
CONTRACTUAL REGULATION IN THE ENERGY SECTOR

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**PLACE OF A RES-BASED GENERATING FACILITY CONSTRUCTION
CONTRACT IN THE SYSTEM OF CIVIL LAW CONTRACTS****Pates A.S.**

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Abstract. In this article, the author has focused on the theoretical understanding of contractual instruments used to create renewable energy source (RES) based generating facilities. The purpose of the study is to find the legal peculiarities of the obligations aimed at the construction of these facilities against the background of a system of general and special contracts highlighted in the Russian civil law and energy law. To do this, the author has correlated the theoretical approaches that have developed in Russian civil jurisprudence and in the energy law science on the application of mixed and comprehensive contractual forms. As a result, the contract for the construction of RES-based generating facilities is proposed to be considered on two levels: as a single civil law agreement and as a set of related civil law transactions. In the first case, the contract generates a set of obligations aimed at the construction of the relevant facility, which subordinates the parties not only to the norms of civil law, but also to the requirements of the Russian energy laws. In the second case, several civil law contracts, including those of a mixed or comprehensive type, are aimed to achieve a common goal, the creation of a specific generating facility. In this case, the effect of civil and energy laws can be differentiated depending on the subject matter and content of the contract.

Keywords: energy law, private law relations, renewable energy sources (RES), contractual regulation, energy facility construction.

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**МЕСТО ДОГОВОРА НА СТРОИТЕЛЬСТВО
ГЕНЕРИРУЮЩИХ ОБЪЕКТОВ, ФУНКЦИОНИРУЮЩИХ
НА ОСНОВЕ ВОЗОБНОВЛЯЕМЫХ ИСТОЧНИКОВ ЭНЕРГИИ,
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Аннотация. В представленной статье автор акцентировал внимание на теоретическом осмыслении договорных инструментов, используемых для создания генерирующих объектов, которые функционируют на основе возобновляемых источников энергии (далее — ВИЭ). Цель исследования заключается в поиске правовых особенностей обязательств, направленных на строительство данных объектов на фоне системы общих и специальных договоров, выделяемых в гражданском и энергетическом законодательстве Российской Федерации. Для этого автор соотнес теоретические подходы, сложившиеся в российской цивилистике и в науке энергетического права, по вопросам применения смешанных и комплексных договорных форм. В результате договор на строительство генерирующих объектов, функционирующих на основе ВИЭ, предлагается рассматривать в двух плоскостях: в качестве единого гражданско-правового соглашения и как совокупность смежных гражданско-правовых сделок. В первом случае договор порождает комплекс обязательств, направленных на строительство соответствующего объекта, что подчиняет стороны не только нормам гражданского законодательства, но и требованиям энергетического законодательства Российской Федерации. Во втором варианте несколько гражданско-правовых договоров, в том числе смешанного или комплексного типа, призваны достичь общую цель — создание определенного генерирующего объекта. В таком случае действие гражданского и энергетического законодательства может быть разграничено в зависимости от предмета и содержания договора.

Ключевые слова: энергетическое право, частно-правовые отношения, возобновляемые источники энергии (ВИЭ), договорное регулирование, строительство энергообъектов.

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SYSTEM OF CONTRACTS THAT FACILITATE THE CIVIL COMMERCE OF RES-BASED FACILITIES

The Russian energy market is undergoing different institutional changes, caused, among other things, by the need for development and integration into a single energy RES-based generation system. If the use of the RES on the scale of the national energy system currently shows signs of fragmentation and is generally not widespread enough, then in some federal subjects the emphasis is on alternative energy, which allowed RES to play a significant part in the regional energy balance.

This circumstance is caused by numerous economic factors, to which political circumstances have been added over the past decade. Thus, the imposition of international sanctions on the Russian energy sector provoked the need to expand the R&D for renewable energy sources (RES), which is impossible without the use of effective contractual instruments designed to coordinate the will of a certain range of business entities and public law entities [1].

