ИССЛЕДОВАТЕЛЬСКАЯ СТАТЬЯ

САМОРЕГУЛИРУЕМЫЕ ОРГАНИЗАЦИИ В СИСТЕМЕ КОНТРОЛЯ И ГОСУДАРСТВЕННОГО НАДЗОРА ЗА ПРОЦЕССОМ СТРОИТЕЛЬСТВА

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Аннотация: В статье анализируется правовое положение саморегулируемых организаций в области инженерных изысканий, архитектурно-строительного проектирования, строительства, реконструкции, капитального ремонта и сноса объектов капитального строительства (далее – СРО), излагается порядок их создания и деятельности. Автор рассматривает место и роль национальных объединений саморегулируемых организаций в системе контроля за всеми стадиями строительства, а также прослеживает процесс формирования нормативно-правовой базы. Особое внимание уделяется актуальным вопросам возмещения саморегулируемой организацией вреда, причиненного ее членами, а также проблеме создания и функционирования компенсационных фондов. Одним из наиболее важных направлений деятельности саморегулируемой организации является работа по повышению эффективности применения мер ответственности к членам организации, уровня и действенности контроля за исполнением ее членами своих обязательств по договорам подряда и усилению надзора за деятельностью самих саморегулируемых организаций юридически и фактически. Правовое положение СРО, основные направления их деятельности в настоящее время урегулированы законодательством. Трудности состоят в применении на практике данных норм, на что и было обращено внимание посредством анализа самих норм закона, порядка вступления их в силу, подзаконных актов.

Ключевые слова: саморегулируемые организации, компенсационный фонд СРО в области проектирования и строительства, государственный и муниципальный контракт, гражданско-правовая ответственность, Ростехнадзор
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SELF-REGULATORY ORGANIZATIONS WITHIN THE SYSTEM OF CONTROL AND STATE SUPERVISION OF THE CONSTRUCTION PROCESS

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RESEARCH ARTICLE

Abstract: The article analyzes the legal status of self-regulatory organizations (SRO) in the sphere of engineering surveys, architectural and construction design, construction, reconstruction, capital repair, and demolition of capital construction objects. The author describes the order of their creation and activities, examines the place and role of the National Association of self-regulatory organizations in the system of control over all stages of construction, and summarizes the process of forming the regulatory and legal framework. The author pays particular attention to the issues of compensation paid by the self-regulatory organization for the harm caused by its members, as well as the problem of creating and functioning of compensation funds. One of the most significant areas of SRO activity is the work aimed at increasing the effectiveness of applying responsibility measures to members of the organization. These include the level and efficiency of control over fulfillment by its members of their obligations under contracts and strengthening of supervision over the SRO activities both legally and practically. Currently, legislation of the Russian Federation regulates the legal status and main activities of SROs. The author notes that the main obstacles lie in applying these norms in practice. The article aims to draw attention to these complications through the comprehensive analysis of the legal norms, the bylaws, and the order of their entry into force.

Keywords: self-regulatory organizations, SRO Compensation Fund in the field of design and construction, state and municipal contract, civil liability, Rostekhnadzor
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Introduction

In the field of engineering surveys, design, and capital construction objects, the legal status of SROs is determined by Federal Law of July 03, 2016, No. 372-FZ "On Amendments to the Urban Planning Code of the Russian Federation and Certain Legislative Acts of the Russian Federation" the provisions of which were entering into force during several years. On July 1, 2017, the authority of SROs to issue certificates of admission to works affecting the safety of capital construction objects was revoked (now it is sufficient to be a member of the relevant SRO to perform these works). Federal Law of August 03, 2018, No. 340-FZ "On Amendments to the Urban Development Code of the Russian Federation and Certain Legislative Acts of the Russian Federation" introduced some amendments and additions to the current legislation. Chapter 6.1 "Self-regulation in the field of engineering research, architectural and construction design, construction, reconstruction, capital repair, demolition of capital construction objects" was included in the Urban Development Code of the Russian Federation (UDC RF) in 2008. Federal Law No. 315-FZ "On Self-Regulatory Organizations" was adopted on December 1, 2007. One of the most significant areas of SRO activity is the work aimed at increasing the effectiveness of applying responsibility measures to members of the organization. These include the level and the efficiency of control over fulfillment by its members of their obligations under contracts and strengthening supervision over the SRO activities by themselves. According to Art. 55.1 of the Urban Development Code of the Russian Federation, the main objectives of self-regulatory organizations in the field of engineering surveys, architectural and construction design, construction, reconstruction, capital repair, demolition of capital construction objects, and the content of their activities include preventing harm to life or health of individuals, property of individuals or legal entities, state or municipal property, the environment, life or health of animals and plants, cultural heritage objects; improving the quality of all stages of constructions; ensuring the fulfillment by members of self-regulatory organizations of obligations under contracts concluded using competitive methods for identifying suppliers (contractors, performers) in procurement of goods, works, services for state and municipal needs, legislation of the Russian Federation on the procurement of goods, works, services by certain types of legal entities. The content of activities of a self-regulatory organization lies in developing and approving the necessary documents (standards) as well as monitoring the compliance by members of such SROs with the requirements of these documents.

One of the areas for reforming the legislation, as well as other normative acts in the field of procurement, is to increase control of the contract system. Control over the purchase of construction work has also been stricter. The customer obliges to include project documentation in the procurement requirements, except in cases where the legislation does not require preparing project documentation or the subject of the contract is designing the object. These amendments were introduced by Federal Law of the Russian Federation of May 1, 2019, No. 71-FZ "On Amendments to the Federal Law "On the Contract System in the Sphere of Procurement of Goods, Works, Services for Ensuring State and Municipal Needs". In 2018, the Criminal Code of the Russian Federation was amended with certain materials providing for criminal liability for offenses in the field of procurement. Since then, the oversight of all procurement activities and criminal law practice has changed significantly. Federal Law of April 01, 2019, No. 50-FZ "On Amendments to the Federal Law "On the Contract System in the Sphere of Procurement of Goods, Works and Services for State and Municipal Needs" authorizes the Government of the Russian Federation to approve a unified procedure for exercising control in the sphere of procurement, as well as to determine the order for assessing the effectiveness of the procurement control bodies. These changes in the legislation are directly related to the activities of SROs in the field of design and construction. Since SRO ensures fulfillment by its members of their obligations under contracts for engineering surveys, for preparation of design documentation, construction contracts concluded following the legislation of the Russian Federation on the contractual system and the legislation on the procurement of goods, works, and services by certain types of legal entities, and serve to strengthen the rule of law in the field of procurement.

