

PUBLIC PROCUREMENT: EVIDENCE FROM KAZAKHSTAN

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ABSTRACT

Provided that public procurement functions adequately, it is supposed to be an effective tool for saving public resources and increasing the population's level of confidence in state institutions. Unfortunately, law enforcement practice in Kazakhstan's government procurement has shown a number of shortcomings in the system, including a weak system of control over funds spent resulting in thousands of corruption crimes in public procurement. In this regard, the present paper aims to overview issues relating to public procurement in Kazakhstan and formulate proposals on the subject. A variety of factors creating obstacles to the transparency of the system were observed, such as the inconsistency of data reported by the Ministry of Finance with those displayed on the electronic procurement website or difficulties in foreigners' access to Kazakhstan's government procurement, which hampers conducting competitive bidding. It was concluded that improvements in Kazakhstan's government procurement should be focused on simplifying procurement procedures for bidders from abroad, consistent adjustment of the legislative and regulatory framework governing the system, and expanding the anti-corruption legal framework, with the specification of legal consequences for the violation of public procurement rules.

Keywords: Bid, Corruption, Law, Regulation, Transparency.

INTRODUCTION

Formal reform efforts that the government of Kazakhstan has been pursuing in recent years were aimed at public procurement in no small measure since it is regarded as a priority area due to its growing influence on the welfare of citizens (Organisation for Economic Co-operation and Development, 2019). Regulation contributes to tackling the strategic objectives of the state by providing access to quality social services (Costamagna, 2017). Financial regulation of public procurement is a crucial challenge pertaining to the operation of the state financial legislation system (Dairabayeva et al., 2018).

Provided that public procurement functions adequately, it is supposed to be an effective tool for saving public resources and increasing the population's level of confidence in state institutions (Otter & Weber, 2015). Public procurement plays an essential role in the delivery of public services, including health care, education and public safety (Toebea, 2018). Kazakhstan's legal framework for government procurement is the Law "*On Public Procurement*".

A general tendency towards a gradual tightening of regulation and supervision over contracting procedures has been noted in the public procurement system of Kazakhstan, with frequent and rapid amendments, which might be interpreted as a factor potentially creating obstacles to transparency, but at the same time, this trend could imply for a response to the detected violations and therefore have a beneficial impact on the system (Kirn et al., 2019).

Kazakhstan's spending on government procurement in 2018 accounted for 35.6 percent of total government budget spending, higher than the current OECD average, which is 30.45 percent as of 2017 (Organisation for Economic Co-operation and Development, 2019). Such expenditure pattern requires prudent decisions regarding government spending, minimizing mistakes and abuses, but in practice, many challenges arise, and issues like those relating to the openness of government activities have been the case even in Finland (Halonen, 2016) not to mention corruption crimes in countries of the Global South, such as Kazakhstan and various African regions (Nyeck, 2016).

The colossal financial turnover in government procurement poses risks in terms of corruption and conflict of interest (Mrak et al., 2016). In 2019, the amount of established damage from corruption in Kazakhstan was 24.6 billion tenge, the approximate equivalent of 48 million euros (Legislation, 2020). At the end of the first quarter of 2020, the Ministry of Finance reported violations in 11,855 procedures amounting to 191 billion tenge, the approximate equivalent of 370 million euros (Regulation, 2019).

One of the fundamental legislative acts of Kazakhstan's anti-corruption policy is the Law "*On Countering Corruption*". It asserts measures for corruption prevention, as well as the main activities of government agencies designed to improve the effectiveness of countering corruption. Furthermore, it lays down the principles providing for publicity, lawfulness, and transparency of the activities of governmental bodies, unavoidability of legal liability for corruption offenses, and cooperation between the state and civil society institutions. These principles should become the starting point for the functioning of public authorities with a view to facilitating equitable economic growth (Zabokrytskyy, 2019).

Law enforcement practice in the field of public procurement has revealed several deficiencies in Kazakhstan's system, such as the absence of some necessary definitions or confusing content of normatively enshrined concepts, uncertainties in financial regulation and the lack of uniform practice of procurement planning, as well as an unsettled system of control over compliance with government procurement legislation and funds spent. These weaknesses cannot be overcome without developments relating to the financial regulation of public procurement. Meanwhile, in our opinion, the issue has not been sufficiently prioritized in Kazakhstani financial law literature. Law researchers consider public procurement mainly in terms of administrative and civil law, although this system is a particular structure of financial legislation and is subject to its respective norms. Moreover, it is one of the methods of government financial activity related to the distribution and use of public financial resources. This necessitates drafting considered recommendations for improving the financial regulation of the system.

Therefore, the current work is aimed at treating issues concerning public procurement in Kazakhstan and formulating proposals on the subject. The article is structured in a way that Kazakhstan's efforts on ensuring the principle of transparency in public procurement are briefly overviewed within the following section, the primary problems regarding the system are observed in the third section, and proposals to improve the situation are outlined in the fourth section.

Transparency of Public Procurement

Transparency is commonly recognized as a major guiding principle of government procurement representing the basis of other crucial components like the principle of competition (Kirn et al., 2019). An integral element of the principle implementation is public access to the contracting data through the Internet, which should induce state customers to take a more responsible approach to carrying out their duties, and is intended to enforce automation of procedures (for instance, appealing against a tender outcome) and equal market access for all relevant stakeholders withal (Organisation for Economic Co-operation and Development, 2019). Starting from 2016, almost all public procurement in Kazakhstan (except those relating to military usage and the like) has been announced and conducted by means of the electronic procurement system mandatory for every public contracting authority. It is operated by the Center for Electronic Commerce under the Ministry of Finance and covers a variety of phases of the procurement cycle, including publishing procurement plans.

