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LEGAL FEATURES OF COMPETITIVE OBLIGATIONS UNDER THE CIVIL LAW OF THE REPUBLIC OF KAZAKHSTAN

The article analyzes specific aspects of civil regulation of the competitive obligation. The high importance and lack of practical development of the above problem determine scientific work's undoubted novelty. Further attention to the civil principle of competitive responsibility is needed to better and rationally address civil law's current concerns. Competitive commitments represent another type of unilateral commitment. They clearly show the features of obligations, which in the private law of foreign countries are called quasi-contract. The content of these obligations may cover those actions of the contestants on the competitive task that is usually performed by debtors under some civil law contracts – contracts, orders, commissions, and others. It is not ruled out for the contestants to commit legal acts, creating science, literature, and art. In the first case, it is not a question of the actual commission of legally significant actions by the contestants in favor of the subject who announced the contest, but about their readiness for legal obliging themselves in exchange for compliance with the person of their condition who disclosed the conflict. Public competitions are once again widespread in the civil circulation. Simultaneously, the comparison of the practice of holding available games with the provisions of civil law shows that public competitions are, in many cases, held in contravening the law. One of the many reasons for this is the imperfection of legal regulation and the lack of good ideas about the Civil Code of Kazakhstan requirements for public competition and their complete or partial disregard.

Key words: competition, obligation, regulation, public customer, organizer, specifics of competitive responsibilities, types of games.

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Қазақстан Республикасының азаматтық заңнамасы бойынша конкурстық міндеттемелердің құқықтық ерекшеліктері

Мақалада азаматтық конкурстық міндеттемелерді құқықтық реттеудің кейбір аспектілері талданады. Жоғарыда аталған мәселенің жоғары маңыздылығы мен практикалық дамуының болмауы ғылыми жұмыстың сөзсіз жаңалығын анықтайды. Азаматтық құқықтың қазіргі проблемаларын неғұрлым тиімді және ұтымды шешу үшін конкурстық міндеттемені азаматтық реттеу мәселесіне қосымша назар аудару қажет. Азаматтық құқықтың қазіргі проблемаларын неғұрлым тиімді және ұтымды шешу үшін конкурстық міндеттемені азаматтық реттеу мәселесіне қосымша назар аудару қажет. Конкурстық міндеттемелер – бұл біржақты міндеттемелердің тағы бір түрі болып табылады. Олар шет мемлекеттердің жеке заңнамасында квазиконтракт деп аталатын міндеттемелердің ерекшеліктерін нақты көрсетеді. Бұл міндеттемелердің мазмұны әдетте борышкерлер бірқатар азаматтық-құқықтық шарттар – шарттар, бұйрықтар, комиссиялар және т.б. бойынша орындайтын конкурстық тапсырма бойынша қатысушылардың әрекеттерін қамтуы мүмкін. Конкурста қатысушылардың ғылым, әдебиет және өнер туындыларын жасау – құқықтық актілер жасауы әбден мүмкін. Бірінші жағдайда, бұл конкурс жариялаған субъектінің пайдасына конкурста қатысушылардың заңды маңызды іс-әрекеттерінің нақты комиссиясы туралы емес, конкурс жариялаған тұлғаның олардың шарттарын сақтау үшін заңды қызметке дайындығы туралы екендігін көрсетеді. Жариялы конкурстар азаматтық үндеуде кеңінен таралған. Сонымен бірге, мемлекеттік конкурстарды өткізу тәжірибесін азаматтық құқықтың ережелерімен салыстыру көптеген жағдайларда жариялы конкурстар заң аясында өткізілетінін көрсетеді. Мұның көптеген себептерінің бірі құқықтық реттеудің жетілмегендігі, сондай-ақ Қазақстанның Азаматтық кодексінің жария бәсекелестікке қойылатын талаптары туралы барабар идеялардың болмауы, яғни оларды толық немесе ішінара елемей болып табылады.

Түйін сөздер: конкурс, міндеттеме, реттеу, жария тапсырыс беруші, ұйымдастырушы, конкурстық міндеттемелердің ерекшелігі, конкурс түрлері.

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Правовые особенности конкурсных обязательств по гражданскому законодательству Республики Казахстан

В статье анализируются некоторые аспекты гражданского регулирования конкурсного обязательства. Высокая значимость и отсутствие практического развития вышеуказанной проблемы определяют несомненную новизну научной работы. Для более эффективного и рационального решения нынешних проблем гражданского права необходимо уделять дополнительное внимание вопросу гражданского регулирования конкурентного обязательства. Конкурентные обязательства представляют собой еще один вид односторонних обязательств. Для более эффективного и рационального решения нынешних проблем гражданского права необходимо уделять дополнительное внимание вопросу гражданского регулирования конкурентного обязательства. Конкурентные обязательства представляют собой еще один вид односторонних обязательств. Они четко показывают особенности обязательств, которые в частном праве иностранных государств называют квазиконтрактами. Содержание этих обязательств может охватывать те действия конкурсантов по конкурсной задаче, которые обычно выполняются должниками по ряду гражданско-правовых договоров – договоров, приказов, комиссий и др. Не исключено, что конкурсанты будут совершать правовые акты – создание произведений науки, литературы и искусства. В первом случае речь идет не о фактической комиссии юридически значимых действий конкурсантов в пользу субъекта, объявившего конкурс, а об их готовности к юридическому услужливости в обмен на соблюдение их условий лицом, объявившего конкурс. Публичные конкурсы вновь широко распространены в гражданском обращении. В то же время сравнение практики проведения публичных конкурсов с положениями гражданского права показывает, что общественные соревнования во многих случаях проводятся в нарушение закона. Одной из многих причин этого является несовершенство правового регулирования, а также отсутствие адекватных представлений о требованиях Гражданского кодекса Казахстана к публичной конкуренции, а значит, их полное или частичное пренебрежение.

Ключевые слова: конкурс, обязательство, регулирование, публичный заказчик, организатор, специфика конкурсных обязательств, виды конкурсов.

Introduction

Among the most common obligations arising from unilateral action are competitive obligations. The scope of proliferation has expanded considerably in recent years.

