FZ "On the System of Public Procurement Contracts for Products, Works, Services for State and Municipal Needs"

Federal law No. 44-FZ "On the System of Public Procurement Contracts for Products, Works, Services for State and Municipal Needs" as of 05.04.2013


The Contracting Law has substantially changed the current public procurement system. Apart from introducing new public procurement methods, the Law has filled in legislative blanks that existed due to the absence of provisions regulating pre-procurement procedures. From now on, the whole procurement process will be regulated, starting from procurement planning up to contract performance. Also, significant amendments have been inserted into the current procurement procedures monitoring system.

This review contains an overview of novelties provided by the Contracting Law and comparison of procedures provided therein with the current procedures provided in the Public Procurement Law. Key amendments can be divided into several blocks described below.

Procurement planning

The Contracting Law provides a compulsory planning procedure for all procurement types. Procurement planning procedure consists of approval and maintenance by owners of two obligatory document types: procurement schedules and roadmaps.

Procurement schedule shall be made for a term equal to the term of a budget act adopted for the relevant budget level for the subsequent financial year and planning period, and shall include information on procurement purposes, amounts and frequency, as well as grounds for such procurement.

Roadmaps shall contain a procurement list of goods, works, services necessary for state and municipal needs for the relevant financial year, and will serve as a ground for procurement.

Following the mandatory public discussion procurement schedules, roadmaps, procurement documentation may be amended, or the procurement concerned may be cancelled.

Mandatory procurement planning requirements will come into effect on January 1, 2015 (part 2, section 114 of the Contracting Law), requirement to make procurement in accordance with approved roadmaps only – on January 1, 2016 (part 3, section 114 of the Contracting Law).

Grounds for procurement

An owner shall, when making a procurement schedule/roadmap, provide grounds for the procurement through, indicating consistency between the proposed procurement with its purposes provided by the Contracting Law.

This novelty results in a much wider requirement list related to procurement grounds, since under the current regulation, every time they make procurement, owners shall provide grounds for the initial (maximum) contract price only.

Provisions related to providing grounds for procurement shall come into effect on January 1, 2015.

Unified data base

Starting from January 1, 2014 the majority of provisions on a unified data base comes into effect, ensuring the availability of certain information, including information on contract performance, on procurement monitoring results. Such unified data base consists of documents, other procurement information published at a web-site indicated by Russian Government, and technical facilities necessary to extract and provide such information. There is a significant difference from the current state and municipal procurement information support system, which is a greater availability of information on executed state contracts. For example, at the moment there is no way to receive any data on the performance of state and municipal contracts.

Contract execution and contents

Procurement parties

Under the Public Procurement Law, owners can have certain requirements only to auction and tender bidders. The Contracting Law contains a list of requirements applicable to all procurement parties. The major part of the requirements was taken from the Public Procurement Law amended.

Additional requirements to parties may be established by laws and regulations of Russian Government if procurement is made on the basis of restricted tenders, two-stage tenders, closed restricted tenders, closed two-stage tenders or auctions. The Contracting Law also introduces a rule under which when budgetary investments are made under the Budget Code of Russia in favour of an entity that is not a state or municipal institution or a state or municipal unitary enterprise, for the purposes of investment projects for construction, reconstruction and equipment, provisions of the Contracting
Law apply to such entity that makes procurement from such funds. This supplemental provision is considered to be advisable and aims at preventing budget funds abuse.

**Beneficiaries**

If the initial (maximum) contract price exceeds an amount provided by Russian Government, a procurement party that is a party to the contract shall provide information on beneficiaries and on management bodies of such party.

A beneficiary shall mean a party that owns, directly or indirectly, more than 10% of voting shares in a business entity, or a participatory interest constituting more than 10% of the charter capital of the entity.

Non-provision of such information does not directly result in termination of the contract, however, such non-provision is disclosed in the unified data system. In such circumstances, the contract may be invalidated if both of the following events occur:

- owner's manager, procurement committee member, head of owner's contracting department or a contracting manager is a blood relative (including relation my marriage) of the parties mentioned above or individual entrepreneurs (winning bidders);
- owner's officials have a personal interest in execution and performance of the contract. Personal interest shall mean a potential availability of income in the form of property or property-related services or other benefits for themselves or for any third parties.

**Procurement item description**

The Public Procurement Law requires to describe procurement items for each procurement type separately. The Contracting Law provides identical requirements in relation to all procurement items.