State and municipal contracts have all the attributes of an individual administrative agreement: the customer acts on behalf of the state or municipality, and the goal of the contract is protecting public-law interests. Among the distinctive features of the agreement are budget financing and strict treasury control, restrictions on changing the terms of the contract, and the possibilities of its termination. The contract often has a standard form and includes certain conditions and detailed requirements for the supplier (contractor, executor). According to Letter of the Ministry of Construction of Russia of July 2, 2019, No. 23849-TB/02 "On the objects of capital construction", the state customer, acting on behalf of the state, when carrying out procurement, the object of which is the construction or reconstruction of roads, obliged to establish a requirement for the constructors to be members of an SRO. The introduction of digital technologies in the field of procurement, enshrined in the legislation, goes along with the use of digital technologies in the activities of SROs in construction area [Leskova, 2018. P. 9–11]. The norms of the law on SROs are closely connected with the provisions of the law and bylaws on various types of liability, with the provisions of civil law on the contract, obligations, legal entities, and the antimonopoly legislation [Akimova, Leus, 2019. P. 43–46].

SROs in the field of design and construction

It is necessary to briefly discuss some issues related to the creation and activities of SROs related to the

topic under consideration, which is mainly regulated by Chapter 6.1. of the Urban Development Code of the Russian Federation.

Work on engineering surveys, design, construction, reconstruction, capital repair, and demolition of capital construction objects under contractual agreements concluded with the developer, technical customer, person responsible for the operation of the building, structure, and regional operator may be performed by individual entrepreneurs or legal entities who are members of SROs in the field of engineering surveys, architectural and construction design and construction of capital construction objects. The Urban Development Code of the Russian Federation defines cases where contractors are not required to be members of an SRO. Namely, when performing work under contracts for the preparation of design documentation, engineering surveys, and construction, concluded with other persons than those listed above. Membership in SRO is not obligatory for subcontractors and municipal unitary enterprises, autonomous institutions when they conclude subcontracting agreements with federal executive authorities, executive authorities of the subject of the Russian Federation, and local self-government authorities. They also include commercial entities, in the authorized capital of which the share of state and municipal unitary enterprises and state and municipal autonomous institutions exceeds 50 %. In case of fulfillment of works on construction agreements, if the financial obligations on each of such contracts does not exceed three million rubles, as well as in some other cases (part 2.1 of Art. 47, part 4.1 of Art. 48, parts 2.1, 2.2 of Art. 52 of the Urban Development Code of the Russian Federation). We might explain it by the peculiarities of control over the finances and activities of state and municipal enterprises and institutions and the specific legal status of persons with a share of public property.

In a Letter of January 15, 2020, No. 568-ТВ/02 "On Membership in Self-Regulatory Organizations" the Ministry of Construction, Housing and Utilities of the Russian Federation (hereinafter referred to as the Ministry of Construction of Russia) points out the absence of a requirement for mandatory membership in SRO for subcontractors, who perform work in the field of engineering surveys and design.

Thus, SRO membership is not a mandatory condition to perform any work in the field of construction by all contractors. Based on their capabilities, each organization and individual entrepreneurs have the right to independently decide on the amount of work they perform, as well as the customer under the contract. Articles 55.2–55.10 of the Urban Development Code of the Russian Federation define the issue of acquiring SRO status and membership in self-regulatory organizations.

The law provides for the establishment of self-regulatory organizations of these three types only: 1) SRO, uniting persons performing engineering surveys; 2) SRO, uniting persons involved in preparing project documentation; 3) SRO, based on the membership of persons carrying out construction. The distinction of the scope of activities of a self-regulatory organization following the types of work performed by its members is reasonable since the qualification requirements for members of SROs are different, and the work performed has its specifics. With this approach, the activities of the SRO should be the most qualified and effective.

According to Paragraph 17 of Art. 1 of the Urban Development Code of the Russian Federation, a self-regulatory organization in the field of engineering surveys, architectural and construction design, construction, reconstruction, and demolition of capital construction objects is a non-profit organization created in the form of an association (union) and based on the membership of individual entrepreneurs and/or legal entities performing the mentioned works under contracts signed with the developer, technical customer, person responsible for the operation of the building or structure, or with a specialized non-profit organization which carries out activities aimed at ensuring capital repairs of the common property in apartment buildings.

The SRO status can be acquired by a non-profit organization established in the form of an association (union) if it meets the specified requirements: to prevent harm to life or health of persons, property of individuals or legal entities, public property, the environment, life and health of animals and plants, cultural heritage objects as a result of work defects, as well as to improve the quality of design and construction performed. And it is sensible since a person does not need to quit the membership in an organization and join a new one if one's organization acquires the status of an SRO.

By Federal Law of December 01, 2007, No. 315-FZ "On self-regulating organizations", at the stage of registering information in the State Register, an organization undergoes thorough inspection and submits a large set of documents to the National Association of Self-Regulating Organizations. These include copies of its state registration certificate, its charter, copies of state registration certificates of its members – legal entities, as well as technical documents on the availability of compensation funds for harm compensation, standards, and internal documents, including documents on the registry of SRO members, on the amount and procedure for calculation of admission fee, membership fees. The standards and regulations of self-regulatory organizations must comply with federal laws and other normative legal acts. These documents regulate the activity and responsibility of each self-regulatory organization and its members, as well as issues of insuring property liability. The National Association of Self-Regulatory Organizations certifies the conclusion on entering or refusal to enter information about SRO in the state register and sends it to the Federal Service for Environmental, Technological and Nuclear Supervision (hereinafter referred to as Rostekhnadzor). Rostekhnadzor is authorized to carry out state supervision over the activities of self-regulatory organizations in the field of engineering surveys, architectural and

construction design, construction, reconstruction, capital repair, demolition of capital construction objects. The responsibilities of Rostekhnadzor also include maintaining the State Register of self-regulatory organizations.

