



## **On application by courts of public procurement legislation**

### *Invalidated Unofficial translation*

Normative Decree of the Supreme Court of the Republic of Kazakhstan dated December 14, 2012 No. 5. Abolished by the regulatory decree of the Supreme Court of the Republic of Kazakhstan dated April 21, 2022 No. 4

### *Unofficial translation*

**A footnote. Abolished by the regulatory decree of the Supreme Court of the Republic of Kazakhstan dated April 21, 2022 No. 4 (effective from the date of the first official publication).**

In connection with issues arising in judicial practice when considering disputes on public procurement, with a view to the correct and uniform application of the legislation, the plenary session of the Supreme Court of the Republic of Kazakhstan hereby resolves:

1. In compliance with paragraph 1 of Article 2 of the Law of the Republic of Kazakhstan "On Public Procurement" dated July 21, 2007 (hereinafter - the Law), legislation on public procurement shall be based on the Constitution of the Republic of Kazakhstan (hereinafter - the Constitution) and comprise the rules of the Civil Code of the Republic of Kazakhstan (hereinafter - CC), the Law and other regulatory legal acts of the Republic of Kazakhstan.

When considering cases of this category, courts shall be guided by the special law, and on matters not regulated by the special law, by the rules of the CC, the Civil Procedure Code of the Republic of Kazakhstan (hereinafter - the CPC) and other regulatory acts. Courts shall distinguish between disputes arising in the process of selecting a supplier and concluding a public procurement contract with it, the procedure for considering of which shall be regulated by the provisions of Chapter 27 of the CPC, from disputes arising from a public procurement contract, which are considered in the lawsuit proceedings.

Paragraph 2 of Article 2 of the Law states that if an international treaty ratified by the Republic of Kazakhstan establishes other rules than those stipulated by the Law, then the rules of the international treaty shall apply. Courts shall bear in mind that in accordance with paragraph 3 of Article 4 of the Constitution, international treaties

ratified by the Republic shall have priority over its laws and be directly implemented, except in cases when the application of an international treaty shall require the promulgation of a law.

2. In accordance with Article 31 of the CPC, lawsuits on public procurement disputes shall be filed at the defendant's domicile. By virtue of paragraph 1 of Article 30 of the CPC, lawsuits on public procurement disputes, in which the parties are citizens engaged in unincorporated business and legal entities, shall be considered by specialist inter-district economic courts.

The courts shall bear in mind that claims arising from public procurement contracts that specify the place of execution, at the choice of the plaintiff shall also be filed at the place of the contract execution in accordance with paragraph 6 of Article 32 of the CPC.

In accordance with paragraph 1 of Article 21, paragraph 2 of Article 31, paragraph 1 of Article 35-3 of the Law, the submission of a bid for public procurement (price offer) is a form of expression of consent to supply goods, perform work, provide services in accordance with the requirements and conditions established by public procurement. In this regard, claims for the recognition of a potential supplier as an unscrupulous participant in public procurement carried out by these methods, at the choice of the plaintiff can also be filed at the place of the contract execution.

3. According to subparagraph 2) of paragraph 3, Article 10 of the Law, persons who establish the fact of supplying false information by a potential provider on qualification requirements, and also the customer in accordance with paragraph 4 of Article 11 of the Law, shall be required to initiate legal proceedings within the time frames specified by Law on recognition of a potential supplier (provider) an unscrupulous participant in public procurement. These terms are preclusive, the expiration of which shall be the ground for rejecting the claim on recognition of a potential supplier as an unscrupulous participant in public procurement.

The requirement of subparagraph 2) of paragraph 3 of Article 10 of the Law shall not apply to the Accounts Committee for Control over the Republican Budget Execution and audit commissions of oblasts, cities of republican status, the capital, except when they act as customers (organizers) of public procurement (paragraph 3 of article 10 of the Law).

4. According to subparagraph 3) of paragraph 1, Article 11 of the Law, the authorized body shall form and maintain a single republican register of unscrupulous participants in public procurement. In this regard, in accordance with subparagraph 1) of the first part of Article 153 of the CPC, courts shall reject an application for inclusion of unscrupulous participants in public procurement in the register as not

subject to review and resolution in civil proceedings or, in the consideration of it, along with other requirements, rule to terminate proceedings in this part on the basis of subparagraph 1) of Article 247 of the CPC.

5. The grounds for formation of the register of unscrupulous participants in public procurement are established by paragraph 4 of Article 11 of the Law, this list is exhaustive and not subject to extensive interpretation.