In Russian legal science, various typologies of contracts have developed that formalize binding legal relations in the use of RES. In particular, a number of researchers propose a whole system of contractual models depending on their subject matter [2]:

- 1) contracts mediating the construction of RES-based generating facilities;
- 2) contracts aimed at carrying out a complex of surveys, design work and passing an expert assessment of the generating facility construction project;
- 3) contracts providing technological connection of such generating facilities;
- 4) contracts aimed at generating facility operational dispatch management;
- 5) contracts regulating the generating facility operation and maintenance;
- 6) contracts by which the capacity of qualifying facilities is provided;
- 7) different contracts mediating the sale and purchase of electricity generated by generating facilities or generation attributes.

The above list demonstrates the appropriate gradation of business activity, the subject of which is

RES-based generating facilities [3]. Actually, in civil jurisprudence and in business jurisprudence, theoretical conceptualizations of contractual means as a certain type of entrepreneurial activity are often found [4], which, in turn, initially narrows the subject composition of these binding legal relations [5].

Meanwhile, this typologization is far from the only one among the scientific researches devoted to the contractual regulation of relations in the field under consideration. Thus, the subject composition of obligations arising on their basis should be recognized as a common criterion for differentiating contracts [6].

Because of this, it is customary to distinguish customers, design and contracting entities, grid operators, owners, customers, each of which is classified according to the type of market within which contractual relations are formed (wholesale or retail, contractual or operational, national, regional or zone markets).

For example, a RES-based generating facility construction contract always presumes the identification of a customer figure on one part and a contracting (design) entity on the other part. However, the complex subject matter of such a contract, justified by the technological instability of the object of contractual relations or its innovative nature in Russian conditions, implies the conclusion of trilateral and multi-lateral obligations in practice, formalized either by a single civil law transaction or a set of related contracts.

From this it can be concluded that the classical typology of civil law obligations, which has developed in civil jurisprudence according to the criterion of the number of parties, can be fully projected onto a contract mediating the RES-based generating facility construction.

However, the theoretical approaches formed in modern civil law to the diversity of transaction types, the subject of which are RES-based facilities, do not allow unambiguously qualifying the obligations arising in the general system of civil law contracts. A good example of this is the contract for the construction of generating facilities, regardless of the energy source on which it will operate.

LEGAL NATURE OF A RES-BASED GENERATING FACILITY CONSTRUCTION CONTRACT

The establishment of the legal nature of obligations aimed to organize the construction of generating facilities rests on the matrix structure of contracts that formalize these legal relations.

Thus, some authors believe that the obligation under consideration fully acts as a kind of construction contract and is based on the norms of Chapter 37 of the Civil Code of the Russian Federation (hereinafter the “Russian Civil Code”) with moderate public law intervention [7].

On the contrary, researchers specializing in individual contractual models in energy industry emphasize the mixed type of contracts aimed at the construction of such facilities, since they simultaneously combine the features of both related contractual obligations and special transactions that are conducted exclusively in the energy industry [8]. Besides, the positions of the second group of scientists differ on the issue of the harmonious application of the norms of private and public law to these legal relations.

According to some authors, the generating facility construction contract is significantly influenced by energy, environmental and administrative law, which significantly reduces the autonomy of the will of the parties thereto [9]. Other researchers note the achievement of a balance between private and public interests in the construction of economically demanded generating facilities, which justifies state participation in stimulating investment projects aimed to increase the share of renewable energy sources (RES) [10].

However, the investment basis of the obligations aimed at the construction of the facilities under consideration involves the formation of several legal frameworks, among which the contractual framework can combine purely civil law means with administrative and financial law ones, if the project is supported by the participation of federal or regional budgets, and is also built on the mechanism of public — private partnership. Thus, the legal nature of such relations depends not only on the subject matter and parties involved in the obligations, but also on the existence of a public (state) interest.

In the legal and regulatory framework established in the Russian Federation, several approaches can be traced at once, interpreting the nature of obligations

in different ways, mediating the RES-based generating facility construction.

According to Article 21(1) of Federal Law of 2003 No. 35-FZ “On the Electric Power Industry”, the Russian Government is entrusted with the function of developing a legal order for the electric power industry facility construction, which includes not only funding terms, but also terms and conditions for the implementation of such construction projects. On February 1, 2024, the government rules for the qualification of RES-based generating facilities came into force [11]. They contain a set of requirements for such facilities to be recognized as qualified, which is an innovation of Russian energy laws.

