

European Research Studies Journal
Volume XXI, Special Issue 2, 2018

pp. 442-452

Public Procurement's Legal Regulation through the Medium of Competitive Procurement in the Republic of Kazakhstan

N. Dairabayeva^{1*}, Zh. Ibragimov², S. Kapsalyamova³

Abstract:

The aim of the article is to study the problems of legal regulation of government procurement in Kazakhstan from the point of view of the latest domestic and foreign researches.

The methodological basis of the study was the legislative acts, statutory documents on the theme of work, fundamental theoretical works, results of practical studies of prominent domestic and foreign scientists.

According to the results, it is important to note that the closed competitive tender is characterized by the fact that the offer to participate in it, is drawn to a certain circle of persons at the discretion of the competition's organizer.

The authors of the study came to the main conclusion that the law on state procurement is being improved, the Law "On State Procurement" is being updated, and orders are issued on topical issues, namely on combating corruption.

Keywords: *State purchases, legal regulation, competitive tenders, national budget, economy of the country, competitive commitments.*

JEL code: *G18, H57, L51, M48.*

¹PhD in Juridical sciences, Department of the Theory and History of State and Law, Constitutional Law, L.N. Gumilyov Eurasian National University, *Corresponding author Email: Dairabayeva.n@gmail.com

²Grand PhD in Juridical sciences, Department of the Theory and History of State and Law, Constitutional Law, L.N. Gumilyov Eurasian National University, Email: zhamaladen@mail.ru

³PhD in Juridical sciences, Department of the Theory and History of State and Law, Constitutional Law, L.N. Gumilyov Eurasian National University, Email: berkut_kapsalyam@mail.ru

1. Introduction

The state is a major purchaser of products on the market almost in all countries. Significant volumes of government procurement (up to 50% of the national budget (Nesterovich, 1998) make the task of ensuring their effectiveness is of a high priority. Global experience shows that the most rational way of organizing purchases for state needs is the implementation of procurement through competitive tenders in order to promote effective competition and, therefore, being a purely economic instrument of the most promising enterprises support, to form a market not only for public procurement but also for the national economy (Suleimenov, 2005; 2008). Nowadays, there is no worthy alternative of this transparent and competitive process of placing orders.

The object, hypothesis, task, furtherance of goal, problem, subject, novelty of this research are as follows:

- The object of this study is public procurement's conditions analysis in the framework of the competitive commitments.
- The hypothesis - government procurement in Kazakhstan requires a strong and effective legal regulation.
- Task of the article: to analyze the conditions of government procurement in the framework of the competitive commitments; to make a theoretical and methodological analysis of the topic from different points of view; to reveal the problems of this research in modern conditions.
- The problem of this research is actual due to frequent study of its in modern conditions.
- The subject of the article is studied at the junction of several interrelated disciplines. The research problems are considered in many works. In general, the material contained in the educational literature is of a general nature, and in numerous monographs on this topic, more narrow questions of the problem are considered. However, it is required to take into account the current conditions in the study of this topic.
- High significance and insufficient practical development of the state purchases legal regulation problem in the Republic of Kazakhstan determine the undeniable novelty of this study.
- Further attention to the issue of public procurement is necessary in order to understand more deeply specific issues of this study. In the furtherance of this goal, the author put and solved the following tasks: to study theoretical aspects and to reveal the nature of legal regulation of public procurement; the results of the study revealed a number of issues related to the topic under consideration, and conclusions were made about the necessity of further the legal regulation of public procurement improvement.

In accordance with the Law of the Republic of Kazakhstan "On Government Procurement» (Law...No. 434-V ZRK, 2015), public procurement is defined as the

purchase of goods, works, services by customer on a paid basis, which are necessary for the operation, as well as the performance of state functions or statutory activities of the customer. The clients are state bodies, state institutions, as well as state enterprises, legal entities, where fifty or more percent of the voting shares belong to the state and affiliated with them legal entities, which are purchasing goods, works and services.