The concept of a competitive obligation is contained in Part 1 of Article 910 Civil Code (CC). In the competitive commitment, its initiator, based on the subject matter and the original terms of the competition, makes an offer to take part in it to an unspecified or specific number of persons and undertakes to pay the established fee to the winner of the competition and conclude a contract with him corresponding to the content of the tender obligation.

Chapter 46 of the Special Part of the Civil Code (Article 910-916) is dedicated to competitive obligations. In addition, as explicitly stated in article 910 of the Civil Code, competitive obligations may be regulated by other legislation of the Republic of Kazakhstan.

A great deal of attention is paid to regulating competitive obligations in such legislation as the Public Procurement Act, the privatization decree,

the real estate mortgage decree, the Commodity Exchange Decree, the Bankruptcy Act, etc. Many by-laws also govern competitive obligations, such as the Rules for the Organization and Public Procurement of Goods, Works and Services, approved by the Government of Kazakhstan on October 31, 2002, No. 1158, the Rules for the Acquisition of Goods, Works and Services in The Conduct of Petroleum Operations, approved by the Government of Kazakhstan on June 7, 2002, No. 612, the Rules for the Purchase of Natural Monopoly Services, Financial Resources, and Financial Resources, the costs of which are taken into account in the formation of tariffs (prices, rates of fees) on the services provided by them, approved by order of the Chairman of the Agency for the Regulation of Natural Monopolies and Protection of Competition of June 6, 2003, No. 140 -OD, etc.

Materials and methods

This study's methodological basis is presented by a holistic set of principles and scientific analysis methods inherent in civil-legal science. The basic

postulates of the general science-based dialectical method of research formed the author's conceptual approach to know the object and subject of the study. They led to the choice of forms and ways of solving the tasks. In writing, the authors applied the doctrinal provisions of philosophy, sociology, and civil law.

The study was based on the universal method of cognition – dialectical and generally scientific research methods – analysis, including system analysis, induction, etc. From private practices were used: specific-sociological, statistical, comparative-legal, hypothetical-deductive methods of research.

Results and discussion

Competitive obligations, in general, are not a new institution for Kazakhstan's civil law. Obligations arising from the public promise of remuneration were also regulated earlier by the Kazakh Soviet Socialist Republic Civil Code (Chapter 42, Article 437-439). However, the norms of this institution have undergone very significant changes. Besides, there are entirely new types of competitive obligations, namely, competitive obligations arising from bidding. It should be borne in mind that the regulation of these relations in Kazakhstan has its specifics and is carried out on several different principles than, for example, in the Russian Federation and several other countries. In Soviet times, competitive obligations were not given sufficient attention to civilizational science (Smirnov, 1976:76). At present, there is no clear scientific doctrine of competitive duties in Kazakhstan, and its formation is yet to come. On the one hand, all these circumstances make it difficult, and on the other hand – increase the importance of a proper understanding of the nature and specifics of competitive obligations.

Entries meet all the traits of the obligation contained in article 268 of the Civil Code. Therefore, as the competition initiator, one person- the debtor- undertakes to commit specific actions: to pay a reward to the creditor – the competition's winner – or conclude with the last contract.

In this regard, the general provision of the obligation law applies to the competition obligations, except where these general provisions are at odds with the particular rules of the chapter on competitive commitments, or when the application of general conditions is not possible because of the specifics of this type of commitment.

The specifics of the competition commitments are as follows.

1. Unlike most civil-legal obligations, from the sale to the contract, competitive obligations arise not from contracts but other legal facts – unilateral actions (deals).

2. Competitive obligations differ from other non-contractual duties, mainly those arising from harm. First, if obligations of damage arise from legal facts about misconduct, competitive obligations arise from transactions, i.e., lawful actions. Secondly, the damage directly generates an obligation consisting of the cause offenders' duty to compensate for the harm and the victim's right to seek such reparation. Competitive obligations, before they reach their final, final form – the responsibility of the initiator of the competition to perform in favor of the winner of the competition-specific actions, take place from the moment of the announcement of the battle several stages, which will be discussed in more detail in this scientific article.

The competition's concept suggests that an individual game, match, or battle of two or more persons is a prerequisite for the emergence of a competitive obligation.

As a legal concept, competition is used in civil law and other branches of law. The game is widely used, for example, when hiring on the so-called «competitive basis». Rules about such a competition are usually referred to as the labor law industry. However, as is known, labor law regulates the relationship between employer and employee, i.e., the person with whom the employment contract is concluded. The competition simultaneously in hiring allows one to identify such a person, which, according to the employer (even only potential), is best suited to perform work in a particular position or specialty. Nevertheless, the competition concept is inextricably linked with the signs of battle, game, and winner identification. According to the competition, scientific and pedagogical staff and management staff are usually appointed (Dzegorites 2003:110-113).

Types of contests. The legislation provides for two types of competitions.

1. Open competition. In the case of an open competition, the initiator's offer to participate in the game is addressed to an unspecified number of persons, i.e., to all comers. Such a request is made through advertisements in the press and other media.

2. Closed competition. In a snug match, the offer to participate in the game is sent to a specific circle of persons on the competition's initiator's choice.

The initiator of the competition decides how to hold the contest (open or closed). The exceptions are cases where the type of game is defined by law. For

example, under the Public Procurement Act, public procurement is usually made through open competition, and a closed competition is held only in cases where goods, works, and services, because of their complex and specialized nature, are available only to a limited number of potential suppliers who are known in advance to the bidder. Simultaneously, the holding of a closed competition is coordinated with the authorized body (part 1 of Article 18 of the Act), (Public Procurement Act, 2015).

Preliminary selection of persons wishing to participate in the competition, which determines its participants' qualifications, can only occur in open competition (part 5 article 19 of the Civil Code).

Competitions can be divided into species and on other grounds.