At the same time, the actions of Rostekhnadzor are also monitored. The order of the Federal Service for Environmental, Technological and Nuclear Supervision of March 31, 2016, No. 132 approved administrative regulations on the provision of public service for entering information in the state register of self-regulatory organizations in the field of engineering surveys, architectural and construction design, construction, reconstruction, capital repair of capital construction objects. The order regulates this public service and contains an appendix with an application sample. The document contains the address of the structural unit of Rostekhnadzor providing the service, its working hours, and all necessary information for the applicant, including an extended list of submitted documents, the pretrial procedure for appealing the actions (or inaction) of Rostekhnadzor, and a flowchart for the provision of this service. An applicant can appeal against the decisions, actions (or inaction) of the Federal Service for Ecological, Technological and Nuclear Supervision and its officials when applying for this state service. A complaint is reviewed by the deputy head of Rostekhnadzor, coordinating and supervising the activities of the relevant structural unit. A complaint on decisions, actions (or inaction) of the deputy head of Rostekhnadzor shall be considered by the head of the Federal Service for Ecological, Technological and Nuclear Supervision.

In accordance with Chapter 24 of the Arbitration Procedure Code of the Russian Federation, decisions, actions (or inaction) of Rostekhnadzor and/or its officials may be contested in court, as well as any actions (or inaction), decisions of executive authorities, local governments, administrative bodies, and officials that affect the rights and legitimate interests of persons in the field of business and other economic activities. The actions of the Federal Environmental, Technological and Nuclear Supervision Service are subject to judicial supervision.

Within three months from the date of granting the status of a self-regulatory organization, SRO approves qualification standards, which are requirements for SRO members of a certain level of knowledge and skills, and independence in the performance of labor functions. These requirements serve to ensure the quality of construction and cannot be lower than the following minimum statutory requirements:

individual entrepreneurs, heads of legal entities, independently organizing the implementation of engineering surveys, preparation of design documentation, construction, reconstruction, capital repair, and demolition of capital construction objects are required to have a higher education of the relevant profile and work experience in their field of at least five years;

depending on the profile of one's activity, SRO member is required to have at least two specialists at the place of employment in the organization of engineering surveys (chief project engineers), architectural and construction design (head project engineers, chief project architects), specialists in the organization of construction (chief project engineers), whose labor function includes organizing the performance of relevant work and the information about these employees should be included in the relevant national registers of specialists.

The law also provides other requirements for SRO members, for example, when working on particularly hazardous, complex, and unique objects.

A legal entity, including a foreign one, and an individual entrepreneur can become a member of an SRO if they meet these requirements and paid fees to its compensation fund unless otherwise established by law.

The following issues fall under the competence of the SRO members' meeting: approving the charter; electing the members of the permanent collegial management body by secret ballot, pre-term termination of one's powers and the powers of its members; electing the head of the collective management body by secret ballot, pre-term termination of one's powers; approving the membership fees. Accordingly, the decisions are taken democratically by all SRO members, and interested parties have the right to demand that constructors and designers strictly comply with them.

There is a judicial practice in cases of contesting decisions of the SRO meeting by its members, who did not participate in the voting for the particular decision, which forensic handwriting expertise witnesses. Such claims can be satisfied. For example, Resolution of the Arbitration Court of the Northwestern District of October 11, 2016, No. F07-8736/2016 in case No. A56-33880/2015).

As we can see, the organizational and legal form of the SRO and the formation of its activities are based on democratic principles, which does not exclude the imposition of strict requirements on its members and on the SRO itself.

General requirements for joining an SRO

For those who want to join an SRO in the field of design and construction, the main requirements are qualifications, professionalism, and the obligation to pay fees to the compensation funds.

Part 3 of Art. 55.6 of the Urban Development Code of the Russian Federation regulates the activities of SROs, facilitates control and supervision procedures, and is an additional guarantee of construction safety. Members of SROs can only be persons registered in the same subject of the Russian Federation in which the self-regulatory organization is registered, except for foreign legal entities, and if there is no relevant SRO in the subject of the Russian Federation in which the individual entrepreneur or legal entity is registered. In this case, a person may apply for membership in an SRO registered in any subject of the Russian Federation that shares a common border with the subject of the Russian Federation in which it is registered. In this way, the regional principle of SRO activity is respected.

The verification of documents of a person joining an SRO is conducted within two months, and during this period, the SRO decides on the admission of this person as a member of the organization or the refusal of admission. By deciding to accept designers and builders as members, the self-regulatory organization is already responsible for them, at least for the validity and legality of the verified documents of those joining it.

The decision to refuse admission may be appealed to the arbitration court formed by the National Association of Self-Regulatory Organizations. A person may be a member of only one SRO of each type of self-regulatory organization.

National SRO associations

National Associations of self-regulatory organizations are all-Russian non-governmental non-profit organizations that unite self-regulatory organizations based on compulsory membership and established in the form of an association (union). National Associations of self-regulatory organizations are a superior body to SROs and are also embedded in the system for the supervision of designers and builders. The Ministry of Construction of the Russian Federation oversees the activities of National Associations of SROs.

The law provides for two types of National Associations of self-regulatory organizations: 1) National Association of self-regulatory organizations based on the membership of persons performing engineering surveys and self-regulatory organizations on the membership of persons engaged in the project documentation drafting; 2) National Association of self-regulatory organizations based on the membership of persons engaged in construction. Only one National Association of self-regulatory organizations of each type may be created. The division of National Associations of self-regulatory organizations by type is reasonable, as the SROs they comprise are similarly divided according to the types of work performed by their members. This creates a system of self-regulation of construction work.

Legislative regulation of SROs

With the legislative regulation of most aspects of SROs, builders, and designers, as well as other participants in these relations, inevitably raise questions connected to the problems of law enforcement. Executive authorities issue letters and orders explaining the norms of law, and legal acts are given in the answers to the questions.

