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The legal essence of tender under the legislation of the Republic of Kazakhstan

In modern conditions, tenders are a key source of income for government organizations and the business community, as it contributes to the effective organization of the procurement process and ensures transparency and competitiveness in choosing a supplier. The authors of the article analyzed the key legislative acts regulating tenders, including the Law “On Public Procurement” in order to define the legal essence of the concept of “tender”. As the analysis of industry legislation has shown, the concepts of “tender” and “contest” in most cases are identified and used as synonyms in the works of domestic and Russian scientists. The article also includes a comparative analysis with international practice, as well as a comparative analysis of the concept of the term “tender” in the current legislative acts of the United States of America, the People's Republic of China and Turkmenistan. This allowed the authors to identify potential areas for reforming the Kazakh tender system by including the relevant concept of “tender” in the current legislation. Within the framework of the article, the main legal aspects of tender procedures were considered, which represent an opportunity through free and open contest to conclude a mutually beneficial contract for contractors, as well as types of tenders, their significance and features in the field of public procurement. The methodological basis of the research consists of general and special methods, such as formal logical, scientific analysis and synthesis, historical and legal and comparative legal methods. The results obtained from the research allowed the authors to formulate proposals and recommendations for improving the legislative framework to ensure the effectiveness and fairness of tender processes.

Keywords: tender, contest, public procurement, contract, contention, tender procedure, law, principles, analysis, legislation, legal relationship.

Introduction

In modern conditions, tenders are an important source of income for government organizations and the business community, contributing to the effective organization of the procurement process and ensuring open contest when choosing a supplier. Tenders are currently one of the main tools in the public procurement system in the Republic of Kazakhstan, starting from planning and preparation to the implementation of the contract for the supply of goods, works and services. Issues arising during the tender procedures affect on various aspects of the legal system. We often hear the term “tender”, which is currently widely used in practice, but the exact definition is not fixed at the legislative level. We conducted a review of industry legislation related to public procurement and commercial tenders, identified some gaps and advantages covering the process of tender procedures. Consideration of these issues is a practical example in an effort to increase transparency, fairness and efficiency of the tender system, which is an important element in stimulating economic development and supporting entrepreneurship and the State.

The purpose of the study is to analyze the legal essence of the tender under the legislation of the Republic of Kazakhstan.

To achieve this goal, research tasks are put forward to identify, clarify and explain the following issues:

- To conduct a comparative analysis of various definitions of the concept of “tender” by reviewing domestic and foreign legislations and scientific works.
- To determine the advantages and disadvantages of tender procedures in accordance with current legislation by conducting an analysis.
- To formulate proposals and recommendations for improving the legislative framework On Public Procurement.

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In the scientific article by Z.S. Ashimova, which was devoted to the exploration of the legal essence of the tender in the implementation of public procurement in the Republic of Kazakhstan, some aspects of legal regulation were briefly highlighted. A number of issues related to the legal regulation of public procurement, questions about the effectiveness of the law of the Republic of Kazakhstan On Public Procurement and other topical issues were also investigated by A.Zh Kiyazova, A.G. Kazbayeva, F.G. Ibragimova, etc. Foreign experience and practice of public procurement were reflected in the research of V.V. Tena., A.B. Tlesova., S.C. Primbetova., L.A. Bimendieva., A.M. Amirova. All this is additional evidence of the need for additional research in this area.

Methods and materials

The methodological basis of the research consists of the laws and categories of materialistic dialectics, which contribute to the knowledge of individual legal phenomena and processes, as well as methods of scientific analysis and synthesis. The analysis of the norms of the current legislation of the Republic of Kazakhstan “On Public Procurement” using a formal legal method is carried out. In addition, the historical-legal and comparative-legal method analyzed the legislation of other countries in the field of tender relations, as well as conducted a study of their legal regulation.

Results

Currently, tender relations in the Republic of Kazakhstan are the main tool for ensuring the effectiveness of government and commercial projects, as well as ensuring transparency and fairness in the procurement of goods and services. However, despite the Government's work to improve the public procurement system, there are a number of problems related to the legal regulation of tender relations.

Tender relations in Kazakhstan are regulated by the Law On Public Procurement [1], the Civil Code of the Republic of Kazakhstan [2], the Law on State Property of the Republic of Kazakhstan [3] and other regulatory legal acts. We would like to note that nowadays the term tender itself is often used in practice, so logically there is a need to clarify the legal essence of the concept of tender.