Thus, there are competitions held in one stage and competitions held in two or more locations. In the first case, the winner of the game is identified immediately, and the second winner (winners) of the next stage becomes a participant in the next step of the competition. Regulatory acts (RA) may provide for the grounds and procedures for holding the competition in several stages. For example, section 19 of the Public Procurement Act (PPA) defines a contest's conduct using two-stage strategies. The game is somewhat well regulated by the two-stage guidelines of Article 14-2 of the Privatization Ordinance. It should be taken into account that although in the subsequent stages of the open competition, not everyone takes part, but only passed the previous steps, i.e., individual persons, the game does not turn into a closed one. Also, cases where the evaluation of competitive applications (proposals of the contestants) are conducted by the competition initiator or the competition commission created by him in several stages. The characteristics of the participants' suggestions (price, technical parameters, etc.) are evaluated.

Types of competitive commitment. Because of competition of one kind or another, a very competitive obligation arises and develops. Law into species, in turn, also divides competitive responsibilities. The Act (part 1 of Article 910 of the Civil Code) divides the competitive obligations into two types:

1) Liabilities arising from a public remuneration pledge;

2) The Republic of Kazakhstan laws established obligations arising from the tender, auction, and other bidding forms.

United by the generic concept of competitive obligation, these species differ because of origin and content (Sukhanov 2010:43). The first type of competitive obligations' content is the competition's ini-

tiator's obligation to pay the winner a fee. The range of the second – the commitment to conclude with the winner of the bidding a contract of the relevant kind.

Besides, the law explicitly allows for the existence of mixed competitive obligations, which will be responsible for the payment of the winning reward and the conclusion of a contract with him. This derives from the notion of a competitive obligation, which indicates the initiator's responsibility to pay remuneration and conclude a contract (Belov 2003:711).

Subjects of competitive obligations. The residents of competitive commitments, as well as any other obligations, are the parties. As parties, the law names the initiator of the contest and the winner of the competition. However, as mentioned above, the competitive obligations in its formation go through several successive stages. Each of these stages has its composition of the participants of legal relations. Only the contest's initiator's figure, participating in all competitive obligation development phases, remains unchanged.

In the literature, the party's obligation (debtor and creditor) is traditionally considered as subjects of responsibility. However, due to the interdependence and interrelation of civil-legal relations in modern society, third parties play an increasingly important role in this relationship. They often affect the content of the obligation and determine its legal nature.

The initiator of the competition is the person in whose interests the contest is always held. The initiator of the game:

1) Determines the subject and the original terms of the competition;

2) Announces the contest, i.e., makes an offer to take part in the fight to an unspecified or specific person's circle. Moreover, the conflict initiator makes an offer to participate in the contest either directly or through an intermediary – the competition's organizer (part 3 of Article 910 of the Civil Code). Sometimes the figure of the organizer of the contest is determined directly in the legislation. For example, the Public Procurement Act contains several provisions relating to the organizer of the competition. First of all, it is established that the organizer is the customer (public bodies, state institutions, as well as state-owned enterprises and public companies, fifty percent or more of the shares (shares) or a controlling stake of which belong to the state, and affiliated with the legal entities) or a person determined by the customer per the law for the organization and conduct of the competition (sub. 5

and 10 of Article 1 of the Public Procurement Act). Separately, it is stipulated that the contest organizer can be the administrator of the republican budget programs, which is also entitled to determine for the state agencies under its control a single organizer of the competition.

3) Determines the winner of the competition. As a rule, to determine the game's winner, the initiator (organizer) of the game creates a competitive commission. Directly about, the competitive (tender) commission is mentioned only in the article dedicated to tenders. Thus, following section 3 of article 915 of the Civil Code, «the choice of the winner of the tender from among its participants is made by the initiator of the tender or the tender commission he created in a closed or, under the terms of the tender, in the open order». However, the creation of a competitive commission is possible in any other competition. The most common is creating a competitive commission (jury), consisting of specialists of the relevant profile, evaluating works in science, literature, art, and other creative activity and sports areas. Although the rule of section 3 of Article 915 of the Civil Code is formulated as dispositive and, therefore, creating a competitive commission is the prerogative initiator of the competition. Still, in some cases, the legislation explicitly establishes the need for such a commission. For example, the creation of a competitive commission provides for part 3 of Article 9 of the Public Procurement Act. The Government determines the education and activities of the competition commission. The order of creation, the number and personal composition of the competition commission, the quorum required for decision-making, etc., are determined for different competitions. As a rule, the competition commission determines the competition's winner and performs all the game's actions, starting with its announcement. The Competition Commission usually operates based on the competition commission's provision approved by the competition organizer;

4) Pays the winner a fee and enters into a contract with him that corresponds to the competition's terms, i.e., fulfills the actual competitive obligation, being its party.

Contestants

Other subjects of competitive legal relations are contestants. Under section 5 of article 910 of the Civil Code, an open competition may be subject to the pre-qualification requirements for contestants of a particular type, established by law. For example, article 8 of the Public Procurement Act lists a po-

tential supplier (Velbi 2018: 813). According to this article, the potential supplier must:

1) Have professional qualifications, as well as experience in the market of purchased goods, works, and services for no more than one year;

2) Have the necessary financial, material, and human resources to meet obligations under the public procurement agreement;

3) Have the civil capacity to enter into a public procurement contract;

4) To be solvent, not subject to liquidation, his property should not be seized, and his financial and economic activities should not be suspended following the legislation of the Republic of Kazakhstan;

5) Do not be held accountable for the failure or improper performance of its obligations under public procurement contracts concluded during the past two years based on a court that has entered into legal force.

The relevant documents confirm the compliance of the contestant (potential supplier) with the requirements. The completeness and reliability of the information provided are established at the time of consideration by the competition commission of documents ensuring the potential supplier's compliance with qualification requirements (A.P. Sergeeva 2018:826-827). It is imperative that the bidder may not set the potential supplier's conditions not provided by the Public Procurement Act. The potential supplier has the right not to provide information that does not relate to the qualification requirements.

The competition's very concept indicates that the number of participants cannot be less than two because otherwise, there can be no competition, competition. In some cases, the law enshrines explicitly this requirement, stipulating that in cases where the number of participants is less than two, the battle be considered to have failed. Nevertheless, even in cases where such a requirement is not contained in the law, it is obvious. For example, part 4 of article 915 of the Civil Code stipulates that a tender may be deemed to have been initiated by less than two bidders or bids by bidders are found to be not eligible for tender. Part 7 of article 916 of the Civil Code also stipulates that an auction can occur if two bidders take part in it. Similar requirements contain other legislation.