**Initial (maximum) contract price**

The Contracting Law provides a number of methods to set and provide grounds for the initial contract price. They include:

- comparable uncontrolled price method (market analysis);
- standard-based method;
- tariff-based method;
- project and budget documentation based method; and
- costing-based method.

Under Contracting Law, a federal contracting authority shall adopt guidelines in relation to such methods.

**Bid security**

Under the Public Procurement Law, owners may require from bidders to secure their bids through a payment by including this requirement into their documentation (such security is considered as a deposit). In tenders and auctions organised under the Contracting Law an owner must include such security requirement. There are more security methods that have become available. Under the Contracting Law, such methods include:

- banking guarantee;
- cash.

An owner may choose a preferable security method at its own discretion, except where auctions are electronic, in this case security can be provided in cash only.

**Contract performance security**

The Public Procurement Law contains provisions on contract performance security that shall be provided for each order placement method separately. The Contracting Law contains a general requirement to provide performance security for all contracts, except where:

- procurement is made for an amount not exceeding 100,000 roubles;
- procurement is made by state and municipal social institutions for an amount not exceeding 400,000 roubles;
- procurement is made for water supply, water disposal, connection to utility systems services at regulated prices;
- other procurement types specified in part 2, section 96 of the Contracting Law.

Contract performance security methods include:

- providing a banking guarantee, in a form satisfying the Contracting Law requirements;
- cash deposit to an owner's account.

In addition, the Contracting Law provides a weighted factor for procurement parties that have lowered the maximum price by more than 25%. Such parties shall, when executing a contract, provide a security in an amount which is 50% more than an amount specified in procurement documentation.

In case of non-provision of contract performance security in due time the relevant party can be acknowledged having avoided the contract and the relevant consequences can apply.

When a contract is performed a vendor may, instead of contract performance security provided earlier, provide the owner with contract performance security less an amount of performed obligations under the contract. In such case contract performance security method can be changed.

**Bid assessment**

Under the Public Procurement Law, criteria for determining procurement winners are applied only in relation to a tender. After the Contracting Law comes into effect, an obligation to determine the criteria will apply to the other procurement types. Moreover, the Contracting Law provides that an owner shall use at least two assessment criteria, one of which shall be the price. The other criteria shall be one of the following:

- expenses for the use and repair of goods or for the use of work products;
- quality, functional and ecological indicators of procurement items;
- procurement parties' qualification, including whether they have financial resources, equipment and other material resources, experts and other employees of certain qualification necessary to perform the contract.

This rule provides exceptions for cases...
when an owner conducts a procurement procedure (a) in a form of a request for proposals, or (b) for a life-cycle contract (in this case a single contract price criteria may be provided, which shall include the cost of all goods, works and services supplied and rendered under the contract).

**Procurement types**

The Contracting Law provides the following options to assign vendors:

- tenders;
- auctions;
- requests for quotation;
- requests for proposals.

The main options listed in the Public Procurement Law have remained in the Contracting Law, subject to some amendments to their contents and application procedure. Such options as a closed restricted tender, a two-stage tender and a request for proposals are new to Russian legislation.

**Tender**

Tender shall mean a vendor assignment method where the winner shall be a procurement party that has proposed the best contract conditions.

The Public Procurement Law provided two tender types: open tenders and closed tenders.

The Contracting Law divides tenders into open tenders, restricted tenders, two-stage tenders, closed tenders, closed restricted tenders and closed two-stage tenders.

- **(a) An open tender**

An open tender is a basic form of tendering. The Contracting Law provides other procurement forms that shall be used only in cases specified therein. Information on an open tender shall be disclosed in the unified data system and made available to public.

Under the Contracting Law, bids shall be reviewed and assessed within 20 days from the date when the envelopes have been opened. The Public Procurement Law provided a two-stage procedure. At the first stage a bid committee used to decide upon the pre-qualification of a bidding party, and at the second stage the committee used to assess the submitted bids. The amendments to the law significantly reduce terms within which a committee shall decide upon a tender winner.

Following the bid review and assessment process the winning bidder that shall become a party to the relevant contract shall be determined. This stage has been significantly amended as compared to the Public Procurement Law. Under the amendments, an owner shall not apply to courts claiming to force the winning bidder to sign the contract. If a winning bidder avoids signing a contract, the owner may only claim for reimbursement of expenses. It shall be noted that this provision of the Contracting Law is inconsistent with Part 4, Section 445 of Russian Civil Code which provides both of the owner’s rights.