The genesis of the development of the concept of “tender”, while it has its origin in the canons of Roman private law, as such, it did not have a modern understanding. But at the same time, there were some analogies in the contractual structures of that time. The legal relationship of obligations between the parties in Roman private law was characterized by the use of the procedure “licitatio” (translated from Latin. — auction or bidding), where the parties to the contractual relationship mutually agreed on the terms regarding the offer of sale of goods and the determination of the most optimal price for both.

According to scientists G.A. Ilyassova, R.A. Tokatov, M.T. Akimzhanova, and other authors, a tender translated from English “tender” is an application for a contract submitted on a competitive basis. Also, a “tender” is an open-type competitive bidding (open tender) or closed-type bidding for a limited number of participants (closed tender). According to the current legislation, the selection of proposals for the supply of goods, services or works should be based on certain principles, which are competitiveness, fairness and efficiency within the agreed time frame, as well as on the terms of contest of the bidders [4; 265].

As practice shows, the concept of contest and tender are used synonymously. Thus, in the “Rules for the activities of Natural Monopoly Entities”, the concept of tender is given as “contest (tender)” — as a method of procurement, which implies contest between potential suppliers and which is aimed at determining the most favorable terms of the procurement contract [5]. In turn, we cannot agree with the indicated position, since when determining the legal essence of a contest as a tender, it is still necessary to take into account all the features of this process. Subsequently, the result of the tender process is the conclusion of an agreement between the customer and the supplier.

The Law of our country, which is aimed directly at regulating public procurement in the Republic of Kazakhstan, defines 6 ways to carry out public procurement such as: contest, auction, from one source, request for price offers, through an electronic store and through commodity exchanges [1].

In our opinion, the contest reflects the prerequisites for the emergence of tender relationships in the Republic of Kazakhstan. Tenders procedures themselves are aimed at concluding a purchase and sale agreement, a lease agreement, a trust management agreement, a contract agreement, etc. Although in most cases, issues related to tenders are limited only to public procurement, it is also worth noting commercial tenders in which the customer may be private companies. Commercial tenders are the process of purchasing goods, providing services and performing certain works, based on contest between suppliers. The purpose of the tender is to identify the bidder who offers the most optimal conditions for concluding a potential contract

for goods, works and services in comparison with those initial conditions that were determined by the organizer of the contest. Thus, it can be determined that the tender is the process of conducting a contest.

In accordance with the current norms of civil legislation, a tender is defined as a process in which the initiator of the tender (organizer) undertakes to conclude a contract based on pre-proposed conditions with the tenderer who will offer the most favorable conditions. The initiator of the tender can act as a seller, buyer, customer, contractor, lessor, lessee, etc. [2].

In the “Dictionary of terms of the advertising language”, authored by S. Itegulova, S. Zhailau, O. Maksut and others, the term we study is described as: 1. a document containing specific requirements and services that the organizer of the auction sends to potential participants; 2. auctions conducted in order to achieve the most favorable terms of sale; 3. an open contest or auction based on pre-submitted bids with commercial offers; 4. a written request or statement of the desire to deliver the goods in accordance with the terms of the fixed-term contract [6; 84].

Discussion

Many scientists have expressed opinions about the inexpediency of fixing the term tender at the legislative level. Thus, according to G.A. Suhadol'skii, the term “tender” is a foreign analogue of the Russian term “contest”, often used in the legal literature (sometimes in regulatory documents). He believes that Russian civil legislation and other federal laws speak about the contest, and also the term tender is not used [7; 10].

And I.I. Neduzhy notes that bidding and tender are synonymous [8]. Nevertheless, we believe that the term “tender” is actively used in practice.

E.S. Barannikova also identifies the terms “tender”, “contest” and “bidding” as synonyms, while noting that their meaning is the same. Bidding (tender, contest) is a competitive competition between participants for the right to conclude a contract. An auction is a form of bidding where a competition of participants is conducted according to a single price criterion, participants of which have the right to change within a set time. According to I.I. Konstantinov and S.E. Barykin, the terms tender and contest are distinguished as commercial purchases of legal entities, and the second as regulating public procurement [9; 13].

A tender (translated from English as an offer) is a type of contest for the supply of goods and services based on the principles of competition based on efficiency and effectiveness. The contract is concluded with the winner of the tender that complies with all the requirements of the submitted documentation.

Under the concept of “tender” in the USA, one can come to the following definition — a tender is a procedure for finding a supplier or contractor for government projects or government orders. As in any developed country, the Government of the United States of America uses tenders to obtain favorable conditions regarding price and quality. In order to receive certain products from commercial enterprises, the US governments conduct an open contest procedure, which is a tender.

