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New format of relations in public procurement of the Republic of Kazakhstan in connection with the pandemic COVID-19

Abstract

In this article, the author examines the problems of legal regulation of public procurement in a state of emergency and quarantine measures. The purpose of this article is to study the changes that have appeared in the legislation of the Republic of Kazakhstan in connection with the introduction of the state of emergency and quarantine in the country. The author provides a legal assessment and analyzes the new norms of Kazakhstani legislation regulating public relations in the field of organizing public procurement.

The closure of state borders, the violation of the usual, accumulated over the years, economic ties led to disruptions in the economic activities of state bodies. With all the disadvantages that took place, the positive factor was that the demand for the goods of Kazakhstani producers on the market increased. The introduced new method of public procurement using framework agreements made it possible, in turn, to ensure the guaranteed sale of products of Kazakhstani commodity producers, and also made it possible to apply import substitution of frequently purchased goods.

In this article, the author, on the basis of a study of the current practice in this area, demonstrates the features of legal regulation of the sphere of public procurement in completely social new conditions with the help of novelties in legislation, and also reveals the features of the operation of legal norms regulating the sphere of public procurement of goods, works and services in conditions of a state of emergency and quarantine measures. The adoption of special measures by the Government of the Republic of Kazakhstan made it possible to transfer financial and economic relations in the state to a new format – "customer-supplier". The measures taken by the government have now been extended until the end of 2020. These measures on the part of the Government of the Republic of Kazakhstan made it possible to introduce a sparing legal regime for regulating this area for representatives of medium and small businesses, in order to minimize the losses of the latter arising against the background of the introduction of a state of emergency and quarantine measures. Taking into account the analysis of judicial practice in the consideration of cases on public procurement, the author emphasizes that in conditions of quarantine measures in Kazakhstan, as a rule, there are violations of the same type, both on the part of customers and on the part of suppliers.

Keywords: public procurement, state of emergency, pandemic, customer, supplier, e-procurement, fair competition.

Introduction

The role of the state in the economy is determined not only by the regulation of economic processes, but also by the fact that the state is a full-fledged economic entity, whose behavior affects the entire national economic system. The most important difference in the behavior of the state as a market entity is that its economic interest is based on the achievement of the goals of the whole society.

One of the directions of state participation in the economic sphere is the sphere of public procurement. The state undertakes not only financing, but also the direct organization of the production process of individual goods and services. Moreover, the state is one of the largest consumers of a significant part of the range of goods and services offered on the market. Public procurement is intended to meet the needs of public administration bodies, both central and local, institutions, public sector enterprises in goods, works and services designed to perform the functions assigned to them. Public procurement covers the most important areas, therefore, improving the public procurement system is an urgent problem [1].

Legal regulation of public procurement in Kazakhstan began in 1997 with the adoption of the Law "On Public Procurement". Subsequently, new laws with the same name were adopted in 2002 and 2007. On January 1, 2016, a new Law of the Republic of Kazakhstan "On Public Procurement" [2] was put into effect.

The UNCITRAL model law on the procurement of goods (works) and services was taken as the basis for the legislation on public procurement, according to which it is desirable to regulate procurement in order to:

- ensure maximum economy and efficiency of procurement;
- expanding and stimulating participation in procurement of suppliers (contractors), regardless of nationality, thereby facilitating international trade;
- development of competition between suppliers (contractors) in relation to purchased goods (works) or services;

- ensuring fair and impartial treatment of all suppliers (contractors);
- promoting objectivity and impartiality of the procurement process and public confidence in it;
- ensuring the transparency of procurement procedures [2].

Currently, the problems of public procurement carried out by electronic means are one of the most pressing in the field of legal regulation of public procurement. As you know, e-procurement is a state mechanism for the efficient, rational use of budget funds. This procedure is based on the principles of openness and transparency in the public procurement process and fair competition.

