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LEGAL REGULATION OF PUBLIC PROCUREMENTS IN THE SPHERE OF HEALTH CARE IN THE RK

Annotation: The article examines the current state of the legal regulation of public procurement in the healthcare sector in the Republic of Kazakhstan. The relevance of the application of the public procurement mechanism in the healthcare sector to save budget funds is substantiated. The author considers the positive aspects and shortcomings of legal regulation in this area. The foreign experience of public procurement is analyzed. The author formulated proposals for improving the legal regulation of public procurement in the healthcare sector of the Republic of Kazakhstan. One of the most important problems of modern health care in the Republic of Kazakhstan is to increase the efficiency of the use of public financial resources to provide medicines and medical equipment to health authorities. One of the means of state regulation of health care is the functioning of the public procurement system. Public procurement plays the role of a promising and important regulator, through which it is possible to form a full-fledged competitive environment in the medical care of the population, to implement a stabilization policy in this area.

Key words: health care, public procurement, legal regulation of the public procurement procedure.

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Правовое регулирование государственных закупок в сфере здравоохранения в РК

Аннотация: В статье исследуется современное состояние правового регулирования государственных закупок в сфере здравоохранения в Республике Казахстан. Обоснована актуальность применения механизма государственных закупок в сфере здравоохранения для экономии бюджетных средств. Автор рассматривает положительные стороны и недостатки правового регулирования в данной сфере. Анализируется зарубежный опыт государственных закупок. Автором сформулированы предложения по совершенствованию правового регулирования государственных закупок в сфере здравоохранения Республики Казахстан. Одной из важнейших задач современного здравоохранения Республики Казахстан является повышение эффективности использования государственных финансовых ресурсов для обеспечения органов здравоохранения лекарственными средствами и медицинской техникой. Одним из средств государственного регулирования здравоохранения является функционирование системы государственных закупок. Государственные закупки играют роль перспективного и важного регулятора, посредством которого возможно формирование полноценной конкурентной среды в медицинском обслуживании населения, реализация стабилизационной политики в этой сфере.

Ключевые слова: здравоохранение, государственные закупки, правовое регулирование процедуры государственных закупок.

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ҚР денсаулық сақтау саласындағы мемлекеттік сатып алуды құқықтық реттеу

Аннотация: Мақалада Қазақстан Республикасындағы денсаулық сақтау саласындағы мемлекеттік сатып алуды құқықтық реттеудің ағымдағы жай-күйі қарастырылады. Денсаулық сақтау саласында бюджет қаражатын үнемдеу үшін мемлекеттік сатып алу механизмін қолданудың өзектілігі дәлелденді. Автор осы саладағы құқықтық реттеудің оң жақтары мен кемшіліктерін қарастырады. Мемлекеттік сатып алудың шетелдік тәжірибесі талданды. Автор Қазақстан Республикасының денсаулық сақтау саласындағы мемлекеттік сатып алуды құқықтық реттеуді жетілдіру бойынша ұсыныстарды тұжырымдаған. Қазақстан Республикасының қазіргі денсаулық сақтау саласының

маңызды міндеттерінің бірі денсаулық сақтау органдарын дәрілік заттармен және медициналық техникамен қамтамасыз ету үшін мемлекеттік қаржы ресурстарын пайдалану тиімділігін арттыру болып табылады. Денсаулық сақтауды мемлекеттік реттеу құралдарының бірі мемлекеттік сатып алу жүйесінің жұмыс істеуі болып табылады. Мемлекеттік сатып алу келешегі зор және маңызды реттеуші рөлін атқарады, ол арқылы халыққа медициналық көмек көрсетуде толыққанды бәсекелестік органы қалыптастыруға, осы салада тұрақтандыру саясатын жүзеге асыруға болады.

Негізгі сөздер: денсаулық сақтау, мемлекеттік сатып алу, мемлекеттік сатып алу рәсімін құқықтық реттеу.

