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## BIDDING IN AN AUCTION OR TENDER UNDER THE LAWS OF THE REPUBLIC OF KAZAKHSTAN

*The article provides the definition of the term "auction", emphasizing that the notions of "auction" and "tender" have both similarities and differences. Other issues associated with auctions and tenders, being different forms of biddings, the notion of the term "tender" in the legislation of the Republic of Kazakhstan, especially procedures of tendering and auction, as well as strengths and weaknesses of tender procedures have been analyzed.*

*Keywords: bidding; tender; auction; contract; public procurement.*

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## ПРОВЕДЕННЯ ТОРГІВ У ФОРМІ АУКЦІОНА АБО ТЕНДЕРА ВІДПОВІДНО ДО ЗАКОНОДАВСТВА РЕСПУБЛІКИ КАЗАХСТАН

*У статті надано визначення аукціону та продемонстровано, що тендер та аукціон мають як спільні риси, так і відмінності. Також проаналізовано проблеми проведення аукціону та тендерів як форми торгів, використання терміну «тендер» в законодавстві Республіки Казахстан, особливості проведення тендеру та аукціону, а також сильні та слабкі риси процедур тендеру.*

*Ключові слова: торги; аукціон; тендер; договір; державні закупівлі.*

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## ПРОВЕДЕНИЕ ТОРГОВ В ФОРМЕ АУКЦИОНА И ТЕНДЕРА СОГЛАСНО ЗАКОНОДАТЕЛЬНОМУ РЕСПУБЛИКИ КАЗАХСТАН

*В статье дается определение аукциона, вместе с тем, отмечается не только различия, но и сходства тендера и аукциона. Также проанализированы проблемы проведения аукциона и тендера как формы торгов, использование термина «тендер» в законодательстве Республики Казахстан, особенности процедуры проведения тендера и аукциона, а также сильные и слабые стороны процедур тендера.*

*Ключевые слова: торги; аукцион; тендер; договор; государственные закупки.*

**Problem setting.** Tenders are surely a universal mechanism that allows establishing the rule of law taking into account the interests of both state and private parties. Tenders having deep historical roots in Roman private law hold down their relevance and today are one of the main ways of making deals in the sale of goods or provision of services. Tender agreements are signed in such areas as government procurement and contracting, privatization, property disposition, provision of services etc.

In legal literature and civil legislation of some countries, we can note the allocation of such forms of tender as auction and contest. In turn, there is a contest in the form of tender and electronic tendering gain more and more popularity as well the legislation of the Republic of Kazakhstan provides for trading through commodity markets (Article 12 of the Law of the Republic of Kazakhstan "On public procurements", 2007). In all listed forms we can see that a major character is competitiveness of bidders competing for the right to sign a contract and looking to make the most advantageous offers that shall meet the terms of bidding. Thus we see the relevance of the chosen research topic for the economic development of the country.

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**Methodology.** In this article we tried to evaluate the current legislation of Kazakhstan on competitive obligations. For this purpose, we used monographs and scientific articles of national and foreign researchers and analyzed the current legislation. Special attention was paid to scientific works of Russian researchers. The reason is the similarity of legal systems.

**Key research findings.** With a great similarity in the essence of tenders and auctions we can mark a range of differences. At first, a winner of a tender shall be a person who, based on the conclusion of a tender committee specially formed by an organizer, offered the best terms (price, time, experience etc.), and a winner of an auction shall be a person offering the highest price.

Secondly, at the time of auction all participants are required to pay a specified amount of security deposit which is not refundable if a person did not wish to purchase any property.

Thirdly, the subject of a bidding in an auction can be any movable or immovable property not withdrawn from civil circulation, including the items of intellectual property, contracts and property rights, including import, export and other quotas and licenses, and the subject of a contest can be also work and services.

Fourthly, the procedure for identifying a winner of an auction and a contest is also different.

Choosing one or another form of bidding shall be determined by the owner of saleable thing or the owner of property rights, unless otherwise is provided by law.

The term "auction" is derived from the Latin word "auctio" – growth, increase, public sale. As a rule, in this form of bidding process a winner is the participant offering the highest price. The applicable Article 916 of Civil Code of the Republic of Kazakhstan (hereinafter referred to as CC RoK) also states that "at the time of bidding in the manner of auction a seller shall undertake to sell the auction item to the participant of the auction who will offer the highest price for it".

In the French Civil Code auction is referred to as a case of ownership transfer through auction, foreclosure on the property. In the Civil Code of the Republic of Belarus, Article 417. "Regulated manner and means of conducting auctions" auctions are referred to Chapter 28 of the Civil Code of the Republic of Belarus Conclusion of the contract. The Civil Code of the Russian Federation also auctions referred to in Article 447 "Conclusion of the contract to the highest bidder".

