

Energy Service Contracts: Russian Practices

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Abstract. The article investigates the problem of legislation in the field of energy conservation and provides an assessment of several of new legislation acts and development prospects. The authors analyze the Russian practice of energy service contracts, problems of contracts' content, as well as a subject of contracts. The authors investigate the possibility of adaptation of contractual structures, such as performance-contract that is used in an international energy services practice.

Introduction

The energy conservation is a promising and attractive niche for research on the part of representatives of the various scientific fields, such as applied science, economics, and legal science.

Overview of energy service legislation

According to expert estimates, the potential of the Russian market of energy services is about 3.5 trillion rubles a year, including debt financing sources - 2 trillion rubles [9]. Based on the priority areas of science, technology, and engineering in the Russian civil nature (approved by Presidential Decree, July 7th, 2011. № 899), we can state that the Russia's energy services will receive intensive and priority development in the medium term.

The implementation of the National Energy Strategy of Russia and the state policy in the field of energy conservation and energy efficiency requires its legal security. "Russian Energy Strategy to 2030" (approved by the Governmental Decree, November 13, 2009, № 1715 - p) (the Strategy) considers the development of comprehensive federal and regional legislation on energy conservation in order to achieve the required energy efficiency. The regulatory support should be addressed for several areas:

- The formation of prospective regulations, standards, and norms (taking to account the increased responsibility for the irrational and inefficient use of energy resources by including requirements for energy efficiency);
- The system of penalties for norms violation;
- The system of tax incentives for performance exceeding standards to encourage the replacement of obsolete equipment;
- The organization of state statistical monitoring of energy efficiency;
- The labeling for different levels (classes) of energy efficiency;
- The organization of energy audits and a consequent issuance of energy passports;
- The development of energy audit and others.

According to the Strategy, in 2030, the Urals Federal District will reach a full potential of energy savings and retain the position of main oil and gas region that supplies energy to the energy-deficient areas of the country and abroad.

The Russian regulation in energy conservation and energy efficiency is a fairly complex system. It has a certain history of its formation and development. In fact, the beginning of the formation of the legislation should not be associated only with the adoption in 1996 of the first Federal Law of

03 April 1996 № 28 - Federal Law "On Energy Saving ", which proved to be very modest in its normative content (includes 19 articles, mostly declarative in nature) and lost legal force [12].

Undoubtedly, currently, one of the basic existing laws is the Federal Law of 23 November 2009 № 261 - FL "On energy saving and energy efficiency improvements and on Amendments to Certain Legislative Acts of the Russian Federation" (hereinafter - the Law) [13]. This law and its novels always cause an increased interest of scientists and law enforcers. A relatively new law is no exception. The Act contains a significant number of blanket norms that require a number of legal acts.

A few generalizations about the legislation in the area of Energy Conservation as a whole are possible to make.

First, the legislation in the field of energy conservation is a complex interdisciplinary array of regulations. Describing the whole system of legal regulation of Energy, V.F. Yakovlev noted that it "incorporates elements of the common law and a special legislation containing special provisions and reflecting the specificity of this sphere of relations" [15]. In the "orbit of legal regulation", regulations of various branches of Russian law are involved. It is symptomatic that the new law resulted in amendments to twelve federal laws, including the Federal law "On Electric Power Industry", the RF law "On Protection of Consumers' Rights", the town planning code, the housing code, the budget code, the tax code, code of administrative offenses and others.

Secondly, the regulation of relations in this sphere is represented at different levels: federal, subjects of the Russian Federation, municipalities, and, even, local. Therefore, in the Sverdlovsk region, the Law of Sverdlovsk region (№ 117-RL "On energy saving and energy efficiency improvements in the Sverdlovsk region") is in force, from December 25, 2009. This legislation primarily determines the authority of the supreme bodies of state authority of the Sverdlovsk region, the state authority in the field of energy saving and energy efficiency of the Sverdlovsk region, and local authorities municipalities in this area of relationships.

Thirdly, the system of this legislation is an important component of technical regulation. One of the most important national standards aimed at ensuring the implementation of legal and technical policy in the field of resources is national standard GOST 52106-2003 "Conservation of resources. General Provisions" (approved by the State Standard of the Russian Federation of 3 July 2003 r. № 236-st). It should be noted that, in accordance with the priorities specified in the list of the United Nations Economic Commission for Europe on standardization, energy efficiency and resources conservation are on the fourth of eight places mentioned in the document.

Fourth, the national legislation in the field of energy conservation is largely determined by Russia's international obligations [5], [6].

Fifth, assessing the prospects of the development of this legislation, authorities can assume that, in the coming years, a special component will be intensely developed. This fact requires an intensification of research in the direction of finding adequate remedies designed to mediate the relationship mentioned. Understanding of the place of the law in the entire array of energy legislation is necessary [8].

Sixth, the legislation on energy conservation is provided for a phased implementation of a number of norms, so it will be characterized by promising validity.

Seventh, the legislation, in this area, represents a significant component of the departmental rulemaking. Departmental acts of inter-industrial action under the authority of federal executive bodies, which are defined by RF Government Decree № 67 of February 20, 2010 "On amendments to certain acts of the Government of the Russian Federation on the definition of the powers of federal executive bodies in the field of energy conservation and energy Efficiency ", will be taken (or have already taken) in accordance with the objects of reference "*Rospotrebnadzor*", Federal Tariff Service, Ministry of regional development, Ministry of Energy, Ministry of Economic Development.

