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CONTRACTS

01

How many **types of contracts?**



There are 8 types of contracts with the contractor:

- Lump sum contract;
- Fixed unit price contract;
- Adjustable unit price contract;
- Time-based contract;
- Cost plus fee contract;
- Performance-based contract
- Percentage-based contract;
- Mixed contract;

Compared to the Law 2013

Compared to the Law 2013, the Law on Public Procurement 2023 has added 4 types of contracts, including:

- (i) cost plus fee contract;
- (ii) performance-based contract;
- (iii) percentage-based contract;
- (iv) mixed contracts.

Which packages is the **lump-sum contract** applicable to?

The package contract applies to:

- Lump sum contracts are used for packages where the scope of tasks, technical requirements and the package execution duration are well defined at the time of contractor selection and changes in quantity or technical requirements or encountering unforeseen conditions is unlikely
- Packages where the quantity and unit price cannot be defined but the contracting parties' ability to manage risks and substantial variations or the physical and qualitative characteristics of output products are well defined, including EPC contracts and turnkey contracts;

Compared to the Law 2013

The scope of the package that applies lump-sum contract under the Law on Public Procurement 2023 has been regulated more specifically. Unlike the Law 2013, the Law 2023 does not regulate the lump-sum contract as the basic type of contract, restricting the right to choose from other contracts.

How is the **package price in a lump-sum contract** determined?

Price in a lump-sum contract:

- The package price which is used as the basis for bid evaluation and contract award shall include contingencies determined for risks associated with quantities and price escalation which may occur during the contract execution in proportion to the risk management liability to be undertaken by the contractor. The bid price should include all contingencies determined for risks associated with quantities and price escalation which may occur during the contract execution in proportion to the contractor's liability for the package;



- The contract price is unchanged throughout the contract duration in respect of the scope of tasks, technical requirements and terms and conditions specified in the contract, except force majeure events or changes in the scope of tasks resulting in change in the contract price;

Payment

- The payment shall be made according to the percentage of the contract price or the price of works, work item or quantity of tasks in proportion to the agreed-upon payment schedule specified in the contract. The payment is made without requiring certification of completed quantities. The Law on Public Procurement 2023 removed the regulation on one-time payment with a lump-sum contract.

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Which packages is the **fixed unit price contract** applicable to?

Fixed unit price contracts are used for packages where the physical characteristics are well defined at the time of contractor selection but the exact quantity or volume of tasks to be actually completed by the contractor cannot be determined

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What characteristics does the **fixed unit price contract** have?

- The contract price shall initially be determined on the basis of quantity or volume of tasks and fixed unit price specified in the contract and contingencies for additional tasks determined in accordance with regulations of law;
- Unit prices specified in the fixed unit price contract shall remain unchanged throughout the performance of entire tasks specified in the contract;
- Payment shall be made according to the quantity or volume of tasks completed and accepted, and the fixed unit prices specified in the contract.

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Which packages is the **adjustable unit price contract** applicable to?

- Adjustable unit price contracts are used for packages with long execution duration where input price fluctuations may occur during the contract execution and the application of fixed unit prices may negatively affect the package execution. Unit prices and the contract price of an adjustable unit price contract may be adjusted according to specified agreements specified in the contract in respect of any tasks of the contract.



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What characteristics does the **adjustable unit price contract** have?

- The contract price shall initially be determined on the basis of quantity or volume of primary tasks and base unit price specified in the contract and contingencies for additional tasks and price escalation.;
- Methods for calculation of price escalation and contingencies for price escalation must be specified in the contract;
- Payment shall be made according to the quantity or volume of tasks completed and accepted, and the unit prices specified in the contract or adjusted unit prices (if any).

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What characteristics does the **time-based contract** have?

- Subjects of application: Time-based contracts may be used for emergency situations; repair or maintenance of works, machinery and equipment; or supply of consulting services when it is difficult to define the scope and length of services

The applicable subject of the Law on Public Procurement 2023 has been expanded compared to the Law 2013, which allows for application in emergency; repair or maintenance of works, machinery and equipment.

- The contract price is based on the unit price per amount of time, agreed hourly, daily, weekly or monthly salary rates specified in the contract and reasonable reimbursable expenses.

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What characteristics does the **cost-plus-fee contract** have?

