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Legal nature of the state procurement contract

The article is devoted to the complex research of the legal nature of the state procurement contract. Analyzed the concept and legal features of the state procurement contract as the main legal instrument of regulating social relations in the sphere of state procurement. Based on the analysis of the legal nature of the state procurement contract, as well as consideration of jurists' interpretations of nature of the sales contract establishes that the state procurement contract is a type of sales contract and legal regulations on the sales contract are applicable to the state procurement contract. The author concludes that the state procurement contract is poorly understood and requires further research.

Keywords: state procurement, state procurement contract, sales contract, state, customer, consensual, onerous contract.

Мемлекеттік сатып алулар туралы шарттың құқықтық табиғаты

Мақала мемлекеттік сатып алу шартының құқықтық табиғатын кешенді зерттеуге арналады. Мемлекеттік сатып алуларды жүзеге асыру саласында туындайтын қоғамдық қатынастарды реттеудің негізгі құқықтық құралы ретінде мемлекеттік сатып алу туралы шарттың түсінігі мен құқықтық ерекшеліктері талданған. Мемлекеттік сатып алу шартының құқықтық табиғатын талдау мен құқықтанушылардың сатып алу-сату шартының табиғатына бағытталған түсіндірмелерінің негізінде мемлекеттік сатып алу шарты сатып алу-сату шартының бір түрі болып табылатындығы және сатып алу-сату шартына қолданылатын жалпы ережелер мемлекеттік сатып алу шартына да қолданылатыны анықталды. Мемлекеттік сатып алу шартының консенсуалдылығы, өтемелілігі мен өзаралылығы атала отырып, автор бұл шарттың толық зерттелінбеген және әрі қарай зерттеуді қажет етеді деген қорытындыға келеді.

Түйін сөздер: мемлекеттік сатып алу, мемлекеттік сатып алу туралы шарт, сатып алу-сату шарты, мемлекет, тапсырыс беруші, консенсуальдылық, өтеулі шарт.

Правовая природа договора о государственных закупках

Статья посвящена комплексному исследованию правовой природы договора о государственных закупках. Проанализированы понятие и правовые особенности договора о государственных закупках как основной правовой инструмент регулирования общественных отношений в сфере осуществления государственных закупок. На основании анализа правового характера договора о государственных закупках, а также рассмотрения толкований правоведов природы договора купли-продажи устанавливается, что договор о государственных закупках является разновидностью договора купли-продажи и нормы законодательства о договоре купли-продажи применимы к договору о государственных закупках. Выделяя консенсуальность, возмездность и взаимность договора о государственных закупках, автор приходит к выводу что данный договор мало изучен и требует дальнейших исследований.

Ключевые слова: государственные закупки, договор о государственных закупках, договор купли-продажи, государство, заказчик, консенсуальность, возмездный договор.

In recent years, functions of the state greatly expanded, especially in industrialized countries. A powerful lever of state influence on the economy is a system of state orders, procurement of products, works and services for public use.

Since government procurement occupy a significant place in the expensive part of the budget of most developed countries, they are an effective tool for managing the economy.

Special legal act regulating relations in the field of state procurement, the Law of RK "On state procurements" (hereinafter - the Law) defines state procurement as the acquisition of customers for a fee of goods, works and services in accordance with the Law and the civil legislation of the Republic of Kazakhstan [1]. That is, in fact, state procurement is - buying and selling of goods, works and services between the buyer - the state and the seller. The state procurement of goods, works and services may include the purchase of medicines, car insurance, renovation of premises, building state institutions, etc. Actually, the state procurement market covers virtually all spheres, and the state acts as the buyer in this market.

An important legal instrument of the state procurement regulation is a state procurement contract. According to the Law of Kazakhstan, the state procurement contract is - a civil contract concluded through the web portal of state procurement between the customer and supplier, certified by digital signature. The provided definition doesn't explain the legal nature of the mentioned contract fully.

The word "procurement" in the dictionary of business terms is defined as the purchase of goods in bulk, in large quantities in the external and domestic markets. A Dictionary of Economics and Mathematics understands by "procurement" customer's acquisition of goods (works and services) on the basis of contracts [2].

Based on the concepts of the term procurement and definitions of the essence of the state procurement contract, it is possible to determine that the

contract is a kind of civil contract, namely the sales contract. Therefore, to fully understand the legal nature of the state procurement contract it is necessary to disassemble the contract of sale.

Purchase and sale is one of the most important institutions of civil law. We know the history of legal regulation of this contract totals almost four thousand years [3; p.74]. The passing centuries have been a kind of natural selection of rules for the sale. Random, unfortunate situation with time then selected, giving way to a more reasonable and quality, raise the level of legal technology. Legal rules governing the initially only the sale, gradually have become a kind of common assumptions for other civil transactions. This sale and purchase Institute have had a great influence on the formation of the contractual rights of all legal systems: the historical aspect of it has grown almost all the general part of the law of obligations. In turn, the general provisions of contract law were almost entirely distributed to the relations between the purchase and sale [4; p.38].

