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MODERNIZATION OF THE PUBLIC PROCUREMENT SYSTEM IN THE REPUBLIC OF KAZAKHSTAN.

Дүниежүзілік банктің бағалауы бойынша әлемдік ЖІӨ-нің бестен бір бөлігін құрайтын мемлекеттік сатып алулар дамыған және дамушы экономика үшін ең үлкен нарық болып табылады. Табысы төмен елдердің экономикасындағы мемлекеттік сатып алулардың ең үлкен үлесі орта деңгейден жоғары - 13,6% (Қазақстанда, ресми ақпарат көздерінде нақты статистика жоқ). Сектордың үлкендігіне байланысты жақсы жұмыс істейтін сатып алу жүйесі мемлекет үшін де, бизнес үшін де тиімді. Сондықтан, осы мақалада мемлекеттік сатып алудың кейбір мәселелерін, мысалы, мемлекеттік сатып алу құқықтық реттеудің жалпы ережелері, қандай заңнамалық жаңашылдықтар кәсіпкерлерді қызықтырады, мемлекеттік сатып алуға қатысушылар үшін заңмен белгіленген мерзімдер қандай, оларды қалай қолдануға болады және оларды жоғалтудың салдары қандай, қалай қорғауға болады, егер келісім-шарт мемлекеттік сатып алу туралы заңнаманы айналып өтіп жасалса.

Түйін сөздер: мемлекеттік сатып алу, келісімшарт, әлеуетті жеткізуші, заң, бюджет, экономика.

Государственные закупки, составляя примерно пятую часть глобального ВВП, по данным Всемирного банка, являются крупнейшим рынком развитых и развивающихся экономик. Наибольшая доля государственных закупок в экономике у стран с низким уровнем доходов выше среднего – 13,6% (в Казахстане точной статистики в официальных источниках нет). Ввиду огромных размеров сектора правильно функционирующая система закупок выгодна как для правительства, так и для бизнеса. Поэтому в данной статье мне хотелось бы рассмотреть некоторые вопросы государственных закупок такие как, общие положения правового регулирования государственных закупок, какие новшества законодательства представляют интерес для предпринимателей, какие сроки установлены законом для участников государственных закупок, как их применять и каковы последствия их пропуска, как защитить свои права и интересы, если договор заключен в обход законодательства о государственных закупках.

Ключевые слова: государственные закупки, договор, потенциальный поставщик, закон, бюджет, экономика.

Public procurement, accounting for about a fifth of global GDP, according to the World Bank, is the largest market for developed and developing economies. The largest share of government procurement in the economy of low-income countries is above average - 13.6% (in Kazakhstan, there are no accurate statistics in official sources). Due to the huge size of the sector, a well-functioning procurement system is beneficial for both government and business. Therefore, in this article I would like to consider some issues of public procurement such as general provisions of the legal regulation of public procurement, what legislative innovations are of interest to entrepreneurs, what are the deadlines established by law for public procurement participants, how to apply them and what are the consequences of missing them, how to protect own rights and interests if the contract is concluded bypassing the legislation on public procurement.

Key words: public procurement, contract, potential supplier, law, budget, economy.

Public procurement, accounting for about a fifth of global GDP, according to the World Bank, is the largest market for developed and developing economies. The largest share of government procurement in the economy of low-income countries is above average - 13.6% (in Kazakhstan, there are no accurate statistics in official sources). Due to the huge size of the sector, a well-functioning procurement system is beneficial for both government and business. Therefore, in this article I would like to consider some issues of public procurement such as general provisions of the legal regulation of public procurement, what legislative innovations are of interest to entrepreneurs, what are the deadlines established by law for public procurement participants, how to apply them and

what are the consequences of missing them, how to protect own rights and interests if the contract is concluded bypassing the legislation on public procurement.

The legal regulation of public procurement in Kazakhstan began in 1997 with the adoption of the Law on Public Procurement. Further, this law underwent many changes, namely in 2002 and 2007. From January 1, 2019, amendments were also made to the Rules of public procurement. [1]

The main changes are the introduction of new applications for customers, with the aim of establishing qualification requirements for a potential supplier, bringing the tender documentation into line with new applications for customers, introducing new Technical specifications

for both customers and potential suppliers, with the establishment of a clear form to fill in the established requirements. Thus, the introduced innovations contribute to the implementation of such basic principles of public procurement as providing equal opportunities for potential suppliers to participate in the public procurement process, and fair competition among potential suppliers. If we look at the history of the formation of the public procurement mechanism in the Republic of Kazakhstan, then the UNCITRAL model law on procurement of goods (works) and services was taken as the basis of public procurement legislation, according to which it is desirable to regulate procurements in order to ensure maximum cost-effectiveness and efficiency of procurement, expansion and stimulation participation in the procurement of suppliers regardless of nationality, thereby facilitating international trade, the development of healthy competition between stavschikami in respect of the purchased goods (works) or services, ensuring fair and impartial treatment of all suppliers, promoting the objectivity and impartiality of the procurement process and public confidence in it, ensuring openness of procurement procedures. [3] These goals are carried out by fixing the principles and procedures of public procurement, as well as responsibility for violation of the established rules. It should be noted that it is the experience of Korea that tries to adopt Kazakhstan. Between the countries in November 2016, a memorandum on mutual cooperation in public procurement was signed. The result of fruitful cooperation can be estimated by the indicators of Kazakhstan in the World Bank report, where our country is among the leading adherents of the electronic format. Kazakhstan has even overtaken its partner - in electronic form, we do not just publish on the Internet, as in Korea, but instantly send it to the participants. In addition, Kazakhstan is the leader in timely payments for work and goods to suppliers - from zero to 30 days. But despite the active digitalization of the sphere, it is still not possible to completely eliminate the human factor in the procurement process. To this end, training programs are being implemented in some countries for both customers and suppliers. If Kazakhstan has a common Code of Ethics for civil servants, then Canada has gone even further and developed a separate Code of Ethical Conduct for public procurement. True, the points are quite standard: do not accept gifts, immediately

whine about attempts to bribe, avoid conflicts of interest for family reasons.