If the official statements (Legislation, 2019) are to be believed, the openness of the relevant processes attributed to the digital system allowed Kazakhstan to develop the competitive environment appreciably and increase annual savings in public procurement, with no cutbacks in the amounts of purchasing. While in 2015 savings amounted to 50 billion tenge (about 98 million euros), by the end of September 2019 it was 319 billion tenge (about 620 million euros). Funds for the maintenance of the system were originally allocated from the state budget, but the Law "*On Amendments and Additions*" (2018), which came into force on January 1, 2019, introduced a mandatory annual subscription fee (depending on supplier's procurement volume or contract costs) for submitting a request for a public procurement process, as well as the contract negotiation and signing. Nonetheless, most of the options have since been free of charges, such as procurement notices, technical specifications, and procurement protocols.

The Major Problems in Kazakhstan's Public Procurement

The issue of corruption and combating are currently relevant all over the world, but anti-corruption measures should be context-specific (Toeba, 2018; Zabokrytsky, 2019). Apart from the high level of corruption, the key negative circumstances that reduce the efficiency of government procurement in Kazakhstan are departmental disunity and the lack of a unified methodology for conducting competitive bidding, the inconsistency of the country's existing regulatory framework for public procurement, the shortage of qualified human resources, as well as the absence of an institution responsible for organizing the tendering process and awarding of contracts in a correct way. Thousands of violations in public procurement are revealed in the country every year, inflicting hundreds of billions of tenge in damages to the budget. Among

the most common corruption offenses are the participation of persons affiliated with officials in tenders, and the overvaluation of purchased goods or services (Azattyq, 2020).

The Ministry of Finance publishes consolidated data on purchasing efficiency in strategic documents (for example, its strategic plan for 2017-2021) or they are presented through speeches by senior officials. Besides, basic real-time statistics and infographics can be viewed on the electronic procurement platform. However, these data are not enough for a detailed analysis, since statistical metadata are not provided and there is no option to obtain data for a certain period or export it in machine-readable format. Moreover, the data provided by the Ministry of Finance differ from those displayed on the website, which casts doubt on the reliability of both sources (Organisation for Economic Co-operation and Development, 2019).

Kazakhstan is characterized by a lack of transparency in terms of summary statistics on various aspects of public procurement. There is no publicly available data on spending relating to single-source procurement for each of the 50 grounds established by law. The electronic system does not provide detailed statistics on complaints submitted by participants and the results of their consideration. It is not possible to obtain or calculate the vast majority of the effectiveness indicators (e.g. the share of competitive procedures that resulted in failed procurement). In theory, the innovations recently implemented by the Kazakhstani government are expected to enhance compliance with the formal requirement. Nevertheless, a large number of direct sole-source contracts, along with the high proportion of procurement failures, are still barriers to improving the effectiveness of the system (Organisation for Economic Co-operation and Development, 2019).

Since January 1, 2019, five grounds for direct procurement from one source have been legally excluded. Moreover, starting from the beginning of 2019, if public procurement is recognized as failed; customers are obliged to repeat the procedure until the achievement of the competitive conditions. Official reports indicate that this novelty has made it possible to reduce the share of competitive single-source purchasing from 53 percent in 2018 to 11 percent in the first nine months of 2019. Besides, the Ministry of Finance has recently begun maintaining a register of customers and suppliers who are entitled to enter into single supplier contracts, which is designed to eliminate the possibility of unreasonable procurement from one source (Legislation, 2019). At the same time, by decree of the President Kassym-Jomart Tokayev in connection with the COVID-19 pandemic, a “special procedure for public procurement” has been in effect since March 16, 2020. It allows customers to purchase from a single source, provided that it is a domestic supplier. The Ministry of Finance positions this procedure as temporary and exclusively for the prompt solution of extraordinary circumstances associated with the state of emergency due to the coronavirus epidemic (Azattyq, 2020).

Furthermore, the issue of foreigners’ access to Kazakhstan’s government procurement contributes to a decrease in market competitiveness, thereby fostering corruption in the country. The problem is that the subscription fees have to be paid solely in tenge through a Kazakhstani bank account, which creates additional obstacles for potential foreign suppliers (Organisation for Economic Co-operation and Development, 2019).

Anti-Corruption Proposals in Public Procurement

Despite the optimization of public procurement performed by the government, a number of problems remain relevant, the solution of which requires the adoption of legislative measures.

The lack of a clear definition of the legal status of the customer in the Law “On Public Procurement” negatively affects the law enforcement practice and the effectiveness of spending the country's financial resources. In our view, therefore, it is necessary to stipulate the concept that would define customers as individuals involved in the purchasing function in Article 2 of the abovementioned Law. Inclusion of norms on the implementation of cameral control in the Law “On Public Procurement” can be an essential element in increasing the effectiveness of public spending.

As for the establishment of appropriate criminal penalties, it would be expedient to make the amendments providing for an expanded range of persons recognized as subjects of corruption offenses to the Laws “On Countering Corruption” and “On State Property”, as well as other legislative acts.

United Nations Commission on International Trade Law (UNCITRAL) has developed lots of documents establishing the principles of effective commercial transactions. For Kazakhstan, the UNCITRAL Model Law on Public Procurement is a relevant document, which is a kind of optimized framework.

CONCLUSION

Thus, improvements in Kazakhstan’s government procurement should be focused on simplifying procurement procedures for bidders from abroad, consistent adjustment of the legislative and regulatory framework governing the system, and expanding the anti-corruption legal framework, with the specification of legal consequences for the violation of public procurement rules.

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