One of the frequently asked questions is "In which cases and how does an SRO ensure fulfillment by its members of their obligations under contracts for engineering surveys, design, and construction deals?" This question is caused by the fact that the possibility and obligation of self-regulating organizations to ensure fulfillment of obligations under construction contracts by their members appeared recently, with the introduction of amendments to the Urban Development Code of the Russian Federation. Creating the most effective mechanism to ensure the property liability of self-regulating organizations and their members has been held for several years. Compensation funds have always been under the close attention of specialists. The experts discussed the amounts of fees, the level of SRO members' responsibilities, models, and types of property liability. A self-regulatory organization forms a compensation fund for harm compensation and, in particular cases, a compensation fund for ensuring contractual obligations according to the procedure established by Articles 55.16 and 55.16-1 of the Urban Development Code of the Russian Federation. SRO ensures the property liability of its members for obligations caused by their failure to fulfill or improper fulfillment of obligations under construction contracts by forming a compensation fund to guarantee contractual obligations by decision of its collegial body, if:

At least 15 members of the organization based on the membership of persons performing engineering surveys and design, submitted to SRO an application on the intention to participate in contracts for executing these works using competitive methods of contracting.

At least 30 members of the organization based on the membership of persons engaged in construction, submitted to SRO an application on the intention to participate in construction contracts using competitive methods of contracting. Specialists called this innovation significant [Seraya, 2019. P. 24], as it is intended to serve as a guarantee of the quality of work.

The minimum contribution to the contractual obligations' compensation fund for one SRO member in the field of engineering surveys and architectural and construction design is from 150 000 to 3 500 000 rubles, depending on the SRO member's responsibility level (there are four responsibility levels).

The minimum contribution to the contractual obligations' compensation fund for one SRO member in the field of construction, reconstruction, capital repair, and demolition of capital construction objects is from 200 000 to 25 000 000 rubles, depending on the SRO member's responsibility level (there are five levels of responsibility).

SRO has subsidiary liability for the obligations of its members. In other words, the SRO is liable to the contractor's liability in the amount of one-fourth of the funds of the compensation fund for ensuring the contractual obligations. The size of this fund is calculated according to the procedure established by the internal documents of the self-regulating organization, if at the time of signing the contract the person has been a member of the SRO.

If information about SRO is excluded from the state register, the National Association is responsible to the extent of one-fourth of the compensation fund to ensure contractual obligations credited to its account.

According to part 5 of Art. 60.1 of the Urban Development Code of the Russian Federation, compensation for actual harm is made in court. Here the difficulties in law enforcement arise since this Article does not apply to relations associated with the property liability of SRO members on obligations that arose before the Federal Law of

July 03, 2016, No. 372-FZ "On Amendments to the Urban Development Code of the Russian Federation and Certain Legislative Acts of the Russian Federation" entered into force. Since not all claimants accept this, court disputes are made. As an example, we can examine the Decision of the Arbitration Court of the Ural District of December 21, 2017, No. F09-5961/2017 in case No. A60-63248/2016.

The amount of compensation from the compensation fund for contractual obligations depends on the size of this fund, as well as on the size of the contribution of each member of the SRO. The procedure for claiming the SRO for refunds from the compensation fund is as usual. If the self-regulatory organization refuses to bear subsidiary responsibility and does not respond to the demand (claim), the claimant goes to court. The same is for the harm compensation claims. However, the number of such claims against SROs and the National Association of Self-Regulatory Organizations is relatively low. Compensation funds for ensuring contractual obligations were formed relatively recently. Sometimes the amount of compensation is covered by the contractor voluntarily. In addition, sometimes, the plaintiff cannot justify the claim and the causal link between the actions of the contractor and the resulting harm (Decision of the Eighteenth Arbitration Court of Appeal of November 16, 2016, No. 18AP-11827/2016 in case No. A76-17757/2015). Unfortunately, situations where the claimant believes that he/she will not get the monetary compensation due to the defendant's evasion from the execution of the court's decision or the verdict in its favor are not uncommon. Federal Law No. 372-FZ "On Amendments to the Urban Development Code of the Russian Federation and Certain Legislative Acts of the Russian Federation" entered into force on July 03, 2016, and if the dispute concerns claim for compensation from SROs before that date, the courts can lawfully deny such claims. Sometimes, judicial acts indicate that the provision of SRO contractual obligations is not provided without explaining that it was this way before. Courts are not obliged to make such explanations, but it may mislead participants in the case. Such cases include the Decision of the Arbitration Court of the Ural District of May 16, 2017, No. F09-1923/2017 in case No. A60-40857/2016 and the Decision of the Arbitration Court of the West Siberian District of July 25, 2017, No. F04-1342/2017 in case No. A46-9396/2016. The same applies to the competency certificate for works that affect the safety of capital construction objects, the issuance of which has been canceled. State authorities often refer to it in their decisions, without mentioning the cancellation of such certificates as of today (Decision of the Federal Antimonopoly Service of Russia of August 03, 2017, in case No. P-86/17). Courts refer to such a certificate when resolving a dispute on another subject, for example, the obligation of SRO to remit the compensation fund contributions made by its former members when they transferred from one SRO to another, which inevitably creates misunderstandings among the participants in these relations. As an example, we can examine the Decision of the Ninth Arbitration Court of Appeal of November 30, 2017, No. 09AP-53619/2017 in case No. A40-79339/2017.

The SRO and the corresponding National Association are responsible for the actions of the members of this self-regulatory organization. This system of responsibility is called a two-tier system. It is important to note the validity and rationality of the amendments made to the Urban Development Code of the Russian Federation. Claims against the SRO for compensation for harm caused by non-fulfillment or improper fulfillment of obligations by a member of the self-regulatory organization under the contractual obligations were sued even before. Previously, the courts reasonably denied the claim, explaining that the SRO compensates for harm arising precisely from tort obligations, rather than contractual obligations (for example, the decision of the Arbitration Court of the West Siberian District of May 20, 2016, No. F04-1851/2016 in case No. A45-18460/2015). Moreover, it is necessary to study the possibility of a legislative increase in the amount of contributions to compensation funds by members of SROs, the responsibility of the self-regulatory organization, and the corresponding National Association. It is required to specify the functions of supervisory bodies to monitor the safety and expenditure of funds, to ensure control over payments, since the compensation of actual harm is done in a judicial order, and the amount of compensation, even paid on time and in full, often does not cover the harm.