The right to health care occupies an important place among other human rights in the modern world. At the international level, this right is guaranteed by a number of legal acts, which include the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the Declaration on the Rights of Persons with Disabilities, the Declaration on the Rights of Mentally Retarded Persons, etc. These documents impose legal obligations on the participating States to take legislative and administrative measures to implement the rights enshrined in them, including the right to health care. The right of citizens of the Republic of Kazakhstan to health care at the national level is guaranteed by Part 1. Art. 29 of the Constitution of the Republic of Kazakhstan [1].

One of the most important problems of modern health care in the Republic of Kazakhstan is to increase the efficiency of the use of public financial resources to provide medicines and medical equipment to health authorities. One of the means of state regulation of health care is the functioning of the public procurement system. Public procurement plays the role of a promising and important regulator, through which it is possible to form a full-fledged competitive environment in the medical care of the population, to implement a stabilization policy in this area.

At the same time, achieving a new qualitative level of medical provision of the population in the context of a new surge in the incidence of COVID-19 [2], limited state finances, is impossible without improving the efficiency of the use of resources aimed at purchasing medicines, medical equipment and providing modern conditions for medical institutions. First of all, the question arises of timely provision of patients with the necessary medicines that enter the market of the Republic of Kazakhstan through the appropriate public procurement procedure. All this directly depends on the effectiveness of the legal

regulation of public procurement in the healthcare sector.

At the same time, the state of legal regulation of public procurement in the healthcare sector in the Republic of Kazakhstan is far from perfect, despite the fact that, in general, it meets the general principles of international law in this area. The dynamic development of public relations in this area requires the constant development of the legal regulation of public procurement in the healthcare sector in the Republic of Kazakhstan, taking into account the realities of market development, the needs of the state and society, and foreign experience in this area.

Currently, changes and additions to the relevant legislation are considered and introduced almost annually, the state and stakeholders are actively modernizing public procurement processes. At the same time, the development of legal regulation of public procurement in the healthcare sector in the Republic of Kazakhstan is impossible without a solid scientific foundation, which determines the relevance of scientific research on this issue.

The purpose of this article is to study the legal regulation of public procurement in the healthcare sector in the Republic of Kazakhstan, formulating proposals for its improvement.

To date, public procurement in the Republic of Kazakhstan is carried out in accordance with the Law of the Republic of Kazakhstan "On Public Procurement", the norms of the Civil Code, resolutions of the Government of the Republic of Kazakhstan and other regulatory legal acts.

The Law of the Republic of Kazakhstan "On Public Procurement" dated December 04, 2015 No. 434-V defines the general system of regulation of public procurement in the country. At the same time, according to par. 2 p. 2 art. 2 of the Code of the Republic of Kazakhstan "On the health of the people and the healthcare system", the effect of the legislation of the Republic of Kazakhstan on public procurement

in terms of the purchase of medicines and medical products, within the guaranteed volume of free medical care and for the system of compulsory social health insurance, does not apply. These legal relations are subject to regulation by the legislation of the Republic of Kazakhstan in the field of healthcare [3].

Thus, public procurement in the healthcare sector is regulated by the above Code and the relatively new Decree of the Government of the Republic of Kazakhstan dated June 4, 2021 No. 375 "On approval of the Rules for organizing and conducting the procurement of medicines ..." (hereinafter referred to as Decree No. 375).

Decree No. 375 provides for six ways to procure medicines, medical devices or pharmaceutical services: tender through a web portal; automated tender through a web portal, etc. (clause 5 of Chapter 2 of Section 1) [3].

The tender procedure contains a number of successive stages, which are: consideration by the tender commission of applications for compliance with the conditions of the announcement and the requirements of the relevant legislation of the Republic of Kazakhstan in this area, an auction among potential suppliers, etc. (clause 23 of paragraph 1 of Chapter 2 of Section 2) [3].

Among the latest legislative innovations in this area, it should be noted that according to paragraphs. 2 of paragraph 223 of Decree No. 375, the application of a potential supplier is rejected by lot if a price offer is not submitted or in it: the price exceeds the maximum price for the trade name approved by the authorized body in the field of healthcare, and in the case of purchase by a single distributor - taking into account the addition to the price of a potential supplier of the approved margin of a single distributor.