When considering claims for recognition of suppliers who have not fulfilled or improperly fulfilled their obligations under public procurement contracts concluded with them by unscrupulous participants in public procurement, the courts shall take into account the guilt of the supplier as the ground for civil liability in accordance with Article 359 of the CC and negative consequences for the customer, issuing from the criteria of fairness and reasonableness in accordance with part 6 of article 6 of the CPC . Negative consequences shall be understood as causing the contract party such damage that it has largely lost what it was entitled to rely on when concluding the contract ( paragraph 2, Article 401 of the CC). Also subject to assessment by courts are additional agreements concluded by the parties to the public procurement contract regarding the change in the deadline. Article 39 of the Law establishes the grounds for amending the project or the public procurement contract. In this regard, the courts shall bear in mind that if the parties did not make changes in the contract, design and estimate documentation in accordance with subparagraphs 7), 8) of paragraph 2, Article 39 of the Law, then reference to additional agreements regarding the change in the deadline for performance of the work provided for by the concluded public procurement contract, is ungrounded.

In accordance with paragraph 1 of Article 10 of the Law, a potential supplier shall be recognized as an unscrupulous participant in public procurement upon the established fact of providing false information on qualification requirements.

Courts need to distinguish this fact from non-submission or submission of an improperly drawn-up document on qualification requirements, which, in accordance with subparagraph 1) of Article 9 of the Law, shall be the ground for recognizing a potential supplier as not meeting the qualification requirements.

In accordance with paragraph 7, Article 8 of the Law, the qualification requirements established by paragraphs 2 and 3 of this article shall also apply to individuals and legal entities, which the potential supplier intends to attract as subcontractors for the performance of work or co-contractors for the provision of services that are the subject of public procurement.

A potential supplier, that intends to attract subcontractors (co-contractors) of work or services, must submit to the public procurement organizer the documents confirming compliance of the subcontractors (co-contractors) with the qualification requirements. A potential supplier involving subcontractors (co-contractors) in public procurements,

when submitting tender applications, is fully responsible for the accuracy of the information provided, including on subcontractors (co-contractors). In the event of false information submitted by a subcontractor (co-contractor), the potential supplier shall also be subject to recognition as an unscrupulous participant in public procurement in accordance with paragraph 1, Article 10 of the Law.

6. In accordance with paragraph 9 of Article 31 of the Law, the customer, within five working days from the date of approval of the results of public procurement by way of requesting price offers, shall sign and send to the potential supplier who has offered the lowest price proposal a draft contract on public procurement.

The draft public procurement contract must be signed by the potential supplier within seven working days from the day the public procurement organizer submits to it /him the signed draft public procurement contract.

When filing a claim recognizing a potential supplier as an unscrupulous participant in public procurement on the grounds of evading conclusion of a public procurement contract, the customer, in accordance with Articles 65, 66 of the CPC, must provide evidence of properly directed draft contract (for example, mail notification of delivery of draft contracts, supplier's acknowledgement of receipt by mail messenger) or indicate the reasons for non-performance. Non-fulfillment by the customer of the obligation entrusted to him in sending the draft public procurement contract shall be the ground for rejecting the application for recognizing the potential supplier as an unscrupulous participant in public procurement on the ground of evading conclusion of the contract.

Exceptions are cases of receipt before the deadline by the customer of the draft contract of a written refusal of the supplier to conclude the contract, regardless of the reasons for the refusal or the proposal of the supplier to amend the essential terms of the contract. These written exceptions may also include other written requests, the execution of which does not make it possible for the customer to conclude an agreement on the terms specified during the announcement of public procurement.

Inconsistency in the description of the characteristics of the goods (work, services) purchased, indicated in the information posted on the public procurement web portal in accordance with paragraph 1 of Article 31 of the Law, with the actual conditions of the contract submitted by the customer for conclusion, may be interpreted in favor of a potential supplier if presented in court of claims for recognition as an unscrupulous supplier for evading conclusion of the contract.

7. The list of general and special qualification requirements for a potential supplier is determined by paragraphs 2, 3 of Article 8 of the Law. In accordance with paragraph 9 of this article, potential suppliers participating in public procurements provided for in paragraph 1 of article 4, articles 30, 31, subparagraph 4) of article 32 and article 36 of the Law do not submit documents confirming their compliance with qualification

requirements. The customer's actions on making demands to requirements to the indicated potential suppliers on provision of any documents certifying the quality, technical characteristics of the goods, works, services, licenses shall be ungrounded and can be interpreted in favor of the supplier in the event that he submits the claims in the court on recognizing him as an unscrupulous supplier.