2. Methodology

The theoretical and methodological basis of the research was legislative acts, normative documents related to the theme of article. The sources of information for writing a scientific article were study literature, fundamental theoretical works of the major scientists of this realm, the results of practical studies of prominent domestic and foreign authors, articles and reviews in specialized literature and periodicals devoted to the theme of government procurement.

The article deals with general questions, analyzes history of development and legal nature of public procurement. The main concepts are determined, the relevance and practical significance of the government procurement legal regulation is determined, and an analysis of the current state was made on the basis of individual data, as well as an analysis of the prospects and trends of the government procurement development in the Republic of Kazakhstan.

3. Results

The role of the state in the economy is determined by the fact that the state is a full-fledged economic entity and its behavior affects the entire national economic system. The most important difference in the behavior of the state as a market participant is that its economic interest based on the achievement of the entire society goals (Akhmetshin and Vasilev, 2016). The state assumes not only financing, but also directs organization of the individual goods and services production process and training of specialists in the field of government procurement, consulting and information services to entities of the public procurement system develops and approves an annual plan for public procurement, organizes and conducts a public procurement, executes contracts on government procurement (Vlasov, 2005). Moreover, the state is one of the largest consumers of a significant part of the range of goods and services offered on the market.

Development of the state purchases system's legislative basis of Kazakhstan took place in such stages:

- 1) 1991: The system of state order was legally fixed by the Directive of the Supreme Soviet of the Kazakh SSR on June 20, 1991.
- 2) 1996: Adoption of resolutions "On State Procurement of Goods (Works, Services) in the Republic of Kazakhstan" and "On Approval of the Model Provision on the Procedure for the Organization of Public Procurement of Goods (Works,

Services) for the Needs of the Regions" in 1996 (Resolution...No. 141, 1998) laid the foundation for basic principles of public procurement, which include openness, transparency and equal opportunities for participation in the public procurement process, as well as general approaches for their implementation;

3) 1997: The Law of the Republic of Kazakhstan "On Public Procurement" was adopted, which was enacted on January 1, 1998 (Law ...No. 163-I, 1997) regulated the legal relations that arise in the process of state procurement, carried out at the expense of the republican and local budgets;

4) 2001: The Program for the Development of the Public Procurement System for 2001-2004 (the Program) and the Action Plan for the implementation of the named Program (hereinafter - the Action Plan) (Decree...No. 1605, 2001) were approved;

5) 2002: In order to implement paragraph 1 of the Action Plan in 2002 a new Law on State Procurement was adopted, which extended its scope to state enterprises, joint-stock companies where controlling interest belongs to the state and its affiliated legal entities. Particular attention in this Law is paid to the support of domestic commodity producers, including small business entities (Law...No. 321-II ZRK, 2002);

6) 2007: New editions of the Law "On Government Procurement" were adopted in the country due to the growth of the volume and complexity of the state purchases system, in the following years namely the Law of the Republic of Kazakhstan "On Government Procurement" of July 21, 2007 (Law...No. 303, 2007);

7) 2015: The latest Law of the RK "On Government Procurement "dated December 4, 2015 (Law...No. 434-V ZRK, 2015),

The principles on which the legislation of the Republic of Kazakhstan on public procurement is based are as follows:

- optimal and effective spending of money, which are used for public procurement;
- providing equal opportunities for potential suppliers in order to participate in the public procurement procedure, except cases stipulated by this Law;
- fair competition among potential suppliers;
- publicity and transparency of the state procurement process.

Also the principle of legal regulation of state purchases in support of domestic entrepreneurs is introduced into the law. Under the conditions of the global financial crisis, the Government of Kazakhstan pays special attention to the Kazakhstan's content in the volume of state purchases. The greatest state support is provided to domestic producers and domestic suppliers of works and services. The obligatory condition is to choose domestic suppliers in cases when declared prices are equal. In order to develop existing production and localization of new production, it is proposed to carry out state purchases of goods from domestic commodity producers concluding a five-year contracts (Ilyinikh, 1998).