In Turkmenistan, the Law “On Tenders for the supply of goods, performance of works, provision of services for State needs” was adopted in 2014, and according to article 1 of this Law, the concept of tender is given as a competitive method for selecting a supplier (contractor) of goods, works and services necessary for state purposes. The main purpose of the Law is to regulate relations arising during tenders for the selection of suppliers (contractors) for the supply of goods, performance of works and provision of services for public needs, and is aimed at the development of fair contest [10].

The public procurement system in the socialist state of China is controlled in accordance with the “Bidding Law” and the “Government Procurement Law”.

The first Law is aimed at standardizing tender processes, protecting the interests of the state and society, as well as the rights of tender participants, improving economic efficiency, and ensuring the quality of traded goods. The mandatory conduct of tenders under mentioned Law applies to construction-engineering projects within the PRC, including design and survey work, construction, supervision of work progress, as well as the purchase of key equipment, materials, and more another [11]. The “Bidding Law” covers procurement procedures conducted by state-owned companies and in the private sector of China.

The second law is aimed at regulating the processes of state procurement, improving the efficiency of public funds expenditure, protecting public and state interests, as well as the rights and lawful interests of participants in state procurement, contributing to the transparency and integrity of the government. State procurement, as understood by Chinese legal act, is defined as the activity of purchasing goods, works, and services with budget funds, carried out by state structures, institutions, and public organizations, where the

purchased items are included in a centralized catalog or their cost exceeds the legal procurement threshold values [12].

It is necessary to note that tenders play a key role in the public procurement system of the authors' country, contributing to the effective use of budgetary funds. In turn, tender relations are closely linked to state procurement. The legislation of the Republic of Kazakhstan on state procurement establishes the following fundamental principles for tender procedures:

1. Ensuring equal conditions for all participants in the process of state procurement, except in cases provided by law.
2. Transparency and openness of state procurement procedures, as well as the protection of the commercial secrets of potential suppliers.
3. Fair competition among participants in state procurement.
4. Support for local producers and suppliers of works, services and goods, in accordance with international agreements that have been approved by the Republic of Kazakhstan.
5. Effective and optimal use of budgetary funds for the implementation of the process under study.
6. Responsibility of all participants in the procurement process.
7. Intolerance to corruption in the public procurement process.
8. Protection of intellectual property objects in the procurement of goods.
9. Procurement of high-quality, innovative and high-tech goods, works and services. [1]

Based on the above principles, tender procedures are conducted. Tender, like any method of public procurement, has its advantages and disadvantages such as:

1. The tender procedure provides equal opportunities for all participants in the process, which affects the eradication of corruption, based on the principle of openness and transparency of the public procurement process.
2. Tender procedures stimulate the emergence of competitiveness among suppliers, which ultimately contributes to improving the quality of goods and services.
3. The tender is the most optimal and effective tool for the supply of goods, works and services, contributing to a reduction in budget expenditures.
4. Participation in tenders provides an opportunity to introduce modern new innovative technologies that contribute to the growth of competitiveness of enterprises and business development.

Disadvantages of the tender process:

1. As a result of the tender relationship, the process can be delayed and a lot of time and costs are required both on the part of the customer and on the part of the supplier.
2. A good offer is not always feasible in practice, which is a big risk for both the supplier and the customer, which can lead to undesirable results or bad consequences.
3. Small and medium-sized enterprises may experience difficulties in the tender process due to limited access to information and requirements.
4. During the tender procedures, you can often see unscrupulous bidders who, in order to satisfy the customer's requirements, offer the lowest price, which may subsequently affect a decrease in the quality of goods, work and services. In the end, the supplier, in turn, begins to save money in everything in order to make a profit.

In general, despite the disadvantages, it can be said that tenders also remain an important tool for ensuring the effective use of budget funds, as well as openness and transparency in a competitive environment.

According to Z.S. Ashimova, the meaning and essence of the tender can be defined as an important tool in the modern mechanism of the market economy. The use of the tender procedure in the trading process has influenced the high growth rate of the national economy, and it also emphasizes the use of the tender allows for effective purchase and sale both to the buyer represented by the state and to the seller. But at the same time, she notes the insufficiency of using the tender as a tool to support domestic producers [8; 113].

