

Kazakhstan has adopted a project of the procedure for procurement by the National Wealth Fund Samruk-Kazyna Joint-Stock Company

In line with GRATA Law Firm's practice of keeping clients informed of important legal developments that may influence their business, we would like to draw your attention to the recent changes in procurement rules of Samruk-Kazyna JSC.

1. General Provisions

In 2022, a draft of a new *Procurement Procedure* was published by the JSC National Welfare Fund Samruk-Kazyna and legal entities, fifty or more percent of voting shares (participatory interests) of which are directly or indirectly owned by Samruk-Kazyna JSC on the right of ownership or trust management (hereinafter referred to as the "**Procedure**"). This Procedure will completely replace the Rules for Procurement by the National Wealth Fund Samruk-Kazyna Joint-Stock Company and organizations fifty or more percent of the voting shares (participatory interests) of which are directly or indirectly owned by Samruk-Kazyna JSC on the right of ownership or trust management dated 3 July 2019 (hereinafter referred to as the "**Procedure of 2019**").

The above Procedure regulates the procurement process of Samruk-Kazyna JSC (hereinafter referred to as the "**Fund**"), including the management of procurement categories, the formation and maintenance of registers, lists in the field of procurement of the Fund, procurement planning, selection of a supplier and conclusion of an agreement with him.

In general, provisions from the standards and other regulatory documents of the Fund, which were previously referred to by the Procedure of 2019, were transferred to the new version of the Procedure. Thus, the Procedure covers a wide range of issues related to the Fund's procurement. In addition, the Procedure contains a number of important innovations regarding the Fund's procurement. The main changes in the Procedure are described in this review.

2. Procurement processes

Electronic store

First of all, it should be noted that according to the new version of the Procedure, procurement is carried out in the following ways:

- 1) tender;
- 2) through an electronic store;
- 3) within the frame of intra-holding cooperation;

- 4) from a single source;
- 5) through goods exchange;
- 6) request for quotations.

Thus, the method of procurement at centralized auctions for electric energy was excluded.

At the same time, the new version of the Procedure discloses the concept of an electronic store and pays special attention to the method of making purchases through an electronic store. An electronic store (hereinafter - the "**Electronic Store**") means an information system for procurement, defined by the Fund and integrated with the procurement web portal¹. We note that the Procedure of 2019 also provided for the method of procurement through Electronic Store, however, the Procedure of 2019 did not contain a description of this procedure.

Procurement through Electronic Store is carried out only for certain categories of goods, works, services ("**GWS**"), or those contained in the priority pool, as well as those included in the annual procurement plan. At the same time, we note that purchases through Electronic Store are carried out in the following categories:

- 1) stationery;
- 2) tools;
- 3) construction materials;
- 4) consumer electronics;
- 5) household appliances;
- 6) electric tools;
- 7) office equipment with accessories and consumables for them².

The procurement winner is determined automatically by the electronic store at the lowest GWS price by comparing all offers from potential suppliers.

Procurement from a single source

It is important to note that the new Procedure reduces the grounds for procurement from a single source. Now, this method of procurement is set as an exception. The customer makes purchases from a single source based on the decision of the first manager for the following reasons:

- 1) when a potential supplier or purchased GWS has no alternative or is predetermined by the current legislation, concluded transactions, the need to ensure unification or compatibility;
- 2) urgent purchases in order to localize, eliminate or prevent emergency events in which the use of competitive procurement methods is impossible due to the need to ensure the smooth operation of the customer;
- 3) within the framework of the execution of the instructions of the President of the Republic of Kazakhstan or the Fund Management Council from a person determined by the Government of the Republic of Kazakhstan or the Board of the Fund;
- 4) when a potential supplier has exclusive rights in relation to the purchased GWS or if the GWS can be acquired only from a single supplier.

List of unreliable suppliers

One of the innovations presented in the Procedure relates to the formation of a list of unreliable potential suppliers of the Fund³. We note that the Procedure of 2019 did not contain provisions regulating the formation of this list, and did not provide for the grounds for including potential suppliers in the list of unreliable suppliers of the Fund. In accordance with the new Procedure, the

¹ Subclause 30) Art. 2 of the Procedure

² Clause 1 of Annex No. 2 of the Rules for Procurement through an electronic store, approved by the decision of the Board of Samruk-Kazyna JSC dated 21 September 2020 No. 34/20

³ Art. 5 of the Procedure

list of unreliable suppliers of the Fund is formed by the centralized procurement control service on the procurement web portal. This list includes suppliers for a period of 24 months on the following grounds:

- provision of false information in the procurement process;
- evasion of a potential supplier, recognized as the winner, from concluding a procurement contract;
- failure to provide security for the performance of the contract within the terms established by the contract;
- a court decision establishing the fact of non-fulfillment of the procurement contract.

The supplier is excluded from the list of unreliable potential suppliers of the Fund:

- on the basis of a judicial act that has entered into legal force;
- upon expiration of the period of being in the list of unreliable potential suppliers of the Fund;
- on the basis of the decision of the conciliation commission on early exclusion of the supplier from the list of unreliable potential suppliers of the Fund.

The composition, operation and decision-making of the conciliation commission are determined by the rules of work of the conciliation commission in accordance with Appendix No. 1 to the Procedure. At the same time, it should be noted that representatives of the Atameken National Chamber of Entrepreneurs of the Republic of Kazakhstan and industry associations must be included in the conciliation commission. Taking into account the foregoing, the new version of the Procedure expanded the competence of the conciliation commission.