Also, there is a significant change in contracting procedure, under which certain timing limits for signing a contract have been set. Under the Public Procurement Law, this issue could be solved at the discretion of an owner, however, under the Contracting Law, all parties shall sign a contract not earlier than 10 days and not later than 20 days from the date when a bid review and assessment memo is published in the unified data system.

- **(b) A restricted tender**

A restricted tender is a type of an open tender. What makes it different from the other types is additional requirements that can apply and winning bidder assignment procedure, under which the winner shall be selected from procurement parties that have successfully passed the pre-qualification stage. During a pre-qualification procedure an owner determines whether bidders meet additional requirement.

The Contracting Law provides two cases in which this type of tender may be conducted:

- if innovative or specialised goods (services, works) are involved;
- if cultural heritage preservation works, museum items or highly precious or rare documents restoration works, or other works in relation to museum items and collections are involved.

- **(c) A two-stage tender**

A two-stage tender is another type of an open tender which is new to the state procurement legislation. The most significant feature of this tender type is that an owner is entitled to change procurement item indicators or bid assessment criteria.

The first tender stage includes:

- provision of initial bids without any contract price proposal by bidders;
- discussion of any proposals from bidders related to procurement items in such bids, between a bid committee and bidders;
- review of bids by an owner and, if applicable, specification of any requirements to functional, technical, quality or operational indicators of procurement items or assessment criteria applied to bids based on inserted amendments.

At the second tender stage bidders can submit final bids with a price, subject to amendments inserted into tender documentation, otherwise they can reject taking part in the tender.

Cases when two-stage tenders can be conducted are provided in the Contracting Law.

**Auction**

- **(a) An electronic auction**

Under the Contracting Law, an open auction shall be conducted in an electronic form only. This principle follows a tendency to transfer all open auctions to electronic platforms.

Under the Contracting Law, an electronic auction shall be conducted at a web-site (an electronic platform) of a special purpose company (operator). Parties willing to participate in an auction shall be registered (get accredited) by the operator.

Bidder accreditation is valid for 3 years
from the date when the relevant bidder is notified of a decision for the accreditation by a platform operator. An accredited bidder may take part in all electronic auctions conducted at the electronic platform.

Under the Contracting Law, selection rules and a list of electronic platform operators shall be set forth by Russian Government.

Except for technical aspects, an electronic auction is in substance similar to a "traditional" one.

The Contracting Law prohibits rejecting to conduct an electronic auction, however, an owner may insert amendments to auction announcements. Thus, electronic auction rules are similar to open tender rules.

Requests for quotation and requests for proposal
A request for quotation is a notion familiar to Russian law, and is set forth in the Public Procurement Law. Contracting Law provisions are similar to the Public Procurement Law provisions on the same. As opposed to requests for quotation, the notion of a request for proposal is new to the placement of orders legislation and differs from a request for quotation in the way a winning bidder is assigned. Thus, under the Contracting Law, a request for quotation means a vendor assignment method where a winning bidder shall be a procurement party that has offered the lowest contract price, and a request for proposal means a vendor assignment method where a winning bidder shall be a procurement party with a final proposal that meets owner's needs for goods, works or services in the best way.

Request for proposal procedure includes two stages: at the first stage bidders submit their request for proposal applications; the best application is determined following their review. At the second stage bidders are asked to submit a final proposal. In request for quotation process bidders submit only one application to participate, and a bid committee shall open envelopes within one business day from the final submission date.

The Contracting Law provides a restricted list of cases and circumstances when an owner is entitled to conduct a request for proposal procedure and a request for quotation procedure.

Single source procurement
A single source procurement procedure is, in substance, similar to a procedure described in the Public Procurement Law, and the list of circumstances in which an owner is entitled to make a single source procurement is similar to the same list provided in the Public Procurement Law.

Closed vendor assignment methods
The Law contains the following closed vendor assignment methods:

- a closed tender;
- a closed restricted tender;
- a two-stage closed tender;
- a closed auction.

Closed vendor (contractor, provider) assignment methods can be applied only in the following cases:

- procurement of goods, works, services for federal needs, if information on such needs constitutes a state secret;
- procurement of goods, works, services, if information on such goods, works, services constitutes a state secret, provided that procurement documentation or a draft contract contains such information;
- contracts for the insurance, transportation and safeguarding of precious items owned by Russian Precious Metals and Precious Stones State Fund, museum items and museum collections, rare and precious editions, manuscripts, archive documents (including their copies) that have a significant historical, artistic or other cultural value;
- procurement of clearing or driving services for judge and bailiff activity purposes.

The closed procurement method is applied as agreed with a federal authority (to be determined by Russian Government).