On the contrary, there is no such requirement in the notion of a competitive obligation arising from a public promise of remuneration. However, it logically derives from the concept itself because, in the absence of at least two participants, it is impossible to determine the best performance of the work; it is impossible to recognize any person as the winner,

and so on. Legislation or conditions of the competition may provide for compulsory participation in the contest and a larger number of participants.

In some cases, the subjective component of the competition obligation, if it is not defined in the law and the competition conditions, can be established based on the substance of the game's subject matter. Thus, if the match is announced to create a work of science, literature, art, or another result of creative activity, the contestants can only be individuals because creativity is inherent only to the individual (person). The Copyright Act explicitly defines that the work authors are an individual whose creative work is created.

The question of the plurality of persons in the competitive obligation is quite controversial in practice. As mentioned above, general duties are applied to competitive commitments, as they do not contravene the institution's extraordinary norms in question. General obligations allow several individuals on each side of the obligation to participate in the responsibility (Ivanova 2005:8-13). Part 2 of article 269 of the Civil Code stipulates that several persons may participate in the deficit as a creditor or debtor at the same time (Bogdanova 2003: 10).

The possibility of acting as the initiator of a contest between two or more persons of doubt, as a rule, does not cause, and in practice, it is quite common. The question of the participation of several persons as participants in the competition is more challenging to resolve. Earlier, we noted that the contestants «can be both citizens and legal entities, including groups of citizens and consortia» (Suleimenov 2003:576). The latter statement needs some clarification and clarification. On September 6, 2002, the Prosecutor General's Office of Kazakhstan explained consortia's participation (associations of legal entities without a legal entity) in competitions to purchase goods, works, and services. The Committee gave a similar explanation of the «consortiums» on Public Procurement by the Ministry of Finance of the Republic of Kazakhstan.

The point of these clarifications is that article 1 of the Public Procurement Act provides that suppliers and potential suppliers are an individual and a legal entity (the latter is defined in article 33 of the Civil Code). Also, since the consortium is not a legal entity, the «participation of consortia in public procurement, particularly as suppliers, including potential ones, is unacceptable». «Because consortia cannot participate in the public procurement process, the purchase of services should be made from legal entities and individuals, not from consortia, as they cannot be potential suppliers under public pro-

curement legislation» (Commentary on the Russian Federation's Civil Code).

The explanations of the Public Procurement Committee stipulate that «regulation of the results of joint activities is not within the scope of the public procurement legislation» and that «violation of public procurement legislation will be admitted to the public procurement process of consortia, respectively, and the acquisition of goods, works, and services from such associations, except when a consortium member participates in the public procurement process as an independent legal entity».

Based on these clarifications, all public procurement organizations deny participation to several individuals as a potential supplier. In other words, they require that only one individual or entity submit one application. When an application is submitted (signed) by several legal entities, the customer announces that the applicant is a consortium. Since the latter cannot be the right subject, it does not accept (rejects) such an application.

In practice, however, there are often cases where the purpose of the contest organizer, especially the bidding, can be achieved only if one contract is concluded with not one but several persons. For example, the organization announces a competition among banks to provide loans for the amount that none of the banks to date can independently offer. On the other hand, a large consignment of goods is purchased, which neither of the sellers can provide alone. In this case, it would be desirable to bring together several such persons for their joint participation in the competition. Moreover, the above explanation does not prevent this from being discouraged.

As you know, the consortium is a temporary voluntary equal union (unification) based on a joint economic agreement. Legal entities pool certain resources and coordinate efforts to solve specific financial problems (Article 233 of the Civil Code). The consortium itself is not a legal entity. Consequently, he may not be a party to competitive legal relations, nor can he be involved in any other civil-legal relationship. Only individuals and legal entities can be applied. Besides, it is quite right that it is not listed among the potential suppliers. Nevertheless, to be the subject of civil legal relations means to speak in them on their behalf and, as a rule, under their responsibility (Lebedev 1988:77).

Moreover, the consortium's meaning is that it binds the legal entities' mutual rights and obligations. A joint business agreement (consortium agreement) is an agreement only between members of a consortium. In all other relationships with third parties (in «external» relations), the consortium mem-

bers – legal entities – Act on their behalf. Nevertheless, the connection of their consortium agreement may determine their joint entry into civil relations. Thus, one application for participation in the public procurement competition can be submitted not by one legal entity but by several, related or even unrelated to each other by a joint economic activity agreement. In this case, the participant of competitive legal relations (potential supplier) will not be a consortium; thus, an entity of civil law does not exist, but legal entities. Here, all legal entities acting together and working in their interests can submit the application and others' parts because of a contract of instruction (trust). Another matter must apply to each of the applicants.

Nevertheless, the requirement – «one application for participation in the competition can be filed by only one person» – is not based on the law. It is noteworthy that legal entities and individuals can submit one application jointly if only by the nature of the purchased works or services (e.g., banking). The participation of individuals in the competition is not excluded. In such cases, there is no legal reason to call such an association a consortium since the latter is an Association of exclusively legal entities. Simultaneously, there are no other grounds to reject such an application since the Civil Code's general rules allow for a plurality of persons in the obligation, including the competitive burden.

Unlike consortia, which are still enshrined in the law, such entities as groups (collectives) of citizens (individuals) are not mentioned in the legislation. However, this does not mean that they are not entitled to participate in competitions or other civil relations. Here, the subject of legal concerns will be not some particular subject – a collective and individuals, but speaking together, together. And in the case of winning the competition with all of them (or only one of the members of the team, having a power of attorney from the rest) can be concluded only one contract or paid the reward conditionally due to the competition (which in this case is shared among the members of the author's team).

All this shows that the law perfectly allows persons' plurality on the participant's side of the competitive obligation (Sergeeva 2008:826).

The winner of the competition is a party to the competition obligation in its final stage. The contest itself is held precisely to identify the winner. The winner in the competitive commitment is the creditor, that is, the party with the right to demand to commit specific actions in its favor – payment of remuneration or the conclusion of a contract of one form or another.