Special procurement procedure for enterprises of Zhanaozen

When drafting a new Procedure, special attention was paid to the process of procurement of goods by enterprises of Zhanaozen. According to the Procedure, enterprises of Zhanaozen are potential suppliers that are residents of the Republic of Kazakhstan, registered and doing business in the city of Zhanaozen for at least 3 years, with a production base⁴. The implementation of long-term purchases of goods by customers registered in Zhanaozen is regulated by Appendix No. 6 to the Procedure.

So, according to that regulation, when making long-term purchases of goods, the delivery time of which is 24 months or more, the Customer has the right to establish a counter obligation of a potential supplier to create new workplaces in Zhanaozen for citizens of the Republic of Kazakhstan registered in Zhanaozen. For these purposes, the local executive body of the city makes a decision to establish the number of workplaces created in the context of the required specialties in agreement with the Atameken National Chamber of Entrepreneurs of the Republic of Kazakhstan.

Thus, we see that the position of the National Chamber of Entrepreneurs has been strengthened by the new Procedure. Moreover, when conducting a procurement by tender, the procurement customer undertakes to invite representatives of the Atameken National Chamber of Entrepreneurs of the Republic of Kazakhstan to participate in the tender as observers, without the right to vote and make a decision⁵. At the same time, representatives of the Chamber of Entrepreneurs, as well as potential suppliers, can send comments to the draft prequalification documentation.

Procurement Restrictions

It should be noted that the new version of the Procedure provides for restrictions previously absent in the Procedure of 2019 related to the participation of suppliers in procurement. Thus, a potential supplier is not entitled to participate in procurement if the potential supplier, its subcontractors, managers and (or) founders:

⁴ Subclause 20) Art. 2 of the Procedure

⁵ Clause 8 Art. 10 of the Procedure

- 1) are in the register of unscrupulous procurement participants, the list of unreliable potential suppliers of the Fund, the list of debtors in respect of which a court decision on declaring them bankrupt has entered into force;
- 2) are included in the list of organizations and persons associated with the financing of terrorism and extremism, or associated with the financing of the proliferation of weapons of mass destruction;
- 3) is a legal entity, the place of registration of which is the state or territory included in the list of states with preferential taxation approved by the authorized state body that manages the provision of taxes and other obligatory payments to the budget.

Special Procurement Procedure

We would like to note that one of the innovations of the Procedure is the introduction of rules governing the implementation of procurement using a special procedure without using a web portal. So, purchases using a special procedure are carried out in the following cases:

- 1) acquisition of GWS, information about which constitutes state secrets and (or) contains official information of limited distribution, and (or) is classified as a commercial secret or information of limited use by decision of the Fund or a subsidiary of the Fund of the first level;
- 2) acquisition of GWS by the Fund's organizations, branches and representative offices of the Fund or the Fund's organizations registered outside the Republic of Kazakhstan, as well as GWS supplied and used outside the Republic of Kazakhstan;
- 3) purchase of balancing electricity, as well as services for the regulation of electric power;
- 4) purchase of goods (raw materials) for subsequent processing or transportation (e.g., gold, silver, uranium, beryllium, tantalum, oil, gas);
- 5) procurement by the Fund's organizations included in the perimeter of the pilot project for the development of the Fund's procurement system;
- 6) purchase of GWS to maintain the technical condition of aircraft and ships, including their repair at specialized enterprises.

As other important innovations fixed in the new Procedure, it should be noted:

- Introduction of the concept of compliance with the principles of ESG (Environmental, Social, Governance) - the principles of the company's activities based on the protection of the environment, the creation of favorable social conditions, conscientious treatment of employees and customers and good corporate governance⁶.
- Introduction of the concept of marketing price, ie. the price of the goods used by the customer to form budgets for procurement costs and does not include value added tax⁷. Marketing prices for goods are determined in accordance with Appendix No. 4 to the Procedure.
- Establishment of the obligation of the customer to purchase goods from people with disabilities, as well as the introduction of the concept of a pool of priority goods - a list of goods that must be purchased from producers or organizations of people with disabilities⁸. When making purchases of goods included in the pool of priority goods, the customer undertakes to make purchases with the provision of priority for the purchase of goods from producers and organizations of the disabled, i.e. individuals with disabilities engaged in entrepreneurial activities.
- Establishing the obligation of the customer to submit monthly reports on procurement issues to the Fund's operator through a web portal⁹.

⁶ Subclause 9 Art. 2 of the Procedure

⁷ Subclause 35) Art. 2 of the Procedure

⁸ Subclause 25) Art. 2 of the Procedure

⁹ Art. 15 of the Procedure

- Possibility of procurement of GWS necessary to ensure the uninterrupted operation of the customer during a state of emergency in the absence of an Internet connection¹⁰.

5. Conclusion

We are of the view that the new version of the Procedure aims at preserving key procurement tools while reducing the grounds for the Fund's procurement from a single source. Moreover, the Procedure is aimed at strengthening the position of the Atameken National Chamber of Entrepreneurs of the Republic of Kazakhstan in the Fund's procurement, as well as supporting vulnerable categories of society.

Obviously, the approval and consistent implementation of the Procedure can have a positive impact both on increasing the transparency of the Fund's procurement procedure, as well as on the digitalization of the procurement procedure.

This Note provides for the analysis of certain provision of the Law. Should you have any questions regarding the matters herein do not hesitate to contact us.

Kind regards,

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¹⁰ Subclause 2 Art. 18 of the Procedure