Contract performance, amendment and termination
Contract performance
Contract performance is regulated by the Contracting Law rather thoroughly. Below are certain performance aspects that are binding for an owner.

1) An obligation to have goods supplied (services rendered or works performed) examined by experts and expert organisations. Exceptions are provided by the

2) Contracting Law (in particular, such exceptions include procurement of goods (works, services) from natural monopoly holders).

An obligation to publish reports on the performance of certain contract stages in the unified data system, pointing out performance or undue performance of the relevant contract or amendment or termination thereof.

Contract amendment
As a general rule, material terms of a contract shall not be amended. Under the Contracting Law, material terms are the following:

- on dates when cash funds deposited as a contract performance security shall be returned to a vendor by an owner (if such security is provided by tender documentation)
- on terms and conditions of payment for goods (works, services);
- on terms and conditions of acceptance by an owner and on terms and conditions of the results;
- on liability of an owner and a vendor (contractor, provider) for non-performance or undue performance of obligations under the contract;
- other material terms of a contract under the civil legislation.

Material contract terms may be amended in exceptional cases expressly provided by law and only as agreed by the parties thereto.

Termination of a contract
Under the Procurement Law, a contract
may be terminated as agreed by the parties or under a court decision. In addition, the Contracting Law also provides that parties may unilaterally repudiate a contract. Such repudiation is allowed if provided in the contract, and inclusion of such provision into a contract simultaneously implies inclusion of a provision under which the contract may be repudiated by the vendor on a similar basis, too.

A unilateral repudiation on a contract leads to a right of an owner to make procurement on the basis of a request for proposal (in relation to the same procurement item).

**Monitoring, audit and control in procurement**

Procurement monitoring and audit are new concepts in procurement for state and municipal needs. The Public Procurement Law provided control over procurement only as means to assess its efficiency.

**Monitoring**

Procurement monitoring regulatory provisions shall come into effect on January 1, 2016.

The Contracting Law provides such procurement monitoring methods as collection, consolidation, systematisation and assessment of information on procurement, including implementation of procurement schedules and roadmaps. The main function of a monitoring authority shall be to determine if procurement objects have been achieved and if the procurement is reasonable.

**Audit**

Audit will be performed by the Accounts Chamber of the Russian Federation, control and accounting authorities of constituent and municipal entities of Russia. The competence of the authorities mentioned shall include an authority to analyse and assess procurement goals achievement and information as to whether expenses for procurement under proposed contracts are legal, reasonable, advisable, timely, efficient and effective.

**State control**

The Contracting Law significantly expands the control area for competent state authorities and provides that such control may be conducted by a larger number of state authorities. Nowadays, order placement legislation compliance control is performed by the FAS of Russia and by competent authorities of the municipal entities and local administration authorities of the Russian Federation.

The Contracting Law adds the following authorities to the list: the Treasury of Russia, financial authorities of Russia's constituent and municipal entities, state non-budgetary funds management authorities, the Accounts Chamber of the Russian Federation, and state and municipal financial control authorities established by legislative (representational) authorities.

Contradictions between state authorities in relation to one and the same procurement are eliminated according to the seniority of state authorities, under which the decision of a higher level authority shall be implemented.

**Public control**

The Contracting Law provides a new control method for procurement procedures — public control. Such control can be performed by individuals, public associations and legal entity associations. Their powers include a right to:

1. prepare proposals on procurement legislation development;
2. send requests for information on procurement and contract performance to owners;
3. monitor procurement process and assess procurement efficiency on an independent basis;
4. to submit control performance applications to state and municipal authorities on their behalf;
5. to apply to law enforcement bodies on their behalf if it has been determined that actions (negligence) of an owner, an authorised authority, an authorised institution, a special purpose organisation, procurement committees and their members, officials, a contract service, a contract manager contain essential elements of offence;
6. to apply to courts to protect violated or challenged rights and legal interests of a group according to Russian legislation.

The Contracting Law provides a court and an administrative procedure to appeal actions and omissions of authorised persons and bodies if such actions (negligence) violate rights and legal interests of procurement parties. An appealer can be represented by a procurement party itself or public associations and legal entities associations performing public control. It should be noted that such right is not provided to individuals.

The Contracting Law comes into effect on January 1, 2014. The Law will apply to procurement relationships where notifications on such procurement are published after the effective date of the Law. A transitional period will be completed by January 1, 2017.

It would be necessary to adopt a number of federal and municipal level regulations to make the contracting system operate properly.