There is a similar document in India - the Fair Conduct Agreement, signed by 39 state-owned companies from different sectors. According to Transparency International India, 100% of participants agree that without such an agreement, the procurement system will never come close to ideal. Nevertheless, public procurement remains one of the most corrupt areas of activity, which is associated with huge resources - budgetary funds that are allocated and mastered during public procurement. The Anti-corruption Strategy of the Republic of Kazakhstan for 2015-2025 stated that the public procurement system is one of the most corrupt areas of activity where every fourth corruption crime is committed [4]. The improvement of the public procurement system along with the reduction of administrative pressure on business was named by the President of the Republic of Kazakhstan, Kassym-Zhomart Tokayev, as one of the tasks to eradicate corruption. [5] One of the directions for improving the public procurement system is the automation and centralization of public procurement. The introduction of a single public procurement organizer, a single public procurement operator in this area of the public procurement web portal is aimed at creating a transparent and understandable system for all its participants. [6] In judicial practice, the number of various complaints by suppliers on the public procurement process has decreased, and the main category of disputes has been the recognition of suppliers as unscrupulous participants in public procurement. [2] All this suggests that positive changes are taking place in the field of public procurement. Since the adoption of the Law on Public Procurement, amendments and additions have already been made to it 20 times, including four times since the beginning of this year. This fact obliges the participants of public procurements to constantly monitor the current legislation and keep abreast of legislative novels. Another important problem in Kazakhstan is unrealistic price offers - it used to exist in Japan. Therefore, in 2003 there appeared a separate Law on the Elimination of Unfair Bidding and Prevention of Participation in It, the implementation of which is being monitored by the Fair Trade Commission. Each year, it identifies an average of 20 cases of unfair bidding during procurement and imposes fines on the violators in the amount of 30-40 million Japanese yen. Such a system will undoubtedly contribute to increasing the transparency and openness of public

procurement. But still I would like to dwell on some changes in our legislation that are of interest to entrepreneurs. So, in the Law on Public Procurement the concept of “false information” is disclosed - this is false information contained in the application of the potential supplier for participation in the tender (auction), as well as made by corrections that distort the actual content and do not correspond to the reality of the submitted application of the potential supplier (p .1 Art. 2 of the Law on Public Procurement).

Thus, the legislator has now clarified and specified what exactly the actions of the potential supplier should be related to the provision of false information on qualification requirements (Clause 3, Article 10 of the Law on Public Procurement), which entails the inclusion of such potential suppliers in the register of unscrupulous participants in public procurement (Clause 1 Article 11 of the Law on Public Procurement). Such concretization will undoubtedly contribute to the formation of a stable litigation practice in disputes, excluding the subjective approach to assessing the actions of a potential supplier. Another important novelty, which was adopted in the interests of suppliers, is a change in the grounds for including a supplier in the register of unscrupulous participants in public procurement. Now, clause 4 of Article 12 of the Law on Public Procurement establishes new rules for inclusion in the register of unscrupulous participants in public procurement of suppliers who have not fulfilled or improperly fulfilled their obligations under public procurement contracts concluded with them.

Under the new rules, the customer is obliged to file a lawsuit in court declaring such a supplier to be an unprincipled participant in public procurement, with the exception of cases that together satisfy the following conditions: 1) payment by the supplier of a forfeit (fine, penalty); 2) full performance of contractual obligations; 3) no damage to the customer. This means that the supplier will be able to protect its interests against the customer’s suit if the court has established a combination of these three circumstances.

As for the time limits established by law for public procurement participants, the following is important here. Under a public procurement contract, the customer is obliged to apply to the court no later than thirty calendar days from the day when he became aware of the fact that the supplier violated

the legislation of the Republic of Kazakhstan on public procurement. Clause 3 of the Normative Decree of the Supreme Court of the Republic of Kazakhstan dated 12/14/2012. No. 5 clarified that the specified period is preventive - its expiration is the basis for the refusal to satisfy the claim. Thus, if the customer has missed the indicated thirty-day period for applying to the court, this period cannot be restored, regardless of the reasons for missing the deadline, and the claim should be denied. In contrast, missing the deadline for submitting a complaint or to the court for a potential supplier entails other consequences. When appealing, the potential supplier must comply with the established pre-trial procedure for the settlement of the dispute - he has the right to appeal the actions (inaction), decisions of the customer, the organizer of public procurement, a single organizer of public procurement, commissions, and an expert. [7]

Among other widespread global practices to improve the work of public procurement is the frequent rotation of employees of authorized bodies. In Germany, the Federal Procurement Agency changes staff every 5-8 years. The problem of applying this practice in Kazakhstan is the lack of a sufficient number of qualified specialists who could provide such a "staff turnover." Lawyers interviewed by Forbes Kazakhstan note that their clients often cannot understand the electronic procurement system and even fill out a complex application on their own. This common problem in Italy is being addressed through the creation of training centers for suppliers throughout the country. First, members of an association of suppliers are trained in new tools (these are usually representatives of large businesses). Then they share their experience with small and medium-sized businesses, which participate in 65% of tenders ranging from 100 thousand to 300 thousand euros.

Undoubtedly, the mechanism of public procurement in the Republic of Kazakhstan is becoming more transparent and open. A number of amendments to the Law on Public Procurement have a positive effect, but as world practice shows, the public procurement system is one of the most corrupt areas of activity where every fourth corruption crime is committed; for this, the legislation requires further improvement.

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