

4 March 2014

Kazakhstan Amends Public Procurement Rules

New rules may affect business activities conducted with state entities.

On 18 January, the president of the Republic of Kazakhstan signed the law “On amendments to some legislative acts of the Republic of Kazakhstan on public procurement” (the Law). The Law came into force on 30 January 2014. This LawFlash provides a brief discussion of the important provisions that may affect business activities with state authorities, agencies, and/or organizations of the Republic of Kazakhstan.

Overview

Public procurements in the Republic of Kazakhstan are governed mainly by the Law of the Republic of Kazakhstan “On Public Procurement” (the PPL) as well as several other acts. The Law introduces amendments to the following legislative acts only: the Civil Procedure Code of the Republic of Kazakhstan; the Administrative Offence Code of the Republic of Kazakhstan; the Budget Code of the Republic of Kazakhstan; the Law of the Republic of Kazakhstan “On Architectural, Urban Planning and Constructional Activities in the Republic of Kazakhstan”; and the PPL.

Amendments to the PPL

Introduction of the National Regime

The Law introduces a concept of “national regime”, which means a regime that allows goods, works, and services of foreign origin to participate in public procurements in Kazakhstan on equal grounds with goods, works, and services of domestic origin, provided that the requirement to grant such a regime is set by the international treaties ratified by the Republic of Kazakhstan and pursuant to the terms and conditions set forth in such treaties. To date, the national regime for the purposes of participation in public procurements is provided **only for Belarus and Russia** under the Agreement on State (Municipal) Procurements¹ entered into within the framework of the Common Economic Space.²

The Law sets out the procedure for national regime implementation and empowers the government of the Republic of Kazakhstan to do the following:

- **Access Prohibition.** The Law provides for the right of the government to prohibit the access of goods, works, and services of foreign origin while conducting public procurements. The wording contained in the Law suggests that such prohibition will either (i) allow participation of only local goods or local suppliers of works and services in public procurements or (ii) block access to public procurements for the suppliers from certain countries.
- **Access Restrictions.** The government of the Republic of Kazakhstan is also entitled to impose restrictions on the access of goods of foreign origin and works and services rendered by foreign suppliers. According to

1. Agreement on State (Municipal) Procurement signed on 9 December 2010.

2. Under the agreement, starting from 1 January 2014, all potential suppliers from the three countries of the Customs Union will be able to participate in joint public procurement in Russia, Belarus, and Kazakhstan. The Agreement on State (Municipal) Procurements states that, in exceptional cases and for a period not exceeding two years, there can be exemptions from the national regime set by the resolution of the government of the Republic of Kazakhstan according to the decision or order of the president of the Republic of Kazakhstan.

the explanatory note to the Law from the Majilis (the lower chamber of Kazakhstan's Parliament), such restricted access envisages participation in public procurements from potential suppliers from Belarus, Kazakhstan, and the Russian Federation only.

- **Access Conditions.** Finally, the government of the Republic of Kazakhstan has the right to determine the conditions of access to public procurements for goods of foreign origin and works and services supplied by foreign suppliers.

Summarising the above, it appears that foreign suppliers from countries other than Belarus and the Russian Federation may participate in public procurements in Kazakhstan either under the national regime—provided that there is a relevant international treaty ratified by Kazakhstan and the country of origin of the foreign supplier—or under conditions of access to be determined by the government. This interpretation is based solely on the wording currently contained in the Law, however, and does not rely upon any supporting materials.

Centralization of Public Procurements

- **Single Organizer.** The Law establishes the concept of a single organizer (arranger) of public procurements as (i) the state institution specifically established to act as such by the government of the Republic of Kazakhstan or Akims (the heads of regional executive bodies) or (ii) the customer itself, acting as such for several state institutions subordinate to the customer or for the customer's affiliates.³ The single organizer is entitled, among other things, to file complaints with the court for the recognition of a supplier as a bad-faith supplier.
- **Reference Book and Prices Database.** The Law also introduces a database of the prevailing maximum, average, and minimum prices for goods, works, and services and a classified goods, works, and services reference book, which are part of the public procurements Web portal (the Portal). Pursuant to the explanatory note to the Law, both the database and the reference book are inter-related and have been initially intended to be mandatory for the purposes of planning public procurements (including the determination of the budget).

Electronic Format of Public Procurements

The Law further enhances the transition of public procurements to an electronic format by way of eliminating from the PPL provisions implying a paper format for tender and auction. Under the Law, the download of tender documentation, the submission of tender bids (applications), the opening of bids, the automatic rejection of bids, and the preparation of minutes on tender results will be done electronically through the Portal. Additionally, public procurement contracts may now be executed in electronic digital format and signed using an electronic digital signature on the Portal.

Additional Changes

A number of other less significant changes were introduced by the Law and are described below.