Establishment of qualification requirements not provided for in paragraphs 2 and 3 of Article 8 of the Law shall not be allowed, with the exception of public procurement applying special procedures for public procurement through a tender, as provided for in Articles 41 and 42 of the Law.

8. From the meaning of subparagraph 1) of paragraph 10, Article 31 of the Law, it follows that in the event of the winner's refusal to conclude an agreement, the customer has the right to conclude a public procurement contract:

- 1) with the potential supplier who has offered the same price offer as the winner;
- 2) in the absence of such a potential supplier - with a potential supplier, whose price offer is the lowest after the price of the winner who has evaded conclusion of a public procurement contract.

The indicated potential suppliers are not winners of the public procurement and in the event of their avoidance of the conclusion of the contract shall not be recognized as unscrupulous participants in public procurement.

9. The law provides for the obligation of the customer in the event of revealed violation by a potential supplier or provider of the Law to file a lawsuit in court to recognize such a potential supplier or provider as an unscrupulous participant in the public procurement. The court shall not have the right to accept a waiver of the claim and grant approval to the settlement agreement in this category of cases.

10. The general provision of the Law is the principles: optimal and efficient spending of public funds, providing potential suppliers with equal opportunities to participate in the public procurement process, fair competition, publicity and transparency of the public procurement process and support for domestic entrepreneurs

Article 39 of the Law provides the grounds for amending the project or the public procurement contract.

Subparagraph 2) of paragraph 2 of Article 39 of the Law provides that an increase in the amount of the contract may take place if the design estimates that passed the state examination were amended and a decision was made on additional allocation of funds in the amount of such a change, adopted in the manner determined by the legislation of the Republic Kazakhstan.

Failure to comply with the requirements for amending the contract and design estimates as prescribed by the Law and Articles 654, 655 of the CC, deprives the

contractor of the right to demand from the customer a payment for additional work performed by him.

Changes to the contract on public procurement can be made during its validity, since in accordance with article 386 of the CC, expiration of the contract shall entail termination of obligations under the contract.

11. Article 4 of the Law specifies the list of public procurements carried out without applying the rules of the Law governing selection of a supplier and conclusion of a public procurement contract with him. This list is exhaustive and not subject to extensive interpretation.

In accordance with paragraph 1 of Article 158 of the CC the contract for the supply of goods, works, rendering of services, concluded without public procurement procedures, in the event when their conduct envisions application of the rules of the Law, shall be invalid.

12. According to article 45 of the Law, a potential supplier has the right to appeal the actions (inaction) of the customer, public procurement organizer, commissions, an expert, a single operator in the field of public procurement, if their actions (inaction) violate the rights and legitimate interests of the potential supplier:

1) by filing a complaint with the authorized body, the customer's decisions on the choice of the public procurement method, on refusal to conduct public procurement, adopted by the customer in accordance with paragraph 10 of Article 5 of the Law, shall not be subject to appeal to regulatory authorities;

2) in a judicial proceeding in accordance with the provisions of Chapter 27 of the CPC, both the results of public procurements and the decision on admission to participation in public procurements held by a tender or auction shall be subject to challenge. Participation of the prosecutor in legal proceedings of this category is regulated by the rules of the CPC.

In accordance with paragraph 3, Article 8 of the Law of the Republic of Kazakhstan "On Administrative Procedures" dated November 27, 2000 (hereinafter - the Law on Administrative Procedures), prior to termination, a legal act may be suspended, amended or repealed by the state body that adopted this legal act, by a higher-ranking state body or a court. In this regard, prior to enforcement of the public procurement contract, the tender, auction commission shall be entitled to cancel, change decisions taken in the process of public procurement, on the proposal (resolution) of the authorized body, state control bodies, prosecutors. After the entry into force of the public procurement contract, the decisions of the tender and auction commissions shall cease to be effective in accordance with paragraph 2, Article 8 of the Law on Administrative Procedures, and the public procurement contract is subject to appeal in the action proceeding. When filing a claim for invalidating an agreement that has entered into force, on the grounds of violation of public procurement

legislation in the process of selecting a supplier and concluding a contract, the authorized body in accordance with Articles 65, 66 of the CPC must submit relevant evidence to the court (control act, control materials). When a contract is declared invalid on the grounds of non-compliance with the requirements of the law, then in the declaration part of the resolution, the courts shall indicate the conclusions on wrongfulness of the decision on the public procurement results (paragraph 11 of the regulatory resolution of the Supreme Court No. 20 of 12/24/2010 “On some issues of application by the courts of the norms of chapter 27 of the Code of Civil Procedure”).