Part 3 of article 915 of the Civil Code stipulates that the winner of the tender's choice from among its participants is made by the initiator of the tender or created by the tender commission in a closed or, under the terms of the tender, in the open. The procedure for determining the winner is regulated in more detail in the legislation on certain types of competitive obligations (privatization, public procurement, etc.).

The competition can be aimed at identifying one winner or several winners (winners). In many ways, the type of competitive obligation determines the choice of one of these options. Thus, competitive obligations arising from bidding aim to conclude a contract that can only be completed with one person (given the multiple as mentioned above of persons in a competitive commitment). On the contrary, the public promise of remuneration of such restrictions does not know. One person or several winners, including their ranking (distribution by place), can set rewards. For example, a competition to create the best musical or literary work may include the first, second, and third prizes or even several prizes at each level.

Separate legislation stipulates that if the winner of the competition does not sign the contract within the specified time frame, the organizer of the game has the right to agree with another participant of the competition, the proposal of which is the most preferable after the submission of the winner per the protocol on the outcome of the match (part 3 of article 23 of the Public Procurement Act). It is usually said that there is a replacement for the winner of the competition in such cases. This statement does not appear to be entirely accurate. Of course, granting the right to enter into a contract with another person, in case of refusal of this winner of the competition, is in the interests of the initiator of the game, as it saves him from the need to hold a new contest, bear the associated costs, etc.

However, from the very concept of the competitive obligation, it follows that, first, the contract is with the winner of the competition, and the refusal of the winner of the warranty does not make the other person the winner. Secondly, before the actual winner, the initiator of the competition should conclude a contract, and it is this duty that constitutes the content of the competitive debt. In the cases under consideration, the competition's initiator has the right to conclude a contract with another person but is not obliged to do so. All this shows that the contract concluded in such cases is not based on a competitive obligation but is an independent way of concluding a contract (particularly a deal on public

procurement or privatization). However, it is an accessory, additional to the competition.

Becoming a competitive commitment. Protecting the interests of the participants of the competition obligation and liability under the competitive obligation.

It was becoming a commitment. The specifics of the competitive obligation, which has already been mentioned above, is such that the deficit in its full form does not arise immediately, not at the time of the announcement of the initiator (organizer) of the contest about its holding, but in the process of becoming a commitment based on its results and identification of the winner of the competition, which becomes a creditor. In this regard, a competitive obligation arises because of a complex factual composition in which unilateral transactions take the central place.

The Civil Code defines transactions as actions by citizens and legal entities aimed at the emergence, alteration, or termination of civil rights and obligations (Article 147 of the Civil Code). Deals are divided into one-sided and two-way or multilateral (contracts). A wrong transaction is recognized for which, following the parties' law or agreement, it is necessary and sufficient to express one party's will (part 1 and 2 of article 148 of the Civil Code).

The announcement of the contest, made by the initiator of the competition, is a one-sided transaction, initial and in many respects determining the competitive obligation's content by the stage of becoming this obligation. The announcement contains the competition's initiator's offer in a statutory order to pay a reward to the winner of the game or to conclude a contract with him when the game-winner reaches an inevitable result of the competition. Legislation may provide lists of the necessary conditions for a public promise of remuneration (Agarkov 1940:123). Such a list is listed in section 2 of article 911 of the Civil Code: a general contract of income must necessarily contain conditions for the substance of the job, the criteria and manner of presentation of the results, the size and form of remuneration, and the manner and timing of the announcement of the products.

This unilateral transaction gives rise to others' rights (an individual or uncertain circle) to participate in the competition by submitting relevant proposals (proposals), presenting works, etc. Accordingly, this transaction also generates a duty, a unilateral obligation for the perpetrator (part 1 of article 149). At this stage, the responsibility is to accept competitive applications (proposals).

As the initial stage of the competition committee's development, the announcement of the competition is significant. That is why the legislation pays excellent attention to how this announcement should be made. In particular, the report should be made no later than a specific date before the contest itself, allowing participants to prepare for the competition properly. It is envisaged that the announcements should be made in periodic printing and distributed through electronic means of communication. In addition to the contest's actual report (notification), the so-called «competition documentation» plays a significant role. The organizer of the competition provides to everyone who wants to participate in it. Competition documentation is designed to provide participants with complete information about the conditions of their participation in the game, as the ad published in newspapers, as a rule, does not always reflect the full story. The competition documentation also contains requirements for preparing the competitive application and its submission and regulations on evaluating competitive applications and recognizing the winning bid.

Applying to a bidder is also a one-way transaction. However, it generates a duty not for the person who committed it but for the competition's initiator. The game initiator must consider and evaluate this application in conjunction with other applications and identify the winner. It is only the identification of the competition's winner that leads to the appearance of a commitment in its final form and makes this winner a party of the competitive obligation. The legislation also imposes a special requirement on this stage of the development of competitive legal relations. In particular, there may be requirements for the form and content of the competition application, the timing of its submission, and so on.

Consideration of the competition winner's applications and identification is also a unilateral action (deal) of the game's initiator. Determining and announcing the competition winner is the final stage of the formation of a competitive commitment. This reveals the person against whom the initiator of the game is fulfilling the obligation.

Legislation details the rules for identifying the winner for certain types of competitions, defines the criteria by which the winner is determined sets the time frame during which the decision to recognize the winner should be made. Particular attention is paid to the order of the design of such a decision. Usually, the competition initiator's conclusion (competition, tender commission) is drawn up by a protocol, reflecting which of the contestants and on what grounds was recognized as the winner.