SROs' compensation fund for harm coverage

Articles 55.16, 55.16-1 of the Urban Development Code of the Russian Federation regulate the main issues of the Compensation Fund operation and compensation for harm by SROs in the field of design and construction, and they should be carefully examined. Creating compensation funds and ensuring that the suffered party receives compensation is one of the main functions of SROs [Ponamarev, 2018. P. 30], as well as a guarantee of economic stability [Gruzdev, 2017. P. 4]. Amounts of compensation funds are determined by a self-regulatory organization, considering the contributions of its members, including those who terminated their membership, as well as income received from the allocation of compensation funds [Ustimova, Rasskazova, 2018. P. 76].

A compensation fund to ensure contractual obligations is formed by SRO only in specific cases while a compensation fund for harm compensation is created in all cases and aims at ensuring property liability of SRO members for obligations arising as a result of harm caused to a person or property of a citizen, a legal entity as a result of destruction, damages to a building, structure or part of a building. Within the limits of this fund, the self-regulatory organization is liable for the obligations of its members, that is, the creditor has the right to demand compensation from the person who caused the harm and from the SRO. A member of a self-regulatory organization cannot be excused from contributing to this compensation fund, which seems reasonable and fair.

A frequently asked question concerns the mechanism and the possibility of transferring the funds paid by an SRO member from one compensation fund to another. In many aspects, the existing controversial questions about the procedure are caused by the above-mentioned changes in legislation, the difficulty of correlating the effective date of these changes with the date of forming the funds, the difficulties of calculations, and the presence of referential norms.

Upon the application on its member's intention to participate in the conclusion of contracts for engineering surveys, design works, and construction contracts using competitive methods of contracting, including, according to the legislation on the contracting system, a self-regulating organization is obliged to use income received from the allocation of the compensation fund formed before July 4, 2016, deposited in dedicated bank accounts in Russian credit organizations, as a contribution to the compensation fund for ensuring contractual obligations in proportion to the amount of its previously made contribution to the compensation fund for harm compensation. The funds of the SRO compensation fund previously contributed by its members who have voluntarily terminated their membership in it and were expelled from it shall be credited to the compensation fund for ensuring contractual obligations. In cases where it was not decided to form a compensation fund to ensure contractual obligations, the funds shall be allocated to the compensation fund for harm compensation, if the decision to form a compensation fund to ensure contractual obligations was made before July 1, 2017. The relevant clarification is also contained in the Letter from Rostekhnadzor of July 07, 2017, No. 09-01-04/8378 "On the application of the Federal Law of July 03, 2016 No. 372-FZ".

The minimum contribution to the compensation fund for harm compensation for one member of a self-regulatory organization in the field of engineering surveys and design is from 50 000 to 3 500 000 rubles; for one member of a self-regulatory organization in the field of construction is from 100 000 to 25 000 000 rubles, depending on responsibility level.

The assets of the compensation funds are placed in dedicated bank accounts in Russian credit institutions that meet the requirements established by the Government of the Russian Federation. Such an account has a particular legal regime. Non-compliance with this obligation leads to the exclusion of the SRO from the state register. These provisions are additionally clarified by the Letter from Rostekhnadzor of July 20, 2017, No. 00-01-22/523 "On the compensation funds of self-regulatory organizations".

Adopted by the State Duma of the Federal Assembly of the Russian Federation at the first meeting on December 16, 2020, Draft Federal Law No. 909970-7 "On Amendments to the Urban Development Code of the Russian Federation" provides for greater banking control over the use of compensation funds. The credit institution is obliged to check the documents required for operations on the dedicated account, also the requirements for the composition of these documents are stricter. These changes will impose additional obligations and responsibilities on the bank in the execution of the above-mentioned operations, thus serving the safety of the compensation funds' assets.

The Credit institution is not allowed to transfer finances of the compensation funds except for the cases specified in part 4 of Art. 55.16 of the Urban Development Code of the Russian Federation. These include the return of the funds transferred by mistake and payments to compensate for the injury. Contributions to a person who terminates membership in an SRO are not refunded. In connection with the requirements for the return of contributions by persons who terminated membership in the SRO, Rostekhnadzor issued a Letter on August 16, 2017, No. 09-01-04/10095 "On the application of the legislation on urban development activities".

Justified claims for harm compensation filed against an SRO are satisfied by the courts. For example, Resolution of the Sixth Arbitration Court of Appeal of April 11, 2013, No. 06AP-1262.

As we can see from the court disputes and explanations of the executive authorities, a significant number of questions from the participants of these relations arise precisely on the activities of the compensation funds. For example, the Letter of the Ministry of Construction, Housing and Utilities of Russia of November 27, 2017, No. 43685-HM/02 "On considering the appeal" is focused on the circulation of SRO compensation funds, information about which is excluded from the state register. In particular, the Letter of the Ministry of Construction of Russia of May 26, 2017, No. 18608-HM/02 "On considering the appeal" concerning the compensation funds formation, explains the possibility of increasing such funds from the contributions of SRO members. The Letter of the Ministry of Construction of Russia of November 27, 2017, No. 43685-HM/02 "On considering the appeal" is focused on the circulation of SRO compensation funds, information about which is excluded from the state register.

