estimated cost of overhauling an apartment building, carried out in full or in part by the means of a regional operator, HOA, housing cooperative or other specialized consumer cooperative or apartment owners in a multi-apartment building.

The Government of the Russian Federation determined the main features of the functioning of the federal state information system for pricing in construction (Government Decree № 959 of September 23, 2016 "On the Federal State Information System for Pricing in Construction"). They include, among other things, subsystems for monitoring construction resource prices, maintaining a federal register of estimates, storing information and the history of its changes, managing security, and some others (Postanovlenie Pravitel'stva RF ot 23 sentyabrya 2016 g. № 959).

Resolution of the Government of the Russian Federation of May 15, 2017 №o. 570 established the types (34 issues) and the scope of work on the construction and reconstruction of capital construction facilities, which the contractor is obliged to perform independently without involving other people (Postanovlenie Pravitel'stva RF ot 15 maya 2017 g. № 570).

From the approved list, the customer will need to include in the procurement documentation possible types and amount of work to be carried out independently.

Some types and scope of work from the number of possible customers will be determined on the proposal of the contractor and include them in the contract. The price of these types of work based on their estimated cost in the aggregate value should be:

- at least 15% of the contract price from the date of entry into force of Resolution №. 570 until July 1, 2018;
- at least 25% of the contract price from July 1, 2018.

If the contractor does not properly fulfill the obligations for independent performance of work, sanctions will be applied in the form of a fine in the amount of 5% of the cost of these works.

Part 1 of Article 110.2 of Law №. 44-FL and issue 1 of Resolution № 570 say that this Resolution is applied only to the conclusion of those contracts, the subject of which is the construction or reconstruction of capital construction facilities. Consequently, contracts for capital repairs, which, in accordance with the provisions of issue 14.2 of Article 1 of the Town Planning Code of the Russian Federation, are an independent type of operations with an object of capital construction different from its construction and reconstruction, are concluded without taking into account the provisions of the above Decree.

7. Conclusion

Thus, the changes in town planning legislation significantly affected the requirements for participants in state (municipal) procurement, procurement of certain types of legal entities in construction, architectural and construction design, engineering surveys. Among the most significant ones are the following:

1. In the sphere of town planning activities applied to the sphere of state (municipal) purchases, purchases under 223-FL, under Government Decision No. 615 from the procurement participant, from July 1, 2017, it is not possible to require a certificate of admission to certain types of work.
2. For certain types of work, mandatory membership in SROs is not required (when contracts are concluded not in accordance with 44-FL, 223-FL, PP № 615, the cost of works does not exceed 3 million rubles, in the course of current repair or maintenance of the capital construction facility, work on construction, reconstruction, overhaul is carried out at facilities not related to capital construction

facilities, membership in SRO is not required for certain types of legal entities established by public legal entities).

3. Since July 1, 2017, the regional principle of SRO membership in the sphere of construction, reconstruction, and overhaul of capital construction facilities has been in force.

4. Since July 1, 2017, to participate in competitive procurement procedures, a special compensation fund for the enforcement of contractual obligations under contracts concluded on the basis of competitive procurement procedures should be established with the SRO of the procurement participant.

5. The methodology for the application of the Estimated Standards approved by the order of the Ministry of Construction and Housing and Communal Services of the Russian Federation of December 29, 2016 № 1028 / pr is obligatory for use in determining the estimated cost of construction, reconstruction, overhaul of capital construction projects financed using budgetary resources of the budget system of the Russian Federation, funds of legal entities established by the Russian Federation, subjects of the Russian Federation, municipal entities.

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