We see that the laws listed states include the said institution auction data heads, unlike the Civil Code of the Republic of Kazakhstan, in which the auction is included in the Chapter on "Competition obligations". Thus, the main feature of the auction classifying Kazakhstan lawmaker, said base competition.

Article 916 of CC RoK stipulates that at the time of competitive bidding in the manner of auction a seller shall undertake to sell an auction item to auction participant who will offer the highest price for it.

As per E.G. Pliev (1999) auction agents are auctioniator (client ordering bidding), auctioneer (organizer of bidding) and persons attending bidding (bidders), although in practice and in law these terms are not used.

In the legislation of the Republic of Kazakhstan there is no special law governing the procedures for conducting auctions. However, there is a mentioning of auc-

tion as a form of bidding in Article 916 of CC RoK and the law of the Republic of Kazakhstan "On Public Procurement".

In compliance with the Civil Code of RoK an auction may be held on the terms of increase or decrease in price vs. price declared by a seller.

In the first method, a winner is determined through a step-by-step increase in price for goods (property). Before the auction, "auction step" shall be declared, i.e. a monetary amount for which the price of the auction shall be reduced. As a rule, it is fixed as % of the starting price. In such a case, each subsequent offer in terms of price is higher than the previous one and the last tenderer shall win. This auction is being actively used in enforcement proceedings upon implementation of the distrained assets or in case of bankruptcy procedures, privatization of state property as well as in many other cases.

In the second way we can see that a winner is determined by step-by-step downward of the initial price. However, we often come across such definitions as "English" or "Dutch" auction methods. As a rule, reverse auctions are used when placing government orders, in this case if tenderer offers the price higher than the initial maximum price it automatically means loss in the auction. Usually starting sale price is fixed 2–3 times higher than the mid-market rate; the bidding organizer reduces it himself/herself but not the bidders. The price will be reduced till the first acceptance by one of the bidders and consequently the first accepter shall win the bid.

The study of legal problems pertaining to auctions has revealed that nowadays the institution of biddings is one of the most complex. Harmonization of the laws on biddings held in the form of auctions and amendment and modification of the CC RoK is also a very complicated process. Satisfaction of public needs in Kazakhstan, i.e. requirement for goods, works or services needed by the state to perform its functions, international obligations or implement interstate target programs, is governed by the dedicated Law of Kazakhstan "On Public Procurement", and please, note that to some extent the aforesaid law prevails over the provisions of the CC RoK.

However, such bidding types as online auctions are not subject to the provisions of the CC RoK due to the gaps that exist in the e-commerce field. The law of Kazakhstan as of April 12, 2004 "On Regulation of Trade Activities" is currently in effect governing public relations in the trade sector and establishes the principles and organizational basis of public regulation practices used with regard to such activities, which must be amended to include provisions governing the development of e-commerce, i.e. governing relations that arise between persons engaged in such trade activities (transactions or other binding activities) using e-documents.

CC RoK, Article 915 contains the definition of the term "tender", for if a bidding takes the form of a tender, the tendering authority shall subject to the initial conditions proposed by it, make a contract (in the capacity of seller, buyer, customer, contractor, lessor, lessee etc.) with the party to the tender process, that has offered the best conditions for the tendering authority. "Tender" is defined as a competition of applicants seeking to be awarded the right to enter into a contract with the tendering authority. Tender is a competitive form of orders placement for the performance of works or services upon previously announced terms and conditions, within the agreed period of time, and consistent with the principles of competitiveness, justice and efficiency.

Many foreign scholars believe that the term "tender" is impractical for application (Gumenyuk, 2008). G.A. Suhadol'skiy (2005) argues that "tender" is synonymous with the terms "competitive bidding" and "contracting trades" and I.I. Neduzhy (1991) notes that "trading" and "tender" are synonymous with the only difference that tender is the term of foreign origin. However, as noted by M.I. Braginsky and V.V. Vitryansky (2006) contest is characterized by two major features: competition and publicity.

For the procedure of competitive tendering please refer to a number of regulatory acts, e.g. the Law of Republic of Kazakhstan as of March 1, 2011 "On State-Owned Property", Art. 100 states that "successful tender shall be the person, which in the opinion of the tender committee previously appointed by the seller, offered the best terms. Bids shall be submitted in writing in sealed envelopes".

The Law of Kazakhstan as of July 21, 2007 "On Public Procurement" defines "tender" as a public procurement process taking the form of competitive tendering, therefore the terms "tender" and "competitive tendering" are used identically.

Though there emerged later other tools of organized trade, tenders have grown as the most crucial from the economic perspective. Tenders are held under common public procurement principles, i.e. appropriate and efficient spending of funds; equal opportunities for potential suppliers taking part in public procurement; fair competition of potential suppliers; open and transparent nature of public procurement processes; support for domestic manufacturers of goods, providers of services.