The concept of sales contract occurred in ancient Rome. Existed in Roman law view of the sales contracts allows us to consider them from three points of view:

- As the basis of legal origin;
- Itself as a legal relationship arising from this base;
- A form that takes the appropriate legal relationship [5; p.4].

It said the multi-valued representation of the contract was so precise and specific that only with certain minor modifications practically implemented in the Civil Code of the Republic of Kazakhstan and in the civil codes of other countries.

In the Soviet and post-Soviet literature, the concept of the sales contract was very consistently developed by many authors, especially well-known O.S. Joffe. Recognizing the sales contract as an agreement between two or more persons of the occurrence, cessation or change in civil relations, O.S. Joffe at the same time noted that "contract sometimes refers to itself under the agreement the obligation arising out of such relationships, and in some cases the term refers to a document that secures the occurrence of an act of commitment to the will of all the parties" [6; p.9].

In contemporary sources, namely Professor G.A. Zhailin, notes that "the purchase and sale agreement (or sales contract) is a kind of contractual relationship, mediating onerous transfer substantially all of the property (except for property withdrawn from civil turnover) from one subject to another. Moreover, the current civil law provides a number of its varieties. Introduction to the Civil Code of RK norms providing features of certain varieties of the sales contract, due to differences in the spheres of public life, where the treaty applies [6; p.11].

Braginsky notes that the sales contract is a two-way, since each of the parties to the contract (buyer and seller) performs duties in favor of the other side and is considered a debtor on the other hand that is required to make in her favor, and at the same time its creditor that that it is entitled to demand from it. Moreover, in the sales contract takes place two opposing obligations, equally significant and important: the seller's obligation to transfer goods to the buyer and the buyer's

obligation to pay the purchase price - are mutually dependent on each other and are in principle economically equivalent [7; p.310] .

Parties of the sales contract are a seller and a buyer. A seller is an individual or any legal entity, as well as a customer - any individual or legal entity, including a business entity [8, p.256].

According to Clause 1, Article 406 of the Civil Code of RK: "According to the agreement of purchase and sale (the seller) undertakes to transfer the property (goods) in property, economic management or operational control of the other party - the buyer, and the buyer is obliged to accept it (property) and pay him a sum of money (price) " [9].

So, after analyzing the above, it can be said that the state procurement contract is a kind of sales contract and generates a relationship of obligation between the parties. According to the state procurement contract, supplier (seller) undertakes to transfer the goods, to provide service, to do the work, and the customer (buyer) undertakes to accept the goods, services, work and pay him a sum of money (price). This formulation allows complete coverage of the possible number of participants. In addition to individuals and legal entities, state and the administrative-territorial units are involved as the main subjects of the state procurement contract and, accordingly, the parties of the contract on state procurement referred as the customer and the supplier.

When the buyer is a state-owned enterprise, government enterprise or public institution, the property comes into their economic management, operational management. At the same time the right of ownership arises either for the state or for the administrative-territorial unit, depending on whether it is Republican or municipal enterprise.

Let's consider some of the essential legal characteristics of this contract.

The contract on state procurement is consensual because it is considered concluded from the moment when they reached the agreement on all essential terms of the contract, which must be installed directly between the parties.

Contract on State Procurement is a compensatory contract. The transfer of goods, services, works require transmission instead of the purchase price. Moreover, the purchase price is not, in some cases the economic equivalent of the goods, the conditions in this respect consists in the fact that the contract does not manifest traits enslaving transaction, and does not violate mandatory rules on pricing.

Subjective rights and obligations of the parties, which are directed oppositely, allow to characterize the agreement on state procurement as a mutual agreement. It is about the rights and responsibilities that reflect the essence of this contract. Auxiliary scope of rights and responsibilities can be a departure from reciprocity.

Contract on State Procurement has some differences from other civil contracts. For example:

- from a deed of gift, it differs by exchanging of goods, services or works for a certain amount of money, whereas deed of gift provides uncompensated expropriation of property;

- unlike the contract of barter is that the contract of barter is not money acts as a counter-meeting, and other goods (things).

Unlike a rent contract is as follows. The main content of the rental contract is the obligation of the debtor to perform periodic payments to pensioners who transferred the property to the debtor in certain property. The total amount of these payments, as opposed to the price in the contract on the state purchases, usually can't be determined, regardless of the value of the transferred property, and payments can be made either in cash or in kind.

In conclusion, according to the contract on state procurement, supplier (seller) undertakes to transfer the goods to be of service, to do the work, and the customer (buyer) undertakes to accept the goods, services, work and pay him a sum of money (price). According to the legal nature, as well as many other instruments in civil circulation, the contract has the legal characteristics of a consensual, compensatory character, reciprocity. The main distinguishing features of the obligations arising out of the state procurement contract are:

- The contracting parties - the customer (the state) and the supplier (natural and legal persons);

- Obligations of the parties under the agreement comply with the rights belonging to them;

- Subject of the contract is the actions of the parties on a paid transfer of ownership of goods, services and works in favor of another.

Significant to note, that state procurement contract is less researched and needs further scientific analysis.

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