13. In accordance with subparagraph 4) of paragraph 86 of the Rules for holding public procurement, approved by Resolution No. 1301 of the Government of the Republic of Kazakhstan dated December 27, 2007 (hereinafter referred to as the Rules for holding public procurement) in order to clarify the data contained in the applications for participation in the tender, the tender commission shall request in writing the required information from the relevant state bodies, individuals and legal entities. Requests and other actions of the tender commission related to bringing the application for participation in the tender into compliance with the requirements of the tender documentation shall not be allowed. Bringing the application for participation in the tender into compliance with the requirements of the tender documentation shall be understood as actions of the tender committee aimed at supplementing the application for participation in the tender with missing documents, replacing the documents presented in the application for participation in the tender, and bringing it into compliance by correcting the improperly executed documents.

Submission by the tender participant of the documents containing incomplete and (or) inaccurate information shall be the ground for rejecting the application, regardless of whether the tender committee has the opportunity to request information about the participant.

14. In accordance with Articles 26, 26-1 of the Law, dumping prices issues are subject to discussion only when evaluating and comparing competitive price offers for work and services in public procurement through a tender.

The procedure for calculating the dumping price is governed by paragraphs 115, 116 of the Rules for holding public procurement, in the event of electronic public procurement, paragraphs 71, 72 of the Rules for holding electronic public procurement approved by Resolution No. 623 of the Government of the Republic of Kazakhstan dated May 15, 2012 (hereinafter - the Rules for holding electronic public procurement)

When determining the dumping price, it is necessary to proceed from the price proposed by the tender organizer to pay for works and services, without taking into account the amounts spent by the customer for the preparation of documentation, execution of expert examination and technical and architectural supervision of the construction.

15. From paragraph 96 of the Rules for holding public procurement, it follows that when considering the experience of a potential supplier participating in a tender for public procurement of goods, works, services, the tender commission considers experience solely in the market for the supply of goods, performance of work, and rendering of services, acquired in this competition. The tender commission conditionally reduces the bid price by half a percent (0.5%) for each year of a potential supplier's experience in the market of purchased goods, works, services, starting from one year, but not more than five percent. In the presence of experience under one year or its absence, such a percentage shall not be established. The total percentage influence on the notional price of the competitive bid of this criterion shall not exceed five percent.

According to subparagraph 4) of article 1 of the Law, a temporary association (consortium) of legal entities that claims to conclude a public procurement contract, may be a potential supplier.

The courts shall bear in mind that calculation of the conditional discount (including under paragraph 96 of the Rules for holding public procurement) shall be carried out not separately to the consortium participant, but with respect to the consortium, which is a potential supplier.

16. The bodies exercising control over compliance with the legislation on public procurement in accordance with paragraph 1 of Article 15 of the Law (hereinafter - control bodies) shall, upon the control measures results, adopt a control act (subparagraph 1) of Article 140 of the Budget Code of the Republic of Kazakhstan). In the event of violations identified in the control measures, the control bodies shall take the following steps:

1) send to the object of control the binding writs, resolutions (subparagraph 1) of paragraph 6, subparagraph 1) of paragraph 7 of Article 15 of the Law);

2) transfer control materials to law enforcement bodies for taking procedural measures on identified facts containing signs of crimes in the actions of the officials and other persons of control objects;

3) transfer the control materials to the bodies authorized to consider administrative infraction cases, on identified facts containing signs of administrative infractions in the actions of officials and other persons of the objects of control.

In the event of disagreement with the actions and decision of the control bodies, only the writ, resolution shall be subject to appeal. The control act shall not be subject to appeal.

The data contained in the control act relate to the evidence on the case and must be examined by the court along with other materials in the case file. Conclusions of the control bodies given in the control act shall not have any precedence over other evidence.

Non-appeal by the control object of the actions and decisions of control bodies shall be interpreted by the courts as recognition by them (by the former) of committed violations of the Law.

17. In the event of dissolution by the customer of the contract on public procurement on the grounds of inexpediency of further execution concluded upon results of public procurement through commodity exchanges, the expenses of exchange fees and brokerage services shall not be refundable.

18. In accordance with article 4 of the Constitution of the Republic of Kazakhstan, this regulatory resolution shall be incorporated in the current law, shall be generally binding and enforced from the date of its first official publication.

*Chairman*

*of the Supreme Court of the Republic of Kazakhstan*

*B. Beknazarov*

*Judge*

*of the Supreme Court of the Republic of Kazakhstan,  
secretary of the plenary session*

*D. Nuralin*