The majority of court cases in this category are claims of former members of self-regulatory organizations to transfer their compensation fund contributions to the new territorial SRO when they transfer from one self-regulatory organization to another. Such claims are satisfied. At the same time, claims are often made to recognize the termination of membership in a self-regulatory organization as voluntary, as well as to recognize the decision to expel a person from an SRO as invalid. It should be noted that despite the statutory requirement for self-regulatory organizations to transfer contributions paid by its member to the compensation funds when a person moves from one self-regulatory organization to another, SROs do not always fulfill this obligation. Justified claims of SROs against its members to receive unpaid membership fees and contributions to compensation funds are satisfied (Decision of the Arbitration Court of the Moscow District of July 15, 2019, No. F05-10803/2019 in case No. A40-

224409/2018). If the organization did not provide evidence of its SRO status, its membership fee claim may be denied (Decision of the Thirteenth Arbitration Court of Appeal No. 13AP-13245/2017 of August 07, 2017, in case No. A56-82963/2016). If the transition to the SRO in another region was not made, and the plaintiff and the defendant are registered in one subject of the Russian Federation, the claim is denied (Decision of the Arbitration Court of the Moscow District of January 22, 2018, No. F05-20430/2017 in case No. A40-57878/2017). The SRO's suit against its former member for reclaiming the contribution to the compensation fund was dismissed because the lawsuit was made after the company was excluded from the list of SROs and is an abuse of law (Decision of the Arbitration Court of the Moscow District of January 22, 2018, No. F05-19687/2017 in case No. A40-74126/2017).

The formation, storage, and expenditure of SRO compensation funds remain relevant because it is difficult to correlate the terms of changes in legislation with the dates of execution, performance, or non-performance of contracts. The law enforcement practice is uncertain, and the problem of real compensation for harm persists.

Disciplinary measures against SRO members

Imposing penalties on SRO members is a method to control their activities. In this regard, the disciplinary penalties applied by a self-regulatory organization to its members and the possibility of contesting them are still relevant. When SRO uses disciplinary measures on its members, it serves to force builders and designers to perform their duties conscientiously while being a complex legal relationship.

According to Art. 55.14 of the Urban Development Code of the Russian Federation, self-regulatory organization considers complaints on decisions, actions (or inaction) of its members and other appeals. The procedure for complaints and appeals handling is approved according to the internal documents of the SRO. Part 3 of Art. 54 of the Urban Development Code of the Russian Federation (objects located in the territory of two or more subjects of the Russian Federation and highways) supervises the quality of work performed by SROs. For example, if a member of a SRO violates the requirements of technical regulations or design documentation during the construction of critical objects, the SRO shall notify the federal executive authority responsible for state construction supervision. If there are violations during the construction or reconstruction of other objects, the SRO shall notify the executive authority of the subject of the Russian Federation responsible for regional state construction supervision. This procedure can also be referred to measures of supervision and control over SROs and their members.

If an SRO member violates the requirements of urban development legislation, technical regulations or standards, and internal documents of the SRO, it will be subject to disciplinary measures, including an order requiring the SRO member to eliminate the violation within a certain period; a warning; a recommendation to exclude the person from the members of the SRO, considered by the acting collegial management body. The violator may also be subject to other measures established by the internal documents of the self-regulatory organization.

An SRO member, subject to disciplinary measures in the form of suspension of the right to perform engineering surveys, prepare design documentation, or construction, until the exclusion is canceled, has the right to continue to perform these works only under contracts concluded before the application of the disciplinary measure. In this way, the interests of the customer are respected, and the SRO member is not deprived of income completely.

The decision of a disciplinary measure can be appealed to the arbitration court formed by the relevant National Association of self-regulatory organizations. Most often, SRO excludes its members for a repeated non-payment of membership fees. Sometimes, excluded persons challenge the decisions of the general meeting of self-regulatory organization members. Generally, the courts satisfy such claims due to violations of procedural issues by SROs.

State supervision over the SROs' activities

According to the Regulation of the Government of the Russian Federation of November 19, 2008, No. 864 "On measures to implement the Federal Law of July 22, 2008, No. 148-FZ "On amendments to the Urban Development Code of the Russian Federation and certain legislative acts of the Russian Federation", state supervision and control over the activities of self-regulatory organizations is carried out by Rostekhnadzor. An analysis of the above-mentioned regulations, as well as examples from judicial practice and the practice of administrative bodies, shows that almost all professional and organizational actions of designers, builders, and their associations are subject to control and supervision.

Despite the state register of SROs, other aspects of relations of self-regulatory organizations and associations with this state body as well as with other executive authorities [Algazina, 2017. P. 25–29], we must recognize that inspections are the main activity of SRO oversight. The provisions of the Federal Law of December 26, 2008, No. 294-FZ "On protecting the rights of legal entities and individual entrepreneurs in the implementation of state control (supervision) and municipal control" are used to regulate the procedure of inspections.

Let us consider the peculiarities of supervisory measures established by Art. 55.19 of the Urban Development Code of the Russian Federation.

Grounds for an unscheduled inspection of a self-regulatory organization also include non-compliance with the requirement to compensate for the harm caused to third parties, non-performance or improper execution of the SRO powers to monitor the activities of its members. In exceptional cases, the inspection period (no longer than 10 working days) may be extended by the head of the supervisory authority for a maximum of 10 working days.

If there are violations of the legislation or other legal acts, Rostekhnadzor issues an order to SRO to eliminate them. If the order is not executed within three months, Rostekhnadzor has the right to apply to the relevant National Association of Self-Regulatory Organizations with an assertion to exclude the SRO's information from the state register of self-regulatory organizations.

If the National Association of self-regulatory organizations agrees with the possible exclusion of information about an SRO from this state register, within thirty days from the date of receipt of this conclusion, Rostekhnadzor has the right to make an extrajudicial decision on the exclusion of information about SRO from the state register.

If the National Association concludes that there are no grounds for excluding information about an SRO from the state register, or if the decision is not taken within thirty days, Rostekhnadzor has the right to apply to the court with a demand to exclude information about this SRO from the state register of self-regulatory organizations. Rostekhnadzor excludes an SRO from the state register if: 1) SRO has not submitted documents to the supervisory authority confirming the organization's compliance with the established requirements; 2) SRO members are persons not registered in the same subject of the Russian Federation, in which such SRO is registered, except in prescribed cases; 3) SRO has violated the procedure for the allocation of compensation funds.