Currently, both in the legal and economic spheres, sufficient attention is paid to these issues, and the problems associated with them, including: financial analysts analyze financial activities, judges summarize judicial practice, legal entities directly involved in public procurement, share their problems that inevitably arise in the course of their activities, etc. [3; 4].

Materials and methods

The methodological basis of this study was the scientific methods of cognition, involving the consideration of phenomena in their constant development, interconnection and interdependence. In the course of the study, a complex of separate scientific methods was used: the comparative legal method, the method of systems analysis, statistical and sociological methods.

The theoretical basis of the research was scientific works on the general theory of law, civil law, business law and other branches of science. The regulatory framework for this study was the Constitution of the Republic of Kazakhstan, the Civil Code of the Republic of Kazakhstan, the Entrepreneurial Code of the Republic of Kazakhstan, as well as the Law of the Republic of Kazakhstan "On Public Procurements".

Results

One of the directions for improving the public procurement system is the automation and centralization of public procurement. The introduction into this area of the web portal of public procurement of a single organizer of public procurement, a single operator in the field of public procurement is aimed at creating a transparent and understandable system for all its participants. In court practice, the number of various complaints from suppliers about the public procurement process has decreased, and the main category of disputes was the recognition of suppliers as unscrupulous participants in public procurement. All this testifies to the fact that positive changes are taking place in the field of public procurement [2].

The creation of a system of electronic public procurement is a rather laborious and long-term business, requiring strategic planning, a clear identification of individual stages. The main stages of building a system for supporting electronic government trading can be identified:

- development of a strategic plan;
- creation of a head server of trades, amendments to legislation;
- creation of software that serves the entire cycle of electronic tenders from the preparation of documentation, publication of announcements and registration of participants to summing up and publishing the results.

First of all, it should be noted the work in the field of national legislation. Two tasks stand out here. The first, more general one, which is of decisive importance for national e-commerce in general, is the legal support of electronic document management and electronic payments. The second, more specific, but no less important, is the adjustment of the regulatory framework that serves the actual public procurement procedures. The difficulties of forming a legislative basis for electronic public procurement are, apparently, of an objective nature.

The legal basis for conducting electronic public procurement is defined in the Law of the Republic of Kazakhstan "On public procurement". In accordance with paragraph 4 of Art. 12 of the Law, public procurement carried out by means of a tender, a request for quotations and from one source can be carried out using information systems and electronic document management in the manner determined by the Government of the Republic of Kazakhstan. Moreover, on the basis of paragraph 2 of Art. 12 of the Law, the method of public procurement is chosen by the customer in accordance with the Law without the consent of the authorized body [5].

In the process of studying the generalized court practice in cases related to public procurement, it should be noted that the same type of violations can be traced, both on the part of customers and on the part of suppliers. A close study of the Rules of Public Procurement [6] and the Law of the Republic of Kazakhstan "On Public Procurements" [7] allows us to say that the changes and additions made in recent years timely correct the previously existing legislative gaps in the field of public procurement and, thereby, contribute to development of economic relations.

It should be noted that the Law of the Republic of Kazakhstan "On public procurement" dated December 4, 2015 is one of the few regulatory legal acts, into which, since the beginning of its adoption, more than 20 amendments and additions have been made.

A special procedure for public procurement was introduced in the Republic of Kazakhstan from March 20, 2020, during the state of emergency, and was extended until October 1, 2020. In April 2020, changes were made to it aimed at supporting Kazakhstani commodity producers during the crisis associated with the global COVID-19 pandemic. Thus, a new method of public procurement was introduced, using framework agreements in order to ensure the guaranteed sale of products of Kazakhstani commodity producers (Decree of the

Government of the Republic of Kazakhstan dated March 20, 2020 No. 127 "On determining a special procedure for public procurement") [6].