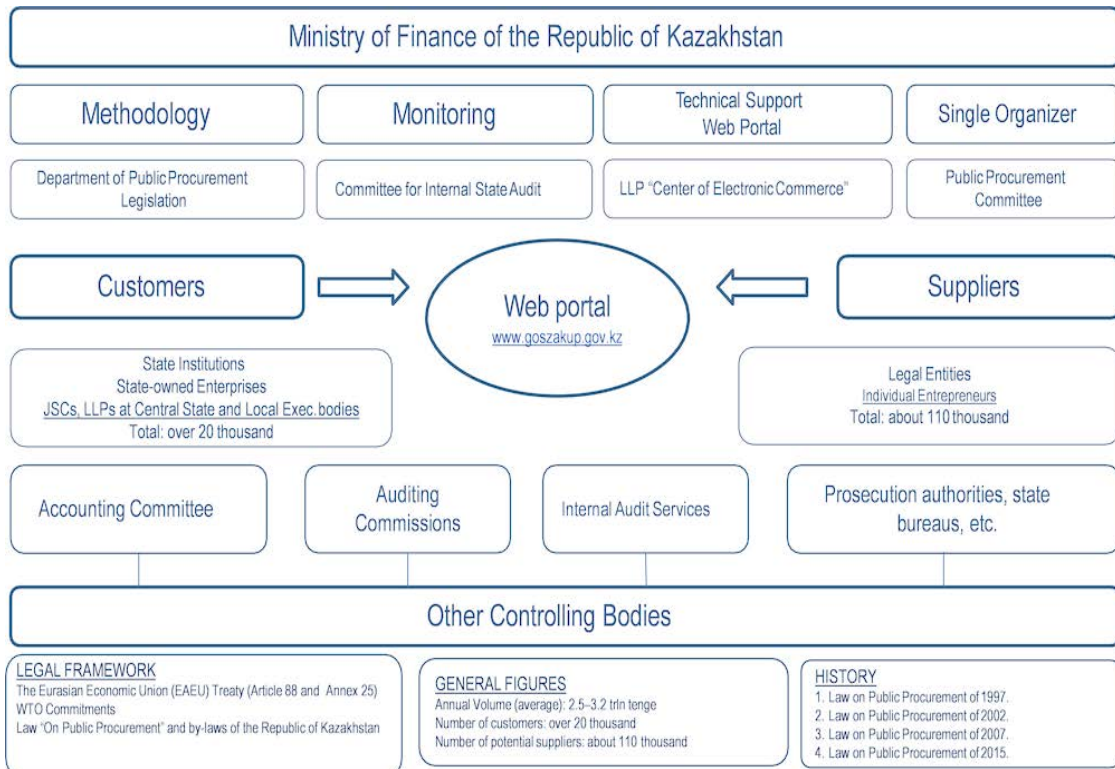


Figure 1

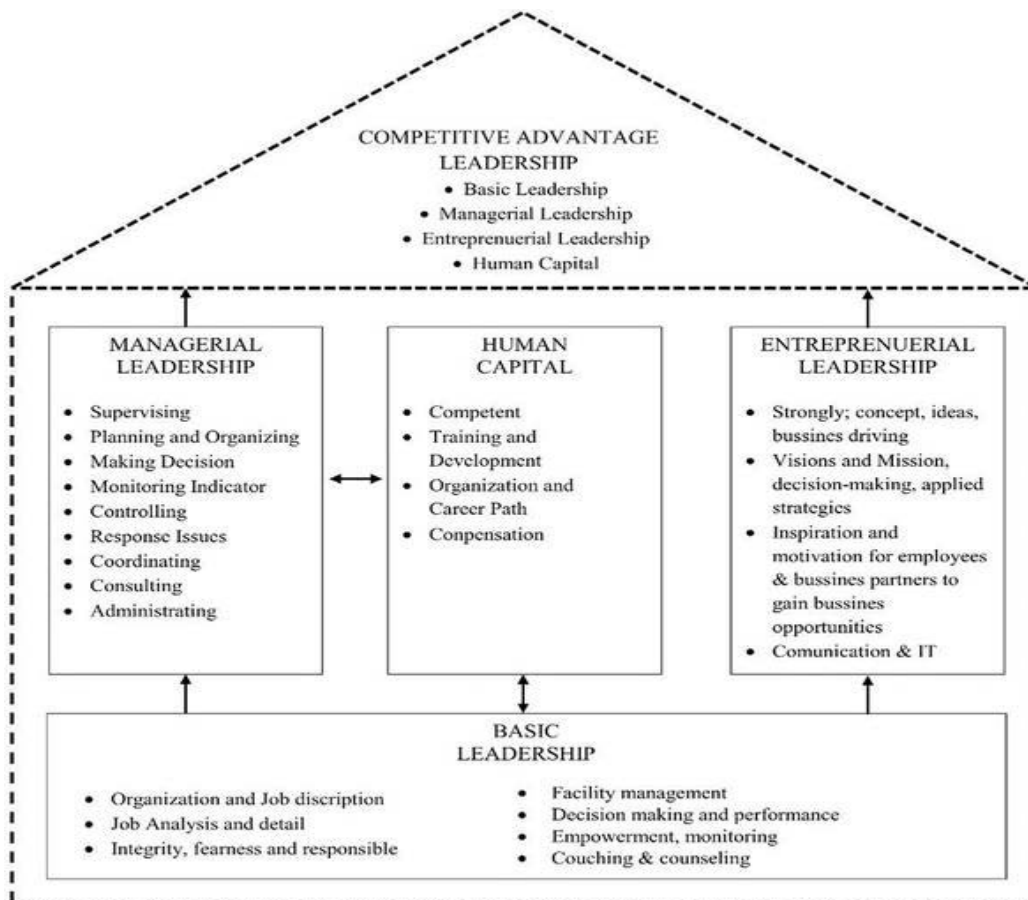


Figure 2

The announcement of the competition, the submission of proposals (proposals), and the decision on the winner's determination are, as has been said, one-sided transactions. Each such transaction, made by both the initiator of the competition and other persons, including the contestants, generates certain rights and obligations. In other words, after each stage, there is a legal relationship, which also meets the signs of the responsibility (e.g., the duty of the initiator of the competition to consider the proposal submitted and the right of the participant to demand such consideration). However, these commitments are not of self-importance to their parties but are subordinated to the ultimate goal of creating a competitive commitment in its final form. Therefore, these circumstances are not considered as separate types of civil obligations but as so-called «interim competitive obligations». However, this does not preclude the possibility of applying to the legal relations that take place at each stage of the formation of the competitive obligation, i.e., to the general norms of the burden.