Information about inspections and on the exclusions of SROs from the state register is published on the Rostekhnadzor official website. In 2020, the Central Office of Rostekhnadzor conducted 28 inspections of SROs to monitor the execution of previously issued orders to eliminate violations. In the second half of 2019, ten SROs were excluded from the state register. Among the most frequent violations are the inconsistency of internal documents of self-regulating organizations with the requirements of the amended legislation on urban development activities; violation of the order for forming the compensation funds and their allocation in dedicated bank accounts in credit organizations according to the requirements of the Government of the Russian Federation; violation of the order for registering members of self-regulating organizations. Letter of Rostekhnadzor No. 00-06-04/1999 of August 8, 2017, outlines the grounds for excluding the SRO from the state register.

Order of Rostekhnadzor No. 325 of July 25, 2013 approved administrative regulations for the execution of the state function of state supervision over SROs in the field of engineering surveys, architectural and construction design, construction, reconstruction, capital repairs of capital construction objects by the Federal Service for Environmental, Technological and Nuclear Supervision. The subject of supervision is defined as the compliance of self-regulatory organizations with the requirements of the law. The rights and responsibilities of officials in implementing state supervision, including the right to request the internal documents of the SRO, and the obligation to inform the head of the SRO of the results of the inspection, are specified. All actions of the inspector and the inspected during the check, from the preparing the inspection to adopting the measures in case of violations, are prescribed. Necessary addresses and telephone numbers are also specified.

Letter of Rostekhnadzor № 09-01-04/9564 of December 13, 2016, "On inspections of self-regulatory organizations" establishes the periodicity of scheduled inspections – the expiration of one year from the date of including the information about SRO in the state register of self-regulatory organizations and the expiration of two years from the date of the last scheduled inspection. Even with the detailed regulation of the oversight procedure, the issues of validity, legality, and thoroughness of their conduct remain relevant, given that the rights of the auditees are respected.

According to Art. 23.69 of the Code on Administrative Offences of the Russian Federation (hereinafter referred to as CAO RF), on behalf of Rostekhnadzor, cases on administrative offenses in this area may be considered by the head of the corresponding federal body and deputies, heads of territorial bodies of relevant federal body and their deputies.

Order of Rostekhnadzor No. 454 of October 27, 2017, approves the list of Rostekhnadzor officials authorized to draw up protocols on administrative offenses. In the central apparatus, these are the head of the service, heads of directorates and their deputies, heads of departments and their deputies, chief state inspectors, senior state inspectors, state inspectors, and other officials whose duties include the implementation of state supervision, control, and licensing of relevant activities. The same situation is in the territorial bodies.

Art. 14.52 of CAO RF establishes SRO responsibility for violating the obligation to disclose information (non-disclosure of information, placement of information in violation of requirements for access to a website that contains information, the absence of an official website when it is a mandatory requirement) in the form of an administrative fine of up to 50 000 rubles for officials and up to 200 000 rubles for legal entities.

Disclosing the information is a prerequisite of SRO activity, one of its principal directions. Usually, the application of the above-mentioned measure does not cause disputes and doubts. A similar requirement is established for other organizations in different spheres of activity unless the information constitutes a state secret.

Art. 14.63 of the CAO RF establishes an administrative penalty to SRO for violating the procedure for providing documents and information to maintain the state register of self-regulatory organizations in the form of administrative fines for officials for 1 000 to 30 000 rubles or disqualification for up to six months; for legal entities, the amount is up to 200 000 rubles.

Art. 14.64 of the CAO RF establishes an administrative penalty for violating the legislation on storing documents in the form of administrative fines for officials for 2 000 to 5 000 rubles; for legal entities, the amount is up to 50 000 rubles.

Art. 9.5.1 of the CAO RF establishes administrative responsibility for engineering surveys, design, and construction of capital construction objects conducted by a person who is not a member of an SRO when such membership is obligatory, in the form of an administrative fine for 40 000 to 50 000 rubles. The Code of Administrative Offences of the Russian Federation provides for responsibility for violations of the requirements of legislation on urban development activities and legislation on the contracting system in the design and construction.

One can argue about the amount of fine. For big construction companies with a turnover of billions, which are members of SRO, these amounts are insignificant, but for others, they can be considerable. However, self-regulatory organizations are allowed a lot of actual offenses not provided for in the CAO RF. These include leaving consumer complaints without response, meaningless responses to complaints, inaction to SRO members on valid complaints, unfair behavior of builders and designers in the execution of work that does not correspond formally to the established sanctions and does not meet the requirements of safety and quality of construction.

The analysis of court practice shows that among the cases appealing against decisions of administrative bodies to bring legal entities to administrative responsibility, there are not many cases of appealing such decisions of SROs in the sphere of construction. Among most frequently challenged are resolutions on imposing administrative penalties and prescriptions based on the results of inspections. If Rostekhnadzor violates the legislation during an inspection by: failing to notify the organization about the inspection; violations when drawing up the inspection report; the lack of a protocol of an administrative offense; violation of the rights of self-regulatory organizations in attracting administrative responsibility; the lack of evidence of an administrative offense – the SROs will appeal, as in similar cases to appeal decisions of administrative bodies in other spheres, is satisfied, and orders and prescriptions of Rostekhnadzor are deemed invalid.

If Rostekhnadzor's inspection followed the legislation and the prescription is legitimate and justified, the court will deny the SRO's appeal. This is confirmed by the Resolution of the Eleventh Arbitration Court of Appeal No. 11AP-5489/2016 of May 31, 2016, in case No. A55-32182/2015.

Conclusion

Issues of safety and quality of construction affect everyone. The development of the institution of administrative responsibility [Kritskaya, 2016] and the role of state regulation of the construction industry [Mkhitaryan, 2019] remain relevant. The requirements of legality and consideration of the peculiarities of the construction contract should be strictly observed at the stage of its conception, and even better at the stage of negotiating the future contract and forming the intentions. Currently, the legal status of SROs and the main directions of their activities are regulated by legislation. The main obstacles lie in implementing these norms in practice; this was outlined by analyzing the legal norms, the bylaws, and the order of their entry into force. The bylaws are issued regularly and usually help in interpreting the legislation, and most of them are reasonable. Letter of the Ministry of Construction and Housing and Utilities of the Russian Federation No. 2890-XM/08 of January 30, 2018, "On the need for a special permit (license) or membership in a self-regulatory organization for the implementation by a legal entity of certain activities" states: if the subject of the contract is to perform engineering surveys and drafting design documentation, the contractor must be simultaneously a member of two SROs – in the field of engineering surveys and architectural and construction design, which is quite reasonable.

