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INFLUENCE OF THE PROVISIONS OF THE DRAFT LAW "ON AMENDMENTS AND ADDITIONS TO CERTAIN LEGISLATIVE ACTS OF THE REPUBLIC OF KAZAKHSTAN ON PUBLIC PROCUREMENT AND PROCUREMENT OF QUASI-PUBLIC SECTOR ENTITIES" FOR THE DEVELOPMENT OF ENTREPRENEURIAL ACTIVITY IN THE REPUBLIC OF KAZAKHSTAN

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ABSTRACT

In this article features of some provisions of the bill on introduction of changes and additions to some legislative acts of the Republic of Kazakhstan on public procurement issues are considered.

Through the analysis, conclusions were made about the impact of changes and additions to the entrepreneurial activity of the Republic of Kazakhstan.

Keywords: public procurement, quasi-public sector, draft law, entrepreneurial activity.

In order to create legal basis for improving the current system of public procurement, the functioning of the centralized service of public procurement, as well as the definition of procedures for procurement in the quasi-public sector, Government of the Republic of Kazakhstan developed the draft Law "On amendments and additions to some legislative acts of the Republic of Kazakhstan on public procurement and procurement of quasi-public sector" (hereinafter – the draft law).

The provisions of the draft law are aimed at regulating public procurement, procurement and quasi-public sector that can influence the possibility and conditions of participation of potential suppliers in the procurement.

A number of norms are aimed at increasing the transparency of the procurement mechanism and protecting the interests of entrepreneurs by reducing the administrative burden on them.

Thus, according to clause 4 of Article 12 of the Law "On Public Procurements", the customer must apply to the court for recognition of the supplier as an unscrupulous participant in public procurement in the event of improper performance of suppliers under the contract [1].

In turn, it follows from law enforcement practice that the delay in the delivery of goods or the provision of services for one day is recognized as improper execution, and the customer is obliged to apply to the court with a claim that, as a rule, is not satisfied.

It should be noted that in accordance with the Regulatory Decree of the Supreme Court of the Republic of Kazakhstan dated December 14, 2012 No. 5 "On the application of legislation on public procurement by courts" when considering claims for recognition of suppliers that failed to fulfill or improperly fulfilled their obligations under agreements concluded in relation to public procurement, unscrupulous participants in public procurement, the courts must take into account the fault of the supplier as the basis for civil liability in accordance with Article 359 of the Civil Code of the Republic of Kazakhstan and the negative consequences for the customer, based on the criteria of fairness and reasonableness in accordance with Part 6 of Article 6 of

the Civil Procedure Code of the Republic of Kazakhstan. The negative consequences should be understood as causing the party of the contract such a damage that this party has largely lost what it was entitled to expect when concluding the contract (paragraph 2 of Article 401 of the Civil Code of the Republic of Kazakhstan) [2].

In turn, the draft law proposes the introduction of an exception to the above provision of the Law "On Public Procurement" for suppliers who paid a forfeit (fine, penalty) that fully fulfilled the contractual obligations, provided that there was no damage to the customer.

So, the customer will not be obliged to apply to the court for recognizing the supplier as an unscrupulous participant in public procurement in the event of payment of a penalty, repayment of obligations under the contract and in the absence of damage to the customer.

At the same time, this amendment is also taken into account in the proposed version of the Law on Public Procurement with regard to the rules on the register of dishonest participants in public procurement, as well as in the editorial of a new article on the register of unfair procurement participants in the Law on State Property for the purchases of a quasi-public sector.

The draft law is also aimed at reducing some of the administrative barriers for the participation of business entities in public procurement.

Thus, the draft law excludes the ban on participation in public procurement from certain categories of suppliers located in the Unified Register of Debtors. Accordingly, certain business entities, despite the existence of unfulfilled obligations under executive documents and registration in the Unified Register of Debtors, will be able to participate in procurement and enter into contracts with the customer, respectively, to receive income from this type of activity.

Thus, the ban is canceled for customers to enter into contracts with a defined range.

The norms of the draft law abolish the application of the requirement for material and labor resources and work experience to subcontractors and co-executors of suppliers in the public procurement system.

In addition, the draft law eliminates the ban on participation in public procurement by requesting price proposals for goods, works and services that require a permit or notification. So, the market of public procurement, carried out by the way of requesting price proposals, will be available to business entities that carry out licensed types of activities.

Certain provisions of the draft law are aimed at protecting the interests of potential suppliers and vendors in the procurement area.

The provisions of the draft law establish separate uniform complaint process for potential suppliers for procurement of quasi-public sector.

It should be noted that due to the lack of uniform rules for procurement of the quasi-public sector, there was no single procedure for handling complaints in this area. Moreover, some organizations of the quasi-public sector currently do not have a procedure for handling complaints, and therefore there is no statistics on the complaints examined in such organizations. Thus, this rule suggests the benefits of business entities, which are to review their complaints in the procurement of quasi-public sector regulated by law.