By the decree of the President of the Republic of Kazakhstan dated March 15, 2020, a state of emergency was introduced on the territory of the country from March 16, which was further extended until May 20, 2020 by the decrees of the President of the Republic of Kazakhstan dated April 14, 2020. Thus, the introduction of the regime brought the customer-supplier relationship into a relatively new format.

At the same time, the existing practice in this area indicates that in connection with the current situation, the very legal relationship in the field of public procurement has changed. So, in particular, one of the medical institutions of the Pavlodar region filed a statement of claim with the Pavlodar Specialized Interdistrict Economic Court on recognizing the supplier as an unfair participant in public procurement and collecting a penalty from him for the delayed delivery of goods in the amount of 0.01 percent for each overdue day. Considering the cost of the goods (a metal security door against ionizing radiation in the amount of more than 15 million tenge, is not produced in Kazakhstan), the amount of the penalty was considerable, even if the delay in delivery of the goods was only 1 week [8].

Based on paragraphs. 1 of part 1 of article 151 of the Civil Procedure Code of the Republic of Kazakhstan [9] judge M. refused to accept the statement of claim to the customer. The court ruling stated that the application was not subject to consideration and resolution in civil proceedings. There is a need to analyze the reason for the refusal.

By the Decree of the President of the Republic of Kazakhstan dated March 15, 2020 No. 285, a state of emergency was introduced on the territory of the Republic of Kazakhstan from March 16, later it was extended until May 11 by the Decree of the President of the Republic of Kazakhstan dated April 14, 2020 No. 306 and dated April 29, 2020 No. 310. Clause 9- 1 of the Resolution of the Government of the Republic of Kazakhstan dated March 20, 2020 No. 127 "On the determination of a special procedure for public procurement" provided for a new procedure for relations between the customer and the supplier, taking into account the situation that took place in the country.

In cases of evasion of potential suppliers identified by the winner of public procurement from concluding a contract, failure to fulfill or improper fulfillment by the supplier of contractual obligations arising from the introduction of a state of emergency, the customer does not take measures to include such potential suppliers in the register of unfair participants in public procurement and the application of penalties to them. The aforementioned Decree determined a special procedure for public procurement for the period of crisis situations (the decree is valid until July 31, 2020).

Thus, customers are prohibited from making demands:

- 1) on recognition of the supplier as unfair participants in public procurement;
- 2) on the collection of penalties.

In the event that such a claim is presented by the customer, the judge refuses to accept the statement of claim as not subject to consideration in the civil proceedings. The effect of part 1 of the Decree of the Government of the Republic of Kazakhstan dated March 20, 2020 No. 127 also applies to contracts under which non-fulfillment or improper fulfillment by the supplier of contractual obligations was caused and arose as a result of the introduction of a state of emergency.

In addition, in accordance with the medical code "On people's health and the health care system" dated July 7, 2020 [10], the sanitary-epidemiological service established restrictive measures and quarantine, which provided for a special regime of entrepreneurial activity, respectively, the supplier's fulfillment of contractual obligations, was at risk of their non-execution due to the state of emergency and quarantine.

Discussion

For well-known circumstances (part 1 of article 76 of the Code of Civil Procedure of the Republic of Kazakhstan), after the termination of the state of emergency, the quarantine regime continued to operate on the territory of the Republic of Kazakhstan, and not all restrictive measures were lifted from May 12, 2020.

In the future, due to the deterioration of the situation, strict restrictive quarantine measures were reintroduced, which were in effect until August 17, 2020, while there is also a gradual removal of these measures. At the same time, it should be noted that this circumstance hindered the implementation of proper business or other activities of suppliers / contractors and the timely provision of services, performance of work and delivery of goods for the specified period [11].

Under such circumstances, the courts did not accept claims for recognizing the supplier as an unfair participant in public procurement and for recovering a penalty for the period from March 16, 2020 to the present. According to part 151 of the Civil Procedure Code of the Republic of Kazakhstan, the refusal to accept the statement of claim prevents the plaintiff from re-applying to the court with a claim against the same defendant, on the same subject and on the same grounds.