An analysis of court practice leads to the conclusion that the significant number of cases involving self-regulatory organizations are disputes relating to compensation fund contributions, the recovery of membership fees, disputing the decisions of general meetings of self-regulatory organizations, on compensation for harm caused by a member of the self-regulatory organization. The purpose of SROs is not only to register and control builders and designers but also to share responsibility with them before third parties. The task of the self-regulatory organization is to ensure the safety of construction and the realization of public interests [Petrov, 2015]. This goal is manageable if all participants of these relations will fulfill the requirements of the legislation because the responsibility for improper actions are borne by builders (SRO members) and self-regulatory organizations themselves, National Associations, and even state and municipal customers [Bayrashev, 2018], since SROs took their place in the field of state and municipal procurement in the construction area [Guseva, Zabelin, 2016]. If the mechanism for state supervision in this area will be effective, control measures are regular, effective, and thoroughly executed, penalties and measures of responsibility applied to violators will always be inevitable, severe, but reasonable and fair.

Литература

Акимова М.А., Леус В.А. Саморегулируемые организации в контексте антимонопольного законодательства. *Конкурентное право.* 2019. № 2. С. 43–46.

Алгазина А.Ф. Административно-правовой статус саморегулируемых организаций во взаимосвязи с органами исполнительной власти. *Государственная власть и местное самоуправление.* 2017. № 1. С. 25–29.

Байрашев В.Р. Приемка товаров, работ, услуг с учетом новых видов юридической ответственности. *Госзаказ: управление, размещение, обеспечение.* 2018. № 54. С. 108–111.

Груздев В.В. Гражданско-правовой принцип стабильности оборота. *Юрист.* 2017. № 23. С. 4.

Гусева Т.А., Забелин А.В. О роли саморегулируемых организаций в обеспечении государственных и муниципальных закупок в сфере строительства. *Законы России: опыт, анализ, практика.* 2016. № 11. С. 52–57.

Критская О.В. Развитие административной ответственности в области предпринимательской деятельности и деятельности саморегулируемых организаций. *Административное право и процесс.* 2016. № 5. С. 82–85.

Лескова Ю.Г. Применение информационных (цифровых) технологий в саморегулировании как условие развития строительной отрасли и правового регулирования. *Гражданское право.* 2018. № 5. С. 9–11.

Мхитарян Ю.И. Концепция приоритетного развития саморегулируемых организаций в экономике. *Законы России: опыт, анализ, практика*. 2019. № 3. С. 103–106.

Петров Д.А. Обеспечение общественного интереса как проявление частноправовой природы саморегулируемых организаций. *Юридический мир.* 2015. № 9. С. 55–59.

Понамарев А.М. К вопросу о компенсационных фондах саморегулируемых организаций в сфере строительства. *Гражданское право.* 2018. № 6. С. 28–31.

Серая Н.А. К вопросу о правовом режиме компенсационного фонда обеспечения договорных обязательств саморегулируемых организаций в сфере строительства. *Гражданское право.* 2019. № 4. С. 24–27.

Устимова С.А., Рассказова Е.Н. Нормативные изменения в деятельности СРО в строительстве: проблемы и противоречия. *Вестник Московского университета МВД России.* 2018. № 3. С. 76.

References

Akimova M.A., Leus V.A. Self-regulated organizations within the framework of antimonopoly legislation. *Konkurentnoye pravo*. 2019. No. 2. P. 43–46. In Russian

Algazina A.F. Administrative and legal status of self-regulatory organizations in the relationship with executive authorities. *Gosudarstvennaya vlast' i mestnoye samoupravleniye*. 2017. No. 1. P. 25–29. In Russian

Bairashev V.R. Acceptance of goods, works, services taking into account new types of legal liability. *Goszakaz: upravleniye, razmeshcheniye, obespecheniye*. 2018. No. 54. P. 108–111. In Russian

Gruzdev V.V. Civil law principle of turnover stability. *Yurist*. 2017. No. 23. P. 4. In Russian

Guseva T.A., Zabelin A.V. On the role of self-regulated organizations in securing state and municipal procurements in construction sector. *Zakony Rossii: opyt, analiz, praktika*. 2016. No. 11. P. 52–57. In Russian

Kritskaya O.V. Developing administrative responsibility in the area of entrepreneurial activity and activities of self-regulated organizations. *Administrativnoye pravo i protsess*. 2016. No. 5. P. 82–85. In Russian

Leskova Yu.G. Using information (digital) technologies in self-regulation as a condition for developing construction industry and legal regulation. *Grazhdanskoye pravo*. 2018. No. 5. P. 9–11. In Russian

Mkhitaryan Yu.I. The concept of priority development of self-regulatory organizations in economy. *Zakony Rossii: opyt, analiz, praktika*. 2019. No. 3. P. 103–106. In Russian

Petrov D.A. Ensuring public interest as a manifestation of the private legal nature of self-regulatory organizations. *Yuridicheskiy mir*. 2015. No. 9. P. 55–59. In Russian

Ponamarev A.M. On compensation funds of self-regulated organizations in construction. *Grazhdanskoye pravo*. 2018. No. 6. P. 28–31. In Russian

Seraya N.A. On the legal regime of compensation fund for securing contractual obligations of self-regulated organizations in construction. *Grazhdanskoye pravo*. 2019. No. 4. P. 24–27. In Russian

Ustimova S.A., Rasskazova E.N. Normative changes in the activity of self-regulatory organizations in construction: problems and contradictions. *Vestnik Moskovskogo universiteta MVD Rossii*. 2018. No. 3. P. 76. In Russian

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