The Head of State of the Republic of Kazakhstan, Kassym-Jomart Tokayev, in his Message to the People of Kazakhstan "The Economic Course of a Fair Kazakhstan" dated September 1, 2023, raised a number of issues related to legislation On Public Procurement. The President was instructed to introduce a new public procurement system to address such problematic issues as endless disputes, long work periods, and the opacity of the existing system. The Government has developed a new bill that should promote economical and accountable spending of budget funds. In addition, the Head of State drew attention to the further support of domestic entrepreneurship, and most importantly, the prompt resolution of topical issues

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Қазақстан Республикасының заңнамасы бойынша тендердің құқықтық мәні

Қазіргі жағдайда тендер мемлекеттік ұйымдар мен бизнес-қоғамдастық үшін негізгі табыс көзі болып табылады, өйткені бұл сатып алу процесін тиімді ұйымдастыруға және жеткізушіні таңдау кезінде ашықтық пен бәсекеге қабілеттілікті қамтамасыз етуге ықпал етеді. Мақалада авторлар «тендер» ұғымының құқықтық мәнін анықтау мақсатында «Мемлекеттік сатып алу туралы» Заңды қоса алғанда, тендерлерді өткізуді реттейтін негізгі заңнамалық актілерге талдау жүргізген. Салалық заңнаманы талдау көрсеткендей, отандық және ресейлік ғалымдардың еңбектерінде көп жағдайда «тендер» және «конкурс» ұғымдары синоним ретінде айқындалып, қолданылады. Сондай-ақ Америка Құрама Штаттарының, Қытай Халық Республикасының және Түркіменстанның қолданыстағы заңнамалық актілеріндегі «тендер» ұғымына салыстырмалы талдау жүргізу сияқты халықаралық тәжірибеде салыстырмалы талдау қарастырылған. Бұл авторларға қолданыстағы заңнамаға «тендер» ұғымын енгізу арқылы қазақстандық тендер жүйесін реформалаудың әлеуетті бағыттарын анықтауға мүмкіндік береді. Еркін және ашық бәсекелестік арқылы контрагенттер үшін өзара тиімді келісім шарт жасасу мүмкіндігін білдіретін тендерлік рәсімдердің негізгі құқықтық аспектілері, сондай-ақ тендерлердің түрлері, олардың маңызы мен мемлекеттік сатып алу саласындағы ерекшеліктері зерделенген. Зерттеудің әдіснамалық негізін формалды-логикалық, ғылыми талдау және синтез, тарихи-құқықтық және салыстырмалы құқықтық әдістер сияқты жалпы және арнайы әдістер құрайды. Зерттеу нәтижесінде алынған нәтижелер авторларға тендерлік процесінің тиімділігі мен әділдігін қамтамасыз ету үшін заңнамалық базаны жетілдіру бойынша ұсыныстар мен ұсынымдарды тұжырымдауға мүмкіндік береді.

Кілт сөздер: тендер, конкурс, мемлекеттік сатып алу, келісімшарт, бәсекелестік, тендерлік рәсім, құқық, қағида, талдау, құқықтық қатынастар.

Р.Б. Жағалов, М.Т. Акимжанова

Правовая сущность тендера по законодательству Республики Казахстан

В современных условиях тендеры являются ключевым источником дохода для государственных организаций и бизнес-сообщества, поскольку это способствует эффективной организации процесса закупок и обеспечения прозрачности и конкурентоспособности при выборе поставщика. Авторами в статье проведен анализ ключевых законодательных актов, регулирующих проведение тендеров, включая Закон «О государственных закупках» с целью определения правовой сущности понятия «тендер». Как показал анализ отраслевого законодательства, в трудах отечественных и российских ученых в большинстве случаев понятия «тендер» и «конкурс» отождествляются и используются как синонимы. Кроме того, проведена параллель с международной практикой, то есть авторы осуществили сравнительный анализ термина «тендер» в действующих законодательных актах Соединенных Штатов Америки, Китайской Народной Республики и Туркменистана. Это позволило им выявить потенциальные направления для реформирования казахстанской системы тендеров путем включения в действующее законодательство понятия «тендер». Рассмотрены основные правовые аспекты тендерных процедур, представляющие собой возможность посредством свободной и открытой конкуренции заключить для контрагентов взаимовыгодный договор, а также виды тендеров, их значение и особенности в сфере государственных закупок. Методологическую основу исследования составляют общие и специальные методы, такие как формально-логический, научный анализ и синтез, историко-правовой и сравнительно-правовой методы. Результаты, полученные по итогам исследования, позволили авторам сформулировать предложения и рекомендации по совершенствованию законодательной базы для обеспечения эффективности и справедливости тендерных процессов.

Ключевые слова: тендер, конкурс, государственные закупки, договор, конкуренция, тендерная процедура, право, принципы, анализ, законодательство, правоотношение.

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