Whenever a tender takes the form of public procurement, the tendering authority shall announce a tender in the form of public procurement on the relevant public procurement website.

Thus, the notification process used for tenders is similar to public tender offer process. The difference is that bids are accepted on the competitive basis.

The competitive tender application filed by a potential supplier or provider implies that such supplier or provider agrees to perform works or services in accordance with the requirements or conditions outlined in the competitive tender documents and shall be filed in the digital form. One could say that a competitive tender application is in a way similar to an acceptance, however the difference is that at a given stage of the tender no contract is made.

Tender, just like any other public procurement process, has its specifics, advantages and drawbacks.

The advantages for suppliers of goods or providers of services include:

1. Increased cash flow. This could be viewed both as higher profits, or working capital increase.
2. Larger sales. Tenders make it possible to cover larger markets, both by industries, and by geographic locations.
3. Increased volumes of services sold, and consequently larger quantities of materials and machinery purchased from manufacturers (suppliers).
4. Cost savings in promotion of and search for new customers or orders. Conventional promotion of services normally requires substantial costs and is time-consuming.
5. Possibility to identify strong competitors.

However, as experience suggests beside their advantages, tenders have drawbacks as well.

The first tender-related drawback to be mentioned is the "price lowering race". The mechanics of tenders and auctions implies that the supplier with the lowest quote wins. This condition also affects the "price-quality" equilibrium: lower price normally implies poorer quality (low quality raw stock, poorly qualified personnel, less control etc.). At the end, the affected parties include customers, end users and suppliers. The adverse effects for the latter manifest themselves in the loss of reputation, deterioration of partnership relations, financial losses and lawsuits.

Today this drawback is eliminated through the introduction of requirements that any potential supplier must have experience of operations with particular goods, works or services, be in possession of a special quality certificate, render support to domestic manufacturers of goods, providers of works and services. It means that for competitive biddings held in the form of tenders, the law-maker is not as focused on the price criterion, as on the combination of the required properties of goods, works and services, provided by a potential provider, experience of operations at the market of goods, works or services constituting the subject matter of such a competitive tender. On the other hand, this criterion contributes into thrifty disbursement of budget funds and higher competitiveness of providers of goods, works and services.

Another drawback is stringent requirements as to the accuracy of documents. If the application or appended documents contain at least one mistake, the tenderer will be dismissed from the tender. To take part in a tender one shall properly fill in the documents, eliminate inaccuracies that may be found in them and take into account the most recent statutory changes.

Nevertheless, despite all the drawbacks of the tender system one can state that tender as such is still an efficient method of receiving orders by a provider that is seeking to reduce its personnel costs, tangible costs or save time.

Thus, we have to note that what makes tenders so important is the fact that they are a crucial tool in today's market mechanics: they promote the development of trade, which in turn facilitates more rapid growth of the national economy. Please, note that tenders help make sales deals more effective for the buyer, in particular for the state acting as the buyer. However, we also have to mention that the use of tenders is not a sufficient tool to encourage the development of domestic manufacturing of goods.

**Conclusions.** The review of legal issues arising in connection with auctions and tenders and described in this article clearly shows that institutional and legal foundations of auctions and tenders in the existing economic environment are one of the most complex legal and economic matters.

One cannot fully harmonize auctions-related provisions in the CC RoK alone. Therefore, to meet public needs, law makers have adopted the corresponding laws.

It should be borne in mind that the entire field of e-commerce is outside the CC RoK or other statutory acts. In consideration of how crucial the specifics of this type of trade activities is, one must introduce the respective provisions to cover new types of trade activities.

Nowadays the term "tender" appears in the Civil Code and is often used in its broad sense. However its application in dedicated statutory acts suggests that it is construed differently.

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**КНИЖКОВИЙ СВІТ**

СУЧАСНА ЕКОНОМІЧНА ТА ЮРИДИЧНА ОСВІТА  
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У посібнику розкриті основні положення, сутність, механізми та функції міжнародних фінансів, розвиток та сучасний стан світової валютної системи та міжнародних фінансових ринків; проаналізовані сучасні тенденції у сфері міжнародних фінансів. Посібник сформовано відповідно до вимог Болонського процесу. Видання містить комплексні тестові завдання, питання для самоконтролю, глосарій. У посібнику знайшли відображення актуальні сучасні дослідження у сфері міжнародних фінансів, матеріали фахових періодичних видань «Актуальні проблеми економіки», «Економічний часопис – XXI» та інших.

Посібник призначено для студентів та аспірантів економічних спеціальностей, а також тих, кому цікаво сформулювати власне розуміння проблематики міжнародних фінансів.