Ways in which government procurement is carried out in Kazakhstan are as follows:

1) competition; 2) request for quotations; 3) from one source; 4) on organized electronic trading; 5) through open commodity exchanges.

E-government procurement: The innovation of the latest edition of the regulatory framework is the introduction of a system of electronic government procurement. Access to internet allows to attract a wide range of suppliers to public procurement competitions. The main advantages of e-government procurement are increasing transparency and openness in the public procurement process, as well as creation competition's equal conditions among suppliers of products. In particular, procedures for obtaining competitive documentation, submission and acceptance of a competitive bidding, transfer of clarifying questions to the competitive commission and sending of answers to them are considerably cheaper, simplified and faster. Creation of a system of e-government procurement is quite labor-intensive and needs time, requires careful planning, clear identification of individual stages.

In Kazakhstan, the system has been launched since April 1, 2008. On the site www.goszakup.kz the E-commerce Center of the Financial Control Committee of the Ministry of Finance of the Republic of Kazakhstan launched the experimental module for price quotes requests for the Automated Information System "Electronic Government Procurement". The key issue of a public procurement system is the efficiency and usefulness of this system for the end user. The basic requirement for the market of public procurement formation is an ability of a state body acting as a customer clearly to identify requirements that relate not only to the scope of work and services, but also to their quality.

The general qualification requirements for a potential supplier are as follows:

- 1) to have the legal capacity (for legal entities), civil legal capacity (for individuals);
- 2) be solvent, not having debts for tax exceeding three months;
- 3) not to be a subject of bankruptcy or liquidation procedures.

The special qualification requirements for a potential supplier (the participant of a tender offering) are as follows:

- 1) having an experience in the market of goods, works, services, which are the subject of government procurement;
- 2) must be specialists, who have professional qualification and experience in the market of goods, works, services that are the subject of government procurement;
- 3) must have a document confirming the voluntary certification of the offered goods, for the domestic commodity producer in accordance with the legislation of the Republic of Kazakhstan on technical regulation;
- 4) must be certified by the system (certified systems) of quality management in accordance with the requirements of state standards;

The measures aimed at solving problems related to the manifestation of corruption is the new regulatory basis for public procurement in Kazakhstan and contains a

number of systemic measures aimed at solving problems related to the manifestation of corruption in public procurement and increasing the transparency of procedures for their conduct. It is notorious that there is a high degree of corruption in the public procurement system. The most common form of violations is observing in the planning of budget applications, which artificially overstate the prices of goods, thereby creating pre-conditions for the violation of the law in the conduct of public procurement. So, in 2008, only according to program "100 schools, 100 hospitals" illegal actions of executive bodies officials and unscrupulous entrepreneurs caused damage to the state in excess of 260 million tenge.

In the same year, 265 corruption offenses were revealed in this sphere, 160 criminal cases were sent to the court. For 6 months of 2009, the financial police authorities instituted 76 criminal cases in the field of health care, 18 criminal cases were sent to court. The amount of caused damage in such cases amounted to 185 million tenge (KAZINFORM, 2013). In order to increase the transparency of purchases and to eliminate corruption as much as possible, the price for the purchase of goods, works and services is legislatively removed by the way of requesting price proposals while conducting them through electronic procurement. Obligatory translation of this method into electronic format was in 2010, since 2009 it is equally effective with other methods (Suleimenov and Basin, 2003; Zhailin, 2002). The list of unreliable (unscrupulous) suppliers (contractors) is posted on the website of the authorized state procurement body at www.goszakup.kz. According to paragraph 8: The Rules for Providing Information on Public Procurement under the Information System "Monitoring of the Public Procurement" was approved according to the Order of the Chairman of the Agency of the Republic of Kazakhstan on state purchases of April 18, 2003, No. 56 (registered in the Ministry of Justice of the Republic of Kazakhstan on May 22, 2003 No. 2300).