When they are formed, all these unilateral transactions form a complex factual structure, from which the final competitive obligation arises. The actual composition that comprises the competitive commitment may include other legal facts. For example, article 913 of the Civil Code states that a contract forms the relationship between the organizer of lotteries and other similar games and their participants. However, the obligation of the lottery organizer to pay the winnings is not contractual. Its offensive requires several elements of the actual composition, particularly recognition of the lottery ticket winners.

According to our country's law, the bidding winner and the seller sign a protocol on the auction results on the auction or tender day. This protocol is reasonably considered in Kazakhstan's legal literature as a preliminary treaty under Article 390 of the Civil Code (Didenko 1999: 156).

The actual composition that creates a competitive obligation, depending on its type, includes other legal facts other than the above.

In addition to dividing deals into one-sided and two-and-multilateral, cynical science, unilateral agreements are also divided into basic and supportive ones. The principal transactions are considered the basis of legal relations; auxiliary – transactions change or terminate legal relations already existing in the person who makes the transaction. The contest's announcement generates only the opportunity to participate in the competition, but not subjective right. The right arises from the moment of making another transaction – applying (work) to the game.

The legislation provides the procedure for forming a competitive obligation and cases where the competitive commitment (competition) can be declared invalid, failed, or the match can be canceled.

A competitive obligation may be invalidated if the transactions that have served as the basis for the appearance of a competitive commitment are invalidated. The court invalidates the competition on the claim of interested persons.

The grounds for invalidating transactions under the basis of a competitive obligation are generally established by chapter 4 of the Civil Code in articles on the invalidity of transactions. It also shows the consequences of invalidating transactions if this chapter's rules are not at odds with the norms of special legislation on competitions or do not contradict the merits of competing obligations. There are also special rules in the law on the invalidity of transactions based on competitive commitments.

The declaration of the contest failed, which should be distinguished from recognizing the match's invalidity, is not related to the violation of the law during the competition but is due to circumstances beyond the control of the contest's initiator, the contestants. It may take place in cases provided by the law or the terms of the competition established by its initiator. For example, a tender may be deemed to have failed if fewer than two bidders took part in it. Their proposals are considered the initiator of the tender that does not meet the tender conditions (part 4 of Article 915 of the Civil Code).

Suppose the contest is recognized as a failure. In that case, there is no obligation of its initiator to pay a reward or conclude a contract with the competition winner, like the latter, in this case, is not determined. Legislation and the conditions of the game may establish other consequences of recognition of the contest failure. For example, in the case of tendering for a failed mortgage, the mortgage holder has the right to convert the mortgaged property into his property at its current appraisal value (part 3 of article 32 of the Real Estate Mortgage Ordinance).

The Civil Code and other competition legislation provide for abolishing and changing certain types of competitive obligations and the consequences of such cancellation and change. Thus, under section 6 of article 12 of the Public Procurement Act, the organizer of the competition has the right to make changes to the competition documentation by the deadline of no later than five calendar days before the expiry of the final deadline for submitting competitive applications on his initiative or in response to a request from a potential supplier to amend the competition documentation by filing a protocol.

The amendments are binding and are immediately reported to all potential suppliers to whom the competition organizer submitted the competition documentation. Simultaneously, the deadline for submitting competitive applications is extended by the organizer for at least ten calendar days to account for these changes in competitive bids by potential suppliers (Sarbash, 2005:27-38). Nevertheless, the Civil Code does not contain a general rule approximately cancellation or modification of competitive obligations. Still, it only includes control over abolishing the public promise of remuneration (Article 912 of the Civil Code).

Such a general rule should be included in the Civil Code.

Rules on abolishing competitive obligations are sometimes contained in special legislation on certain types of such duties. In cases where the consequences of the competition's cancellation are not provided by special legislation, it is necessary to proceed from the Civil Code's general norms on obligations and the game's declared conditions.

Conclusion

They are protecting the interests of the initiator of the competition. The Civil Code contains one measure to protect the interests of the initiator of the game, held in the form of bidding (tender and auction). Thus, part 6 of article 915 of the Civil Code stipulates that the terms of the tender may be provided for each bidder to make a guarantee fee, which is returned to the participants after the tender results. The guarantee fee will not be refunded if the bidder withdraws his offer or changes it before the tender expires. The guarantee fee is not returned to the tender winner if the winner refuses to enter into an appropriate contract with the tender's initiator on terms that meet the tender winner's proposals.

Those wishing to participate in the auction must apply for participation in the auction and make a set amount of the guarantee contribution (part 6 of article 916 of the Civil Code) before the auction if the conditions are not established. If the buyer refused to enter into a sale contract, he is excluded from the bidders' list, and the guarantee fee is not returned to him. The guarantee contribution was born for persons who took part in the auction but did not buy anything. For those who purchased any of the auction items, the amount of the guarantee fee is counted in the account of the paid purchase price.

The guarantee fee mentioned in the rules is a means of protecting the competition's initiator's in-

terests, resulting in a sales contract (at auction) or, in general, any warranty (attender). Bidding and conducted by their initiator (organizer) for this purpose, so the refusal of the winner of the bidding from the conclusion of the contract violates the interests of the initiator (the organizer), who usually plans its activities given those contracts, which are to be concluded at the auction, bears individual costs associated with the bidding, etc.

The guarantee fee should be distinguished from the payment for the right to bid under special legislation. Thus, applications for participation in the competition of investment programs for the right to subsoil use for exploration, extraction, and combined exploration and extraction of minerals are accepted for consideration after payment of the contribution to participate in the competition. Unlike the guarantee fee, the fee for participation in the game is not subject to a refund.

It should be borne in mind, however, that a guarantee contribution is not a means of securing a competitive obligation, as it is often referred to in the legal literature and the current legislation (Civil and trade law of capitalist states 1993:407-408).

As you know, the Civil Code regulates in sufficient detail the various ways of ensuring compliance. Article 292 of the Civil Code includes forfeiture, collateral, withholding of debtor's property, surety, guarantee, deposit, and other means provided by legislation and treaties. The mere non-mention of the guarantee contribution in this article does not mean that it is not exhaustive. The guarantee fee performs the same functions as the means of enforcement, named in article 292 of the Civil Code. It has even some terminological affinity with them, particularly with a guarantee. Therefore, a more detailed analysis of the general concept of ways of securing the security is necessary to clarify whether the guarantee fee is a way of securing a competitive obligation or not.