It should be noted that the events in the country related to the COVID-19 epidemic have changed the nature of the customer-supplier relationship, but here there is a need to consider each individual case of a supplier's breach of obligations. It is clear that when it comes to the supply of goods from far abroad, and the borders are closed due to the epidemic, it is clear that it is not possible to fulfill the obligations to the customer on time [12]. In these cases, we are talking about the application of the rules of law that regulate relations during

the period of emergency and quarantine, i.e. By the Decree of the Government of the Republic of Kazakhstan dated March 20, 2020 No. 127 "On the determination of a special procedure for public procurement."

In the same case, when the supplier has the opportunity to fulfill the obligations and deliver the goods of the Kazakh manufacturer and the customer fully agrees with the delivery of such goods, but the supplier does not supply it, here, of course, there is a need to file an application with the court and recognize such a supplier as unfair participants in public procurement and collect a penalty from him, i.e. to act within the framework of the law of the Republic of Kazakhstan "On public procurement", the Rules on public procurement. In all cases, when it comes to violations on the part of the supplier, it is necessary to prove the causal relationship between the failure to fulfill the violation of obligations by the person and the circumstances to which he refers and, having identified the reason, correctly apply the law.

Circumstances that have become insurmountable and unavoidable for one supplier are not necessarily the same for another. For example, a supplier has undertaken an obligation to deliver to a medical facility products in the form of sugar and cereals that are available in wholesale outlets of the city and the supply of this product to them is in no way connected with the pandemic; to fulfill this obligation, it is enough to have money and transport to deliver on time to the customer the goods. This is an example of an irresponsible attitude towards the undertaken obligations.

Conclusions

Currently, the special procedure for conducting public procurement has been extended (within the framework of the Decree of the Government of the Republic of Kazakhstan dated March 20, 2020 No. 127 "On determining a special procedure for public procurement") until December 31, 2020, which means that the special procedure for public procurement continues to regulate relations, but it is not worth, referring not to quarantine conditions, to justify negligent suppliers who, under the guise of a pandemic, allow themselves to violate the norms of the law, while remaining unpunished.

Thus, it should be noted that the current, in connection with the quarantine measures taken in Kazakhstan against the background of the COVID-19 pandemic, revealed a number of problems that were not previously known to Kazakhstani legal science and practice, and which, in order to resolve themselves, require immediate reactions from government agencies.

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COVID-19 пандемиясына байланысты Қазақстан Республикасындағы мемлекеттік сатып алу қатынастарының жаңа форматы

Мақалада автор төтенше жағдай мен карантиндік шаралар жағдайында мемлекеттік сатып алудың құқықтық реттеу проблемаларын қарастырады. Мақсаты - елде төтенше жағдай және карантин режимінің енгізілуіне байланысты Қазақстан Республикасының заңнамасында пайда болған өзгерістерді зерттеу болып табылады.

Автор мемлекеттік сатып алуды ұйымдастыру саласындағы қоғамдық қатынастарды реттейтін қазақстандық заңнаманың жаңа нормаларына құқықтық баға береді және талдау жасайды. Мемлекеттік шекаралардың жабылуы, дағдыланған, жылдар бойы қалыптасқан экономикалық байланыстардың бұзылуы - мемлекеттік органдардың шаруашылық іс-әрекетіндегі ақаулықтарға әкелді. Орын алған барлық кемшіліктерге қарамастан, нарықта барлық қазақстандық өндірушілердің тауарларына сұраныстың артуы жағымды ықпал тигізді. Негіздемелік келісімдерді пайдалана отырып, енгізілген мемлекеттік сатып алудың жаңа тәсілі өз кезегінде қазақстандық тауар өндірушілердің өнімдерін кепілді өткізуді қамтамасыз етуге, сондай-ақ жиі сатып алынатын тауарлардың импортын алмастыруға мүмкіндік берді.