The qualification of generating facilities was embodied into the provisions of Federal Law No. 35-FZ of 2003 “On the Electric Power Industry” in 2023 through a set of new norms [12], which in their entirety do not endow the owners of such facilities with an obvious legal obligation to undergo such a procedure, but encourage to do this with the purpose of the dissemination of special legal norms governing the operation of RES-based facilities. Thus, the laws do not contain special requirements for the subject matter of a generating facility construction contract, which is compensated by the conditions for recognizing such a generating facility as a qualified facility.

However, the entrepreneurial use of a generating facility depends on a number of benefits provided by the state. According to Article 32(2) of Federal Law of 2003 No. 35-FZ “On the Electric Power Industry”, the Federal Government may establish both an appropriate incentive mechanism and put forward requirements for the content of contracts used by business entities in the construction, reconstruction, modernization and repair of such facilities.

The noted legal peculiarities justify the control of the Russian Government over the creation of RES-based generating facilities. For example, a list of federal subjects is compiled annually in which the installation or operation of generating facilities using industrial waste is planned [13].

Besides, the facilities under consideration must meet specifications within the framework of the use of generated electricity, which is also subject to regulation by legal acts of the Russian Government [14]. The parties having obligations for the construction of such facilities cannot ignore such technical standards, since the corresponding legal obligation arises regardless of the content of the contract and the purposes

of subsequent operation of the generating facility being created.

Thus, the analyzed subordinate regulations of the Russian Government and the norms of Federal Law No. 35-FZ of 2003 “On the Electric Power Industry” are special in relation to civil law norms governing contractual obligations. Their application is based on a mixed type of RES-based generating facility construction contract, which does not contradict the normative model of Article 421(3) of the Russian Civil Code.

RELATIONSHIP BETWEEN A RES-BASED CONSTRUCTION CONTRACT AND RELATED CONTRACTUAL MODELS

The common legal nature of the contract under consideration and a construction contract as well as other types of contractual obligations is implied by the disposition of Article 740(1) of the Russian Civil Code, in which the subject matter may be both the construction of a certain facility and a number of other construction works. Article 740(2) of the Russian Civil Code lists in a variable form such actions as reconstruction, installation, commissioning, as well as any types of work that are inextricably linked to the construction facility. In comparative terms, the subject matter of the contract may also provide for the subsequent operation of the constructed facility on the terms and conditions agreed by the parties.

Thus, the customer who ordered the RES-based generating facility construction is entitled to make do with the civil model of a construction contract, and to arrange other types of work, services or the purchase of necessary structural elements with another contract (including a supply contract).

In the named system of contractual instruments ensuring the generating facility creation or reconstruction, the civil law principle of freedom of contract is traced, which, despite the specific subject matter to the requirements of energy laws, provides the interested party with a certain choice of both counterparties and contractual means of achieving an economic result.

Moreover, the customer’s right to issue a set of works aimed at the RES-based generating facility construction in the form of a set of contractual obligations practically leads to the conclusion of a mixed contract that combines the terms and conditions of a construction contract, design and survey work,

supply and paid services. Given the level of development of RES in the Russian Federation, business entities are forced to independently order R&D and technological work, which can become part of a common combined obligation.

In civilistic publications, the category of a comprehensive contract based on achieving a common goal is often differentiated [15]. Within the framework of such a model, the customer who ordered a generating facility can conclude several contracts with one or more contractors at once, provided that they comply with uniform requirements (for example, government conditions for the qualification of a future facility), including the obligation to achieve such a condition of the facility that would meet specifications.

The differentiation of contractual instruments used to form an obligation for a generating facility construction, as a rule, has a practical purpose. Contractual relations are subject to both the terms and conditions agreed upon by the parties and to the requirements of laws, which differ depending on the subject matter of obligations. Therefore, the simultaneous combination in one contract of several contractual models provided for by the Russian Civil Code imposes a set of diverse responsibilities on the parties involved in construction.

Thus, the RES-based construction contract represents a dichotomy of contractual regulatory instruments:

- 1) a single civil law agreement formalizing a set of obligations of the parties to create, reconstruct or modify an appropriate facility subject to the simultaneous operation of civil and energy laws; and
- 2) a set of related civil law agreements united for the purpose of creating a specific generating facility with a distinction between the operation of civil law and energy law.

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