In addition, the system of public procurement involves the formation and subsequent maintenance of the republican register of complaints, in which it is planned to reflect information on the receipt of complaints, as well as decisions taken on the basis of complaints consideration and issued orders (notices).

At present, exclusion of unfair participants of public procurement from the register is possible after two years from the date of recognition of the potential supplier or supplier as an unfair participant, and the decision on its entry into the register may be appealed by the participant in accordance with the legislation, that is, in court.

The norms of the draft law presuppose the introduction of a mechanism for compulsory pre-court settlement of disputes when listing potential suppliers identified as the winners (potential suppliers who took the second place) who have evaded from the conclusion of the contract on public procurement.

Thus, the norms of the draft law provide for an additional instrument for settling disputes, thanks to which an entrepreneur can prove before court that the decision to add him to the register is illegitimate.

The norm of the draft law is aimed at supporting domestic producers, which allows the authorized body to approve a list of goods, works, services, with the state purchases of which additional requirements can be established for potential suppliers and suppliers [3].

These requirements can be set to limit the participation of potential suppliers that are residents in member states of the Eurasian Economic Union.

The draft law provides for the creation of a single point of access to procurement for monitoring and analysis of ongoing purchases of goods, works and services.

To implement this norm, a single point of access to procurement will be created that will allow entrepreneurs to seek purchases for their goods on a single portal, which will reflect public procurement and purchases of the quasi-public sector consolidated from all information systems.

The draft law proposes to exclude the possibility of recognizing potential suppliers who took the second place, evading the conclusion of the contract. Consequently, the draft law proposes not to include them in the register of unscrupulous state participants.

So, often potential suppliers, who took the second place, are not aware that they have received a contract for signing, as a result, they enter into the Register of Unfair Participants for avoiding a contract signing. In this regard, in order to reduce the burden on potential suppliers who took the second place, the draft law provides for this provision.

The norms of the draft law establish the requirement to meet the deadlines for the performance of public procurement activities that require design and estimate documentation, the deadlines for the completion of work specified in the approved design estimates. This norm is aimed at maintaining competition and avoiding a situation in which the customer establishes, regardless of design estimates, a biased time frame in which it is difficult or impossible to perform work, to provide services or to deliver goods for the most participants in public procurement.

The norms of the draft law provide for the use of technical supervision for public procurement of works and services in which the dumping price is applied, relative to the value of the criteria affecting the tender price proposal, only if tender bids are equal [3].

Thus, the norm establishes that the first selection criterion is price, and only when the price is equal, relative values of the criteria can be used. Changing the approach will reduce the risks of biased choice in favor of a potential supplier and will increase the transparency of public procurement data.

The draft law provides for the direction of the draft contract on public procurement to the potential supplier, who took second place, not only if the winner does not sign the contract within the prescribed period, but also in the case of not making of the enforcement of the already concluded contract on public procurement by the winner.

With the introduction of this basis, the procedure of public procurement is simplified, which can accelerate the supply of goods, performance of work, provision of services, as well as provide an additional opportunity for a potential supplier, who took second place, to get the income.

At the same time, the provisions of the draft law provide for measures that can help to avoid unilateral termination of the public procurement contract due to failure to ensure its execution within the prescribed period.

So, according to the draft law, the customer within two working days from the date of expiry of the period for making the security must send a notification to the supplier about the intention to terminate the contract via the web portal. If the supplier does not provide security within three working days of receipt of the notice, the next step is to notify the customer of the termination of the contract.

Thus, the sending of the notice of intention to terminate the contract, provided by the norms of the draft law, serves as a reminder to the supplier of the need for

security, which can protect a certain part of the suppliers against unintended evasion of their obligations.

Currently, there is a practice where potential suppliers and suppliers included in the register of unfair participants in public procurement participate in public procurement as a subcontractor (co-executor). In this regard, the provisions of the draft law provide for clarification that not only potential suppliers can not participate in public procurement who are registered in this register, but also if the registry includes their subcontractors (co-contractors).

Thus, this rule assumes the exclusion of this possibility for unscrupulous business entities - potential participants of public procurement. It should be noted that a similar prohibition contains the provisions of the new article provided for by the draft law on the register of unfair participants in procurement in the quasi-public sector.

In general, it should be noted that the draft law is aimed at improving the procurement mechanism, as well as the unification and consolidation of the rules of procurement of the quasi-public sector at the legislative level.

At the same time, the draft law contains provisions that can have a positive impact on the business sector. Thus, to protect the interests of entrepreneurs-potential vendors or suppliers-the norms were introduced that provide for the responsibility of the quasi-public sector

entities for violation of procurement legislation that determine the procedure for considering complaints of potential suppliers for procurement of quasi-public sector entities.

Separate norms reduce administrative barriers and restrictions for entrepreneurs planning to participate in procurement, as well as create a single database to provide entrepreneurs with consolidated information on ongoing procurement.

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