In the framework of the electronic trading system's introduction, according to the State program for the formation of the e-Government infrastructure in the Republic of Kazakhstan for 2005-2007, the Committee was approved by the Decree of the President of the Republic of Kazakhstan on November 10, 2004, No. 1471 and continues to work on the development and implementation of the Automated Integrated Information System Electronic Public Procurement.

4. Discussion

For this purpose the Committee conducted a subjects' questionnaire of public procurement, obliged to purchase goods, works and services at the expense of money at their disposal in accordance with the legislation on public procurement for compliance of existing computer equipment with the technical requirements of the System and access to the Internet. The questioning was conducted according to the branch and departmental affiliation, territorial distribution and organizational, legal form of the public procurement subjects. In accordance with the analysis results (about 4,000 submitted questionnaires out of the public procurement subjects total

number 27 thousand, were received and processed), it follows that the readiness of the public procurement subjects for the implementation of the System is only 22%, in the cities of Almaty and Astana is about 50%.

At the regional level, the readiness of government procurement entities to implement the system is on average 30%, in some areas (and in Mangystau and Kyzylorda regions) is a rather low readiness rate of 9%. According to the results of the analysis, 70% of the technical readiness for the implementation of the System was revealed in the state bodies, however, it should be taken into account that practically all subjects of state purchases provided questionnaires only on the central apparatus and today there is no information about readiness for System's implementation in the context of the subordinated institutions. The main problems of low indicators are poor computer equipment, lack of access to the Internet by the regional subordinate institutions of state bodies and institutions, as well as weak personnel preparedness. The authorized body for state purchases in 2003-2004 carried out 43 scheduled inspections of compliance with the legislation on public procurement of the Republic of Kazakhstan in ministries and departments, local executive bodies, national companies and joint-stock companies.

Main violations in the process of public procurement (due to the conducted analysis) are as follows:

- in evading the procedures of state procurement provided by legislation;
- the determination of the suppliers tenders winners that do not meet the qualification requirements and the requirements of the tender documentation, and often in the selective approach to determining the winners of the competitions;
- artificial reducing of potential suppliers amount due to the establishment of unnecessary requirements to them;
- participation in competitive procedures and determination of the winners of affiliated potential suppliers;
- unreasonable rejection of suppliers with lower price proposals and other violations of the requirements of the legislation on public procurement.

The number of contestants can not be less than two if the greater number of contestants is not stipulated by the terms of the competition or regulatory legal acts. Competitions are always aimed at identifying their winners (Didenko, 2004). A contract is concluded with the winner, or a reward is paid to him depending on the type of competition. Sometimes it is possible to combine the payment of remuneration and the conclusion of a contract. The conditions of the competition can be directly provided the identification of several winners (prizewinners) of the competition. For example, in the Regulations on the competition for the creation of the best song about Astana, one first, one second and one third prizes are envisaged. The procedure for determining the winners of the competition is established by regulatory legal acts and the terms of the competition, determined by its initiator

(Pokrovsky, 2003). According to Art. 147 Civil Code, transactions recognize the actions of citizens and legal entities aimed at establishing, changing and terminating civil rights and obligations. Transactions can be one-sided and two-or multi-sided. Unilateral deals are recognized for the fulfillment of which it is necessary and sufficient to express the will of one party (paragraphs 1 and 2 of art. 148 of the Civil Code), in this case the initiator of the tender (Kuanyshbaeva, 2005).

The Civil Code does not contain a general rule referring the procedure of cancellation and changes of competitive obligations but includes the norm of cancellation of the public promises of remuneration (art. 912 CC) (Suleimenov, 2005; Sergeev, 2005). The announcement with the offer to take part in the competition generates the responsibility of the competition initiator to accept and to consider the competitive offers (Balakin, 2010). For the recognition of a contest, it is necessary to participate in it at least two or even more of the contestants according to law or to the terms of the competition. It is necessary to distinguish the recognition of the competition as invalid, failed and cancellation of the competition. Recovery of damages is providing according to the general provisions of Chapter 20 of the Civil Code (Bunich *et al.*, 2002).