- Subjects of application: Cost plus fee contracts are used for tasks or services when the scope of tasks or input factors or costs necessary for performing estimated tasks of the contract cannot be properly defined at the time of contractor selection.
- Requirements with the contents of the contract: the parties shall reach specific agreements on administrative and overhead expenses, profits, direct costs-based calculation method; method for determining direct costs, and other contents necessary for executing the contract.



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What characteristics does the **performance-based contract** have?

- Subjects of application: performance-based contracts are used for tasks or services for which the payment is based on the contract execution outcomes with accepted quality and quantity, and other factors.
- Requirements for contract contents: the contract must clearly indicate the quantity and quality of outputs, methods for inspecting, evaluating and measuring the achievement of output quality standards, reduction of payments, price adjustment provisions (if any) and other contents necessary for executing the contract.

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Which packages is the **percentage-based contract** applicable to?

Percentage-based contracts are used for construction insurance service packages where the contract price is exactly determined on the basis of the value of works actually accepted.

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What characteristics does the **mixed contract** have?

- A mixed contract means a contract whose scope comprises different types of contract;
- The mixed contract must clearly define the scope of tasks to be performed under each type of contract and relevant modifications made when different types of contract are applied to the same task or service.;
- Provisions on payment for each type of contract shall apply to payment for the scope of tasks of the mixed contract.

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What **documents** does the contract signed with a contractor include?

■ The contract documents signed with a contractor shall include:

- Contract agreement;
- Contract appendices, including the activity schedule, price schedules, and execution schedule (if any);
- Decision on approval of contractor selection result.

■ Depending on the scale and nature of each package, the contract documents may, in addition to the documents specified in Clause 1 of this Article, include one or some of the following documents:

- Contract completion record;
- Contract negotiation record (if any);
- Written agreement made by the parties on conditions of the contract, including general conditions of contract and special conditions of contract;
- Bid or proposal of the successful bidder and clarifications thereof;
- Bidding documents or RFP and addenda thereto;
- Other relevant documents.



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What **conditions** should the contractor ensure?

Conditions for signing of contract:

- The bid or proposal of the successful bidder must still remain valid at the time of signing the contract. In case of centralized procurement with use of the framework agreement, the framework agreement must still remain valid at the time of signing the contract.
- At the time of signing the contract, the successful bidder must meet all technical and financial requirements for executing the package in accordance with the requirements laid down in the bidding documents or RFP.
- The employer is requested to provide funding for making advances and payments, premises and other conditions necessary for ensuring the package execution schedule.

Compared to Law 2013, the Law on Public Procurement 2023 removed the provisions on verifying the contractor capacity of the investor in necessary cases.

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How is the **signing of a contract with the selected contractor** carried out?

The signing of contract between the employer and the successful bidder shall be subject to the following provisions:

- Only a single contract will be signed for executing a package

A contract may be prepared applying one or some types of contract. A centralized procurement package or a package which is divided into smaller parts may be executed under several contracts. Each contract shall cover one or some parts of the package. If different types of contract are employed, the type of contract for each task must be specified;

- Contents of the contract signed by and between the parties must be conformable with contents of the bidding documents, RFP, bids or proposals, contract negotiation results (if any), decision on approval of contractor selection result. The contract should clearly indicate the scope of tasks to be undertaken by specialist subcontractors (if any) and maximum value of tasks to be subcontracted. The maximum value of tasks to be subcontracted shall not include the value of tasks to be undertaken by specialist subcontractors.
- In case of a consortium bidder, the contract agreement must bear signatures and seals (if any) of all members of the consortium. In case of centralized procurement with use of framework agreement, all members of the consortium shall directly append their signatures and seals (if any) to the contract agreement with the entity in need of goods or services or a member of the consortium shall be authorized to do so under terms and conditions of the consortium agreement;



What **measures** are there to ensure the implementation of the contract?

The successful bidder shall be required to choose one of the following options for ensuring their execution of the contract, including:

- Pay a deposit;
- Submit a letter of guarantee issued by a domestic credit institution or foreign bank branch lawfully established under the law of Vietnam;
- Submit a certificate of surety bond insurance issued by a domestic non-life insurer or branch of a foreign non-life insurer duly established under the law of Vietnam.



This is a **new point** of the Law on Public Procurement 2023 compared to its 2013.

What cases **do not apply performance security**?