Автор осы салада қалыптасқан тәжірибені зерттеу негізінде заңнамадағы ???новеллалардың??? көмегімен мүлдем әлеуметтік жаңа жағдайларда мемлекеттік сатып алу саласын құқықтық регламенттеудің ерекшеліктерін көрсетеді, сондай-ақ, төтенше жағдай және карантиндік шаралар кезінде тауарларды, жұмыстар мен көрсетілетін қызметтерді мемлекеттік сатып алу саласын реттейтін құқықтық нормалардың қолданылу ерекшеліктерін ашады.

ҚР Үкіметінің арнайы шаралар қабылдауы мемлекеттегі қаржы-экономикалық қатынастарды «тапсырыс беруші-жеткізуші» жаңа форматына көшіруге мүмкіндік берді. Қазіргі уақытта Үкімет қабылдаған шаралар 2020 жылдың соңына дейін ұзартылды. ҚР Үкіметі тарапынан көрсетілген шаралар төтенше жағдай мен карантиндік шараларды енгізу аясында туындайтын шығындарды барынша қысқарту мақсатында орта және шағын бизнес өкілдері үшін осы саланы реттеудің жеңіл құқықтық режимін енгізуге мүмкіндік берді. Мемлекеттік сатып алу жөніндегі істерді қараудың сот тәжірибесіне талдау жасауды ескере отырып, автор Қазақстанда карантиндік шаралар жағдайында, әдетте, тапсырыс берушілер тарапынан да, жеткізушілер тарапынан да бір типті бұзушылықтар орын алғанын атап көрсетеді.

Түйін сөздер: адам құқығы, жеке бас бостандығы, адам ұрлау, бас бостандығынан заңсыз айыру, адам саудасы, құлдық.

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Новый формат отношений в государственных закупках Республики Казахстан в связи с пандемией COVID-19

В настоящей статье автором рассматриваются проблемы правового регулирования государственных закупок в условиях чрезвычайного положения и карантинных мер. Целью настоящей статьи является исследование изменений, появившихся в законодательстве Республики Казахстан в связи с введением в стране режима чрезвычайного положения и карантина. Автор дает правовую оценку и анализирует новые нормы казахстанского законодательства, регулирующие общественные отношения в сфере организации государственных закупок.

Закрытие государственных границ, нарушение привычных, наработанных годами экономических связей повлекло за собой сбой в хозяйственной деятельности государственных органов. При всех минусах положительным фактором стало то, что возрос спрос на имеющиеся на рынке товары казахстанских производителей. Новый способ государственных закупок с использованием рамочных соглашений позволил обеспечить гарантированный сбыт продукции казахстанских товаропроизводителей, а также применить импортозамещение часто закупаемых товаров.

Автором на основе исследования сложившейся в данной сфере практики демонстрируются особенности правовой регламентации сферы государственных закупок в совершенно новых социальных условиях при помощи новелл в законодательстве, а также раскрываются особенности действия правовых норм, регулирующих сферу государственных закупок товаров, работ и услуг в условиях чрезвычайного положения и карантинных мер. Принятие Правительством РК специальных мер позволило перевести финансово-экономические отношения в государстве в новый формат – «заказчик-поставщик». В настоящее время принятые правительством меры продлены до конца 2020 года. Указанные меры Правительства РК позволили ввести шадящий правовой режим регулирования данной сферы для представителей среднего и малого бизнеса, в целях максимально возможного сокращения их убытков, возникающих на фоне введения чрезвычайного положения и карантинных мер. С учетом анализа судебной практики рассмотрения дел по государственным закупкам автором подчеркивается, что в условиях карантинных мер в Казахстане наблюдаются однотипные нарушения как со стороны заказчиков, так и со стороны поставщиков.

Ключевые слова: государственные закупки, режим чрезвычайного положения, пандемия, заказчик, поставщик, электронные закупки, добросовестная конкуренция.