Analyzing the system of current legislation in the field of public procurement in the healthcare sector in the Republic of Kazakhstan, it should be concluded that this system is undergoing significant changes. Of course, this fact reflects the government's steady desire to modernize the relevant legislation in this area, but this also serves as a disadvantage, since it creates additional difficulties for the procurement authorities. The latter have to take into account constantly changing legal requirements. The current profile legislation

lacks stability. At the same time, the final optimization of the legal regulation of public procurement in the healthcare sector should serve to more efficient spending of the budget on procurement.

The vast majority of procurement procedures are currently carried out in electronic form, which, of course, is a positive factor. At the same time, among the shortcomings of the legal regulation of public procurement in the healthcare sector in the Republic of Kazakhstan, it should be noted that the supplier selection mechanism is based on compliance with formal requirements. At the same time, recent reforms have only strengthened this approach of the legislator.

Decree No. 375 provides for the possibility of appealing against actions (inaction), decisions of the procurement organizer, customer and single distributor through state audit and financial control bodies, as well as its higher body in pre-trial order. However, the problem of the so-called "professional complainers", whose activities slow down the work of the appeal mechanism, has not yet been resolved. It is also desirable to ensure the direct participation of external stakeholders in the public procurement system. Differences in the legal framework governing procurement in the healthcare sector have not been completely eliminated, and the desired level of uniformity in this area has not yet been achieved.

To improve the legal regulation of public procurement in the healthcare sector in the Republic of Kazakhstan, it is important to take into account international experience in this area.

In the legislation of foreign states, which regulates the procedure for organizing and conducting public procurement in the healthcare sector, significant attention is paid to ensuring transparency and openness of information, preventing abuse by organizers, customers and participants in the procurement procedure. The use of open bidding procedures makes it possible to implement the above principles to the greatest extent in practice and ensure compliance with the relevant requirements by all participants in the procurement procedure.

For example, in the United States, legislation defines the need for a policy that does not allow the emergence of conflicts of

interest and stimulates the appropriate behavior of employees responsible for government contracts. In this context, for example, it is prohibited to disclose information about an application for a contract, except as required by law, until the announcement of the conclusion of a contract. This ban applies not only to employees of US federal structures, but also to other participants in the procurement process [5, p. 93]. Characteristically, in the United States, as in many other countries, the procurement procedure is carried out mainly through a centralized electronic system, interference in the work of which is considered an offense.

It should be noted that foreign countries are characterized by the experience of using:

- centralized public procurement for goods, works and services necessary for the maintenance, logistics of the work of customers in the presence of their long-term constant need for the same goods, works and services that already have their own established market and a known price level;
- joint public procurement, providing for the right of two or more customers planning to purchase the same goods, works or services, to transfer, on the basis of an agreement, all or part of their own procurement authority to one of the customers.

The experience of individual European countries is interesting in this aspect. In particular, in Austria, Spain and Portugal, central-level institutions are directly obliged by law to procure through centralized purchasing organizations, while for other customers this procedure is not mandatory. In Belgium, this is mandatory above a certain value of purchases, and in Germany, where centralized purchasing organizations operate at the level of the Ministry of the Interior, all procurement tenders of federal ministries above a certain threshold must be carried out exclusively through centralized purchasing organizations.

It should be noted that in Switzerland the procurement procedure is regulated by cantonal, intercantonal and local legislation providing for equal, non-discriminatory access to the market for suppliers both from Switzerland and from other countries, with an identical Swiss public procurement regime. The legislator focuses on the scope and subjects of public procurement.

Brazilian law establishes that, except as

provided by law, public works, services, acquisition and transfer of ownership of goods and other products must be negotiated through an open tender procedure, which must provide equal conditions for all bidders with provisions establishing payment obligations. Effective conditions for participation in the tender must be maintained, as provided by law, which can only allow the requirements for technical and economic qualifications necessary to ensure fulfillment of obligations [6, p. 7, 9].

The legislation of some foreign countries in the process of exercising control over the observance by the participants of the procedure of the conditions and rules of public procurement involves antimonopoly authorities.