Eighth, the legislation in the field of energy saving affects the interests of almost all economic operators, public entities, citizens; therefore, the law must respect the right balance of public and private -legislative regulation.

In connection with the implementation of measures aimed at energy efficiency and energy conservation, relations among diverse subjects need contractual and legal mediation. Contracts are an ideal form of activity for participants in civil commerce. According to M. Braginsky, the application of contracts for thousands of years proves its flexibility, which allows contractual form to take a wide variety of social relations [2 p. 9]. Chapter 5 of the analyzed legal regulation is devoted to energy service contracts, and energy service obligations included in the supply agreements and the transfer of energy resources. The subject of these contracts is actions conducted by an energy service company in order to receive energy saving and increase energy efficiency of resources used by the customer. According to the law, this is a new contract, but it has precedents in practices of foreign countries. Services of energy service companies are carried out on the basis of a contract with consumers of energy, the so-called energy-saving performance contracting and program management of energy demand. These types of contracts are widespread in Europe, the USA, Canada, Japan, South Korea. Legal qualification of such contracts, of course, is civil and is another type of service agreement, which is subjected to chapter 39 of the Civil Code "paid services".

Prospects of development of energy service legislation in Russia

Russian business practices of contractual regulation of relations within energy service activity has not yet accumulated a wealth of experience in forming the content of contracts, so there is no material for generalization and litigation related to the execution of contractual obligations. The main reason for this gap is a recent implementation of this type of contract. Meanwhile, the existing experience of contractual regulation of relations in the field of energy services allows to identify some of the legal issues that require scientific understanding.

1. The issue about the subject of energy service agreement and of distribution of the burden of the risk of failing the result of economies of counterparties in energy service agreement is debatable. In accordance with applicable law, the subject of an energy service contract is the implementation of actions aimed at conservation and improving efficiency of energy use for a customer. The condition of the amount of energy savings (including - in terms of value) is included in the contract under the direct orders of the Law on Energy Conservation (p.2 p.p. 1 Article 19). A constitutive feature of the energy service contract is the placement the burden of the risk of failing result (the amount of energy savings) on a performer (energy service company).

2. The assessment of the risks of law enforcement is important for Russian contractors (primarily for Energy Service Companies). For this purpose, recommendation methodology can be useful for assessing contractual risks addressed by sides of contractual obligations. The business associations of energy service companies and the Ministry of Economic Development of the Russian Federation can develop these methodologies.

3. The subject of scientific interest can be the entire system of civil law contracts to ensure customer satisfaction in saving energy. For example, legislators haven't studied enough interconnections among energy monitoring contracts, energy audit, and energy service contracts.

Energy survey aims to obtain the objective data on the amount of energy used to study the efficiency indicators and the potential for improvement. The energy survey can be carried out in relation to a product, a technological process, as well as a legal entity or an individual entrepreneur. Audits aim not only at all purposes of energy survey, but also at development of a list of measures (standard, publicly available, as stressed by the law itself) for energy conservation and valuation. Members of self-regulatory organizations in the field of energy audits are only those who are eligible to conduct energy audits. The energy survey is conducted on a voluntary basis, besides cases provided by law (Clause 16 of the Law).

4. The law provided energy saving measures that are mandatory for government agencies. Organizations with the participation of the state or municipality and organizations carrying out regulatory activities (items 9, 10 Art. 2 of the Act) have to approve and implement programs in the field of Energy Conservation and Enhancement of Energy Efficiency. Federal and Municipal clients

are required to place orders for goods, works and services for federal and municipal needs in accord with the requirements of energy efficiency. As a result, legal regime of government contracts in the light of the Federal Law of April 5, 2013 № 44-FL "On the contract system in the procurement of goods, works and services for state and municipal needs" must be understood taking into account the specifics of an energy service activity [14].

5. Although the law itself as the principles of legal regulation (Article 4 paragraph 2) provides support for proliferation of energy savings and energy efficiency, there are additional stimulating rules. For example, savings achieved by reduction in resource consumption (fuel, natural gas, heat, electricity) are at the disposal of the budgetary institutions for different purposes, including allocation for the increase in annual payroll (n. 3 art. 24). Moreover, legislation on taxes and fees will provide incentives in form of partial reimbursement of the costs of interest on loans received in Russian credit organizations to carry out investment activities, implementation of investment projects in the field of energy savings (n. 2 art. 27).

In Civil Law, the researchers have repeatedly drawn attention to the fact that sanctions are not effective in prevention from violation of norms and even less effective as guarantees of the best performance of obligations [16, p. 83]. Therefore, theoretical and legal research problems of incentives and promotion seem to be a promising direction for a research.

6. Progressive aspects of foreign legislation, contractual generalization of business practices in energy service area of relationships, research in the aspect of comparative law are undisputed interests for Russian legislation and Russian jurisprudence [4], [11].

Summary

It can be noted that the indicated range of legal issues related to energy services is not exhaustive and requires a "symbiotic" research for development of adequate legal structures that meet the needs of a progressive and a priority in the Russian economic activity- energy services.

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