The competitions can be open or closed, depending on who is invited to participate in it. The open competition assumes that the appeal to participate in the contest is directed to an indefinite circle of persons, that is, the conditions of the competition is published precisely in the press or in other media. The organizer of the competition can influence the composition of the participants by setting some certain qualifying requirements. The closed competition is characterized by the fact that the offer to participate in it is addressed to a certain circle of persons at the discretion of the contest organizer, and the organizer has no right to pre-qualify the participants; the public competition should be aimed at achieving any socially useful goals.

The initiator of the tender - the seller is obliged to sell the subject of the auction to the bidder who will offer the highest price during performing of an auction (Smirnova, 2000). One of the forms of ensuring the competition initiator interests is a security deposit that is refunded to the persons who refused to participate in the auction, if the refusal was made no later than three days before its holding. The security deposit may be set off against the paid bidder for the purchase price (Nozdrachev, 1990).

The purpose of the public competition is to satisfy needs and interests of the general public (for example, to develop a bridge across the river for city residents), certain groups of people (for example, disabled people), the whole society or the state; the promised remuneration should be a specially established premium that is paid to the winner of the competition for the achieved result, regardless of his/her right to receive other types of remuneration for this work. In this case, the prize should be monetary or clothing. Any other encouragement of the competition's winner, if not combined with the payment of the award, is not recognized as a competitive award.

5. Conclusions

Public procurement plays a significant role in the economy of most countries in the world. Public procurement is aimed to meet the needs of government agencies, both central and local, institutions, public sector enterprises in goods works and services in order to perform their functions.

There are several ways to conduct public procurement mentioned in the Law on Public Procurements: 1) contest; 2) auction and through commodity exchanges; 3) requesting price proposals; 4) from a single source. The article deals with contest method, not only in accordance to the law on state purchases, but also due to branch right. These relations are regulated by different norms, but they are characterized by one common quality: in each case, the obligation arises from unilateral actions of a person who publicly promised an award, publicly announced the tender or organized the bidding. The organizer appoints conditions, determines the procedure for the fulfillment of conditions for a certain or more often undefined circle of persons who, after fulfilling these conditions, have a right to receive remuneration from the organizer.

It is noted that the system of electronic procurement of each country is unique, because each country has its own institutional features, which are distinctive only for this country, therefore each system is characterized by its own features. The advantage of the Kazakhstan's model is that: 1) all purchases are implemented on a single web portal, combining all information on public procurement in Kazakhstan; 2) common classifiers are used; 3) transparency, openness of those procedures, trades, which are carried out.

But, despite the simple procedure for presenting price proposals, there is often a situation of misunderstanding between suppliers and customers while conducting public procurement procedures. Potential suppliers need to know and to follow the procedure for submitting price proposals and concluding a contract based on the results of purchases in order to ensure the victory of the price proposal, to avoid difficulties in meeting the terms of the contract and to include to the register of unscrupulous participants in public procurement in Kazakhstan.

World experience shows that customs unions create favorable conditions for the development of trade and production, contributes to strengthening not only economic, but also political ties of states that are united by common economic interests.

References:

- Akhmetshin, E.M., Vasilev, V.L. 2016. Control as an instrument of management and institution of economic security. *Academy of Strategic Management Journal*, 15(Special Issue 1), 1-7.