In 1996, the Swiss government passed an antitrust law that not only expanded the powers of the competition commission, but also secured the right to sanction cartels, despite the fact that the country's constitution allows the creation of industrial associations and cartels.

In Brazil, public agents may not accept, stipulate, include or apply in a tender any requirement or condition that compromises, restricts or impairs the competitive nature of the procedure. It is also forbidden to establish advantages or distinctions regarding the place of birth, place of origin or residence of bidders or any other circumstances not related to the specific object of the contract; or establish a differential treatment of commercial, legal, labor, social or any other difference between Brazilian and foreign companies, including currency, mode and place of payment, even if it concerns the financing of international agencies, except as provided in separate articles of the law [6, With. 7, 9].

It should also be noted such an interesting feature of the regulation of the procurement procedure in Switzerland as the possibility of a complete departure of the customer from the requirements of legislation in the field of procurement in certain cases. In particular, it has been established that the customer has the right not to comply with the provisions of the Swiss public procurement law if there is a threat of harm to morality, public order and security, and also if it is required by the need to protect the health and life of citizens, fauna and flora, or if intellectual property rights are violated. This clause emphasizes that the

economy in Switzerland is truly socially oriented, since any rules and conditions remain in force until there is a real threat of harm to human life or health, deterioration of the environmental situation, etc. We consider this experience useful for the Republic of Kazakhstan, since it can be used in the legal regulation of public procurement of critically important drugs and medicines.

Despite the fact that the open bidding procedure has been and remains one of the most common in Western Europe and the United States, public procurement is not limited to this procedure only, since, in addition to competitive ones, in many countries the out-of-competition procedure is widely used - purchases from one participant (Switzerland, Japan, Poland, Moldova). This procedure applies in the following cases: an emergency situation, there is only one bidder, the purchase of items protected by special rights or a patent, a purchase for research or development, or if additional purchases are needed from a supplier that has already been contracted.

Brazilian law permits the use of a procedure other than open tendering only in well-defined cases. In particular, in this State, procurement can be carried out by applying the so-called predetermined requirement procedure. It is allowed for service contracts where the government cannot determine the exact nature and timing of the service in advance of the procedure. A predetermined requirement is a structured administrative process for authorizing work with suppliers on an "as and when required" basis based on the terms and conditions proposed by the contracting authority. This contract defines the tasks and area where it is necessary to provide services or perform certain work, deadlines and any other specific instructions (such as reporting expenses based on pre-established financial limits) [6, p. 24].

The positive achievements of the legal regulation of the public procurement procedure in some European countries, the United States, etc., which can be used in the development of proposals for improving the legislation of the Republic of Kazakhstan in the field of healthcare, include:

- fixing restrictions on participants in public procurement procedures on the basis of anti-

corruption legislation, including in order to prevent a conflict of interest;

- defining the features of local procurement, that is, granting the right to local governments to independently organize and conduct procurement within their needs at the expense of local budgets;

- definition and specification of the bases of non-discrimination of participants in the procurement procedure, i.e. conditions that it is unacceptable to establish for customers as those that may be recognized as discriminatory;

- Prevention of violation of the legislation on economic competition, consolidation of anti-competitive requirements and guarantees of their provision during the procurement;

- increasing guarantees for the protection of the rights of foreign participants in public procurement procedures by establishing equal conditions with domestic business entities, except in cases where this may harm the public interest.

Findings. Thus, the legal regulation of public procurement in the healthcare sector in the Republic of Kazakhstan has undergone significant changes in recent years, but still contains a number of significant shortcomings, although it generally meets the general principles of international law in this area. The current profile legislation lacks stability. The problem of the so-called "professional complainers", whose activities slow down the work of the appeal mechanism, has not yet been resolved. Differences in the legal framework governing procurement in the healthcare sector have not been completely eliminated, and the desired level of uniformity in this area has not yet been achieved.

To improve the legal regulation of public procurement in the healthcare sector in the Republic of Kazakhstan, it is also important to take into account foreign experience in this area, especially in terms of determining and specifying the conditions that are unacceptable for customers due to their discriminatory nature, securing anti-competitive requirements and guarantees for their provision during the procurement.

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