The performance security measures are not applied in case:

- Consulting service supplier;
- The contractor that is selected adopting the self-execution or community participation method;



- The bidder to be contracted for executing a package whose price does not exceed the price limit, specifically packages of procurement cost estimates whose price ranges from VND 50 million to VND 100 million; packages of investment projects of state-owned enterprises or wholly state-owned enterprises and investment projects defined in the Law on public investment, including: consulting service packages whose price does not exceed VND 500 million, and packages for non-consulting services, procurement of goods, construction, or mixed packages whose price does not exceed VND 01 billion.

Compared to the 2013 Law

Compared to the 2013 Law, the Law on Public Procurement 2023 has added one case of non-application of security, which is the third case mentioned above.

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What are the **requirements** for contract performance security?

- Thời điểm thực hiện biện pháp bảo đảm thực hiện hợp đồng: trước hoặc cùng thời điểm hợp đồng có hiệu lực.

Luật Đấu thầu 2023 đã cho phép biện pháp bảo đảm có thể có thực hiện cùng thời điểm hợp đồng có hiệu lực.

- Contract performance security: Depending on the scale and nature of each package, the value of the performance security equaling 2% - 10% of the contract price shall be specified in the bidding documents or RFP.
- The validity period of the performance security begins on the effective date of the contract until all contractual obligations are fulfilled by the parties or warranty obligations, if specified in the contract, are taken on. In the event that the duration of the contract needs to be extended for a specified period, the contractor shall be requested to extend the validity of their furnished performance security for a corresponding additional period before the contract is granted an extension.

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In what cases will the contract performance security **be forfeited**?

The performance security shall be forfeited if the successful bidder:

- Refuses to perform the contract that is still effective;
- Violates terms and conditions of the contract;
- Refuses to extend the validity period of the performance security, in case failure to meet the contract execution schedule is at their fault.

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What **principles** must the parties comply with when performing the contract?

Contract execution rules include:

- Parties to a contract are responsible to comply with terms and conditions of their signed contract.
- Honesty, cooperation and lawfulness.
- No infringement upon the interests of the State and community as well as legitimate interests of other organizations and individuals.

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What cases do the **contract amendments** take place?

A contract may be modified:

- In cases agreed upon by the parties and specified in the signed contract in conformity with regulations of law;
- When circumstances for executing the contract fundamentally change as prescribed by the Civil Code;
- At the request of a competent authority that affects the execution of contract with no fault of the employer's fault.

» The Law on Public Procurement 2023 **specifically supplemented** the cases of amendments to the contract compared to the Law of 2013.

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What contents of the contract **can be modified**?

The following contents of the contract may be modified, including: quantities, execution schedule, prices, additional purchase option, and other contents as agreed upon by the parties in the signed contract.

Quantities, execution schedule and prices may only be modified during the package execution duration specified in the signed contract, except cases where the additional purchase option is applied.

In what case is the adjustment of the **intended completion dates of tasks specified in the contract** carried out?

During the contract execution, the parties are allowed to modify the intended completion dates of tasks specified in the contract in the following circumstances:

- A force majeure event or unexpected situation arises and hinders the contractor from executing the contract without fault or negligence of any party to the contract;
- There are changes in the project, scope of tasks, scope of supply, primary construction solutions, designs or supply methods due to objective reasons resulting in changes in the contract execution schedule;

- One or both parties to the contract propose initiatives for executing the contract which require changes in the contract execution schedule with the aim of generating considerable interests to the employer;
- The contract execution schedule is affected due to the employer's failure to provide the site as agreed upon in the contract or suspension of the contract through no fault of the contractor;
- The performance of tasks is suspended at the request of a competent authority due to the fault of neither of the employer and the contractor.

Price issues when modifying the contract?

- Any modification to the contract resulting in changes in the contract execution schedule or an increase in the approved package price (including contingencies) shall require an approval from the competent person;
- Any increase in price shall not make the contract price exceed the total investment or total funding in the procurement cost estimate;
- In case a project or procurement cost estimate comprises multiple packages, any increase in price shall not make the sum of contract prices exceed the total investment or total funding in the procurement cost estimate.

What changed cases are **not required to sign contract appendices**?

In case of changes in the contract price, quantities and other contents as agreed upon in the contract, the signing of contract appendices shall not be required if the following conditions are met:

- Any change shall not make the contract price exceed the package price specified in the contractor selection plan; if the package cost estimate is approved after the approval of the contractor selection plan, total funding in the package cost estimate shall not be exceeded;
- Any change shall not lengthen the package execution duration specified in the contract;
- Methods, formula, items and other contents necessary for making such changes are available in the contract.



This is a **new point** of the Law on Public Procurement 2023 compared to its 2013.



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