- A potential supplier is now granted the opportunity to deliver missing documents within a set period of time in order to bring its tender/auction bid (application) into compliance with tender/auction documentation and qualification requirements.
- The list of procurements conducted without the application of PPL provisions regarding choice of supplier and the execution of procurements contracts was amended to, particularly, (i) exclude procurements by state enterprises, state entities,⁴ and their affiliates from acting as suppliers under public procurements required for performance of executed public procurements contracts; and (ii) include procurements from a person designated by the government of the Republic of Kazakhstan upon the resolution (instruction) of the president of the Republic of Kazakhstan.

3. The National Bank is entitled to act as the single organizer for entities where the National Bank is a founder or a shareholder.

4. State entities are entities where the state owns 50% and more of shares (participatory interest).

- In addition to the introduction of the national regime concept, the Law also changes the criteria for determining the winner of a tender in cases of equal quotes. Now, if the quotes are equal, the winner is the entity that has more experience in the relevant market. If the experience is equal as well, then the winner should be the supplier who submitted their quote first.
- In order to conform the PPL provisions to the Agreement on State (Municipal) Procurement, the local content and national entrepreneur concepts were excluded.
- The court will invalidate a public procurements contract concluded in violation of public procurements laws, except when the public procurements contract is dully and fully performed.
- The organizer of public procurements in public procurements for construction works now must separate via different lots works that are inseparably linked with construction from goods not linked with construction.
- The two-stage tender procedures order is determined by the rules of public procurements.
- The penalty for non-fulfillment or improper fulfillment of obligations under the agreement on public procurements now will be charged in the amount for non-fulfilled or improperly fulfilled obligations, rather than from the full amount of the procurements contract.
- The choice of a supplier of goods/services is now more quality oriented. When choosing tender bids (applications) admitted to tender, the tender commission shall choose the best technical specification,⁵ while a potential supplier whose technical specification was not determined to be the best has the right not to deliver its quote. If no best tender bid (application) has been submitted, the tender commission shall consider technical specifications that comply with characteristics declared by the customer.
- The list of grounds to consider tender failed has been specified and extended to include the absence or submission of fewer than two bids, the absence of suppliers admitted or only one supplier admitted to tender, and the absence or submission of fewer than two quotes.
- The list of grounds to consider auction failed has been extended. An auction must be considered failed if an applicant to conclude a public procurement contract fails to sign and submit the procurement contract within seven working days from the date of the customer's signing of the procurement contract.
- A new provision allowing amendments to a concluded procurement contract was introduced. If a supplier manufactures the goods procured, then the procurement contract term may be extended, provided that the extension is within the current financial year and the supplier provides notice. The maximum extension allowed is 10 working days.

In addition to the changes described above, the enactment of the Law will necessitate amendments to and/or the adoption of various rules and regulations.

Amendments to the Administrative Code

Customers' administrative responsibilities were extended to include, among other things, liability for violations relating to auction documentation as well as liability for failure to file or the untimely filing of claims to recognize a supplier (potential supplier) as a bad-faith supplier. In view of the changes set by the Law, customers may be even more inclined to make suppliers (potential suppliers) responsible for improper performance in the course of public procurement via the filing of relevant claims with the court.

Amendments to the Budget Code

The Law states that, when considering the budgetary requests of administrators of budget programs, the database of prevailing prices for goods, works, and services that is required during planning and conducting public procurements shall be used as a reference.

5. The best technical specification will be the technical specification of goods and services that have better characteristics than those declared by the customer.

Morgan Lewis

Amendments to the Civil Procedure Code

The Law states that cases against the decisions and the actions (or inaction) of the commissions in state procurement will be considered and resolved within one month.

Amendments to the Law “On Architectural, Urban Planning and Constructional Activity in the Republic of Kazakhstan”

The Law excludes the requirement of passing state expertise for tender documentation relating to procurements of works on construction of large or complex facilities.

Contacts

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact the authors, **Aset A. Shyngyssov** (+7 727 250 7575; ashyngyssov@morganlewis.com), **Asem B. Bakenova** (+7 727 250 7575; abakenova@morganlewis.com), and **Daniyar Zhumakhanov** (+7 727 250 7575; dzhumakhanov@morganlewis.com).

About Morgan, Lewis & Bockius

Founded in 1873, Morgan Lewis offers more than 1,600 legal professionals—including lawyers, patent agents, benefits advisers, regulatory scientists, and other specialists—in 25 offices across the United States, Europe, Asia, and the Middle East. The firm provides comprehensive litigation, corporate, transactional, regulatory, intellectual property, and labor and employment legal services to clients of all sizes—from globally established industry leaders to just-conceived start-ups. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.

This LawFlash is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered **Attorney Advertising** in some jurisdictions. Please note that the prior results discussed in the material do not guarantee similar outcomes. Links provided from outside sources are subject to expiration or change. © 2014 Morgan, Lewis & Bockius. All Rights Reserved.