- Balakin, V.V. 2010. Bidding as an institution of civil law in a modern market economy. PhD abstract thesis. Moscow.
- Basin, Yu.G. 2003. Selected works on civil law. Almaty: AY-VSHP "Adilet", Research Institute of Private Law of KazGYU.
- Bunich, G.A., Goncharov, A.A., Poponov, Yu.G. 2002. Civil Law: Textbook. Moscow: IGK "Dashkov and K".
- Decree of the Government of the Republic of Kazakhstan No. 1605. 2001. On approval of the Program for the Development of the Public Procurement System in the Republic of Kazakhstan for 2001-2004. URL: https://zakon.uchet.kz/rus/docs/P010001605_.
- Didenko, A.G. 2004. Favorites. Post-Soviet period. Almaty, Juridical Literature.
- Ilyinikh, V.A. 1998. State regulation of the agricultural market of Siberia in the conditions of the NEP (1921 - 1928). PhD abstract thesis. Novosibirsk.
- KAZINFORM. 2013. During the implementation of the program "100 schools, 100 hospitals," the state suffered damage amounting to more than 260 million tenge. Available at: https://www.inform.kz/ru/v-hode-realizacii-programmy-100-shkol-100-bol-nic-gosudarstvu-prichinen-uscherb-na-1-5-mlrd-tenge-mazhilismen_a2607916.
- Kuanyshbaeva, S.O. 2005. Entrepreneurial transactions under the legislation of the Republic of Kazakhstan. PhD abstract thesis. Almaty.
- Law of the Republic of Kazakhstan No. 163-I. 1997. On Public Procurement. Available at: https://zakon.uchet.kz/rus/docs/Z970000163_.
- Law of the Republic of Kazakhstan No. 303. 2007. On Public Procurement. Available at: https://online.zakon.kz/document/?doc_id=30115056.
- Law of the Republic of Kazakhstan No. 321-II ZRK. 2002. On Public Procurement. Available at: https://online.zakon.kz/document/?doc_id=1031085.
- Law of the Republic of Kazakhstan No. 434-V ZRK. 2015. On Public Procurement. Available at: https://online.zakon.kz/document/?doc_id=34050877.
- Nesterovich, N.V. 1998. Procurement. Principles of organization of procurement of products for state needs. Competitive Bidding, 9, 44-46.
- Nozdrachev, A.F. 1990. The legal nature of state orders. Soviet state and law, 3, 44-54.
- Pokrovsky, B.V. 2003. Selected works on civil law. Almaty: Research Institute of Private Law of KazGYU.
- Resolution of the Government of the Republic of Kazakhstan No. 141. 1998. On Approval of the Procedure for Conducting Public Procurement of Goods, works and services, Regulations on the tender commission for the definition of suppliers goods, works and services purchased in the process of public procurement, and forms of tender documentation. Available at: https://online.zakon.kz/Document/?doc_id=1008686.
- Sergeev, A.P. (ed.). 2005. Civil law. Textbook. Vol. 1. Moscow, Prospekt.
- Smirnova, V.I. (ed.). 2000. Formation of the market system of public procurement in Russia. Kazan: NGO "BusinessInfoService".
- Suleimenov, M.K. 2005. Subjective civil law and means of its provision. Proceedings of the International Scientific and Practical Conference dedicated to the memory of Professor Yu.G. Basina, Almaty: Institute of Private Law of KazGYU, 81-87.
- Suleimenov, M.K. 2008. State and Civil Law: Problems of Theory and Practice. Materials of the international scientific and practical conference dedicated to the memory and 85th anniversary of the birth of Doctor of Law, Professor Yu.G. Basina (in the framework of annual civilian readings), Almaty: Institute of Private Law of KazGYU, 8-27.

- Suleimenov, M.K., Yu.G. Basin (eds.). 2003. Civil Code of the Republic of Kazakhstan (Special Part). Almaty, Jet Heat.
- Vlasov, V.A. 2005. Legal regulation of purchases of agricultural products for state and municipal needs: history, theory, practice: monograph. Krasnoyarsk, KrasAAU.
- Zhailin, G.A. 2002. Civil law of the Republic of Kazakhstan. Part Special. Vol. 2. Almaty, Daneker.