First, it should be borne in mind that the Civil Code establishes ways to ensure not obligations as such, but ways to ensure the performance of responsibilities. As derived from the rules of Chapter 17 of the Civil Code, the fulfillment of the blame is the debtor's commitment to the actions that constitute his duty's content. The bidder makes the guarantee contribution and encourages him to conclude a contract with the initiator under the threat of assistance loss. However, the winner of the competition does not have an obligation to end such a contract. As discussed above, the competitive responsibility is unilateral. The very concept of this type of debt follows only the competition initiator's commit-

ment (trades) to conclude with the winner of the contract of the appropriate kind. For the winner of the conclusion, the initiator's agreement is a right, but not a duty. Therefore, if the competition winner does not enter into a contract with the initiator, it cannot be said that he violates any duty lying on it. Moreover, if there is no duty, there can be no way to ensure its fulfillment. Nor can we talk about the guarantee contribution as a means of securing or that the bidding winner is obliged to enter into a contract with the initiator because the loss of the guarantee contribution means negative property consequences for the winner who has not agreed (Didenko 2006:545).

In this regard, the guarantee contribution provided by the competition obligations rules should be considered an independent way of protecting the interests of the competition's initiator, but not as a way of securing obligations.

Legislation regulating certain types of competitive obligations, on the other hand, not only speaks of the provision of competitive obligations but also even provides for separate ways of ensuring. Thus, the Public Procurement Act does not mention, unlike the Civil Code, a guarantee contribution. However, article 14 regulates in sufficient detail the so-called «provision of a competitive application». It is established that the provision of a competitive application can be submitted in the form of:

- 1) Pledge of money placed in the bank;
- 2) Bank guarantee.

The validity of the competition application must be at least the expiration date of the competition application itself.

The provision of the tender application is not returned to the potential supplier who submitted the competitive application and the appropriate condition, in cases where the potential supplier:

- 1) Withdrawn or changed the bid after the final deadline for submitting the competition application;
- 2) Did not enter into a public procurement agreement, being confident as the winner of the competition;
- 3) Did not provide security for the public procurement contract's execution after signing the public procurement contract in the form, scope, and terms stipulated in the tender documentation.

The competition organizer returns the submitted provision of the tender application to a potential supplier within five business days of the following cases:

- 1) Expiration of the competition application;
- 2) The entry into force of the public procurement agreement;

3) Termination of public procurement procedures without determining the winner of the competition;

4) Withdrawal of the competition application before the final deadline for submitting competitive applications;

5) Rejecting the competition application as non-compliant with the competition documentation;

6) Determine the winner of the competition, another potential supplier.

For the reasons outlined above, the guarantee contribution should be in mind, not how the obligations are enforced (the more incomprehensible the «enforcement of the application»).

Moreover, even if the competition winner did have a responsibility to conclude a contract and the fulfillment of this duty could be provided somehow, the collateral and bank guarantee for this purpose are unacceptable. The essence of the collateral is that the collateral holder has the right, in the case of default, to obtain satisfaction (meaning the joy of the requirement, which corresponds with the outstanding duty) from the value of the mortgaged property mainly to other creditors, who own this property (the lender) (Article 299 of the Civil Code). If the winner of the competition had a duty to conclude a contract, and the initiator, accordingly, would have the right to demand such an agreement, for example, the supply of equipment, in case the winner of the competition did not fulfill this duty, the initiator would still not receive the satisfaction of his requirement (requirement to conclude a contract) by applying the mortgaged money to his property.

In this case, money can replace neither the contract for the supply of equipment nor the equipment itself. The guarantee is that the guarantor obliges the creditor of another person (the debtor) to be responsible for the failure to comply with the person's obligation in full or in part in solidarity with the debtor (Article 329 of the Civil Code of the Republic of Kazakhstan). According to the literal meaning of the guarantee (including banking), in case of refusal of the winner of the competition to conclude a contract, the guarantor bank had to complete such a deal instead of the winner. In practice, however, the implementation of the bank guarantee is that in the case of refusal to conclude a contract (and in other cases), the initiator of the competition requires the guarantor of payment of money, which, as already said, can replace neither the contract nor the subject of the agreement, which remained unconversionable.

It can be recognized, therefore, that the public procurement legislation «bail of money» and «bank guarantee» as ways to «ensure a competitive ap-

plication» have nothing in common but the name, with civil-legal concepts of ways to ensure the fulfillment of obligations, collateral, and guarantees. Public procurement legislation can and should only provide a deposit, as follows from the Civil Code's general rules on Competitive Obligations.

Responsibility for violation of competitive obligations. General rules on liability for non-performance or improper performance of duties also apply to competitive commitments, as long as it does not contravene special legislation on these obligations or their merits. As a rule, liability for violation of competitive obligations comes in the form of damages. Since the competitive duties are one-sided, in which the responsibility lies only with the initiator of the competition, but not on its participants (competitors), the fault in the form of damages can be borne exclusively by the initiator; thus, if the initiator of the tender refuses to conclude with the winner of the relevant contract the winner of the tender in the right to recover the damages caused to him (part 5 of Article 915 of the Civil Code of the Republic of Kazakhstan). For the tender's winner, if he refuses to conclude a corresponding contract with the tender's initiator on the terms that meet the winner's proposals, there is no compensation for damages.

Commitments are arising from a public promise of remuneration.

Commitments from the public promise of remuneration are widespread in practice. For example,

these are competitions for creating works of science, literature, and art, battles for the best performance of music, dances, the best sporting achievements, etc. These contests can be both one-off and systematically held at specific intervals.

The contents of the obligation arising from the public promise of remuneration are disclosed in article 911 of the Civil Code. Under Part 1 of this article, any person who has publicly announced a payment of monetary or other remuneration for better performance or different results must fulfill the obligation to a person recognized as the winner under the competition's terms.

Signs of this type of obligation, while limiting it from others, including similar, legal relations should be highlighted.

First, being a kind of competitive commitment, the type of commitment is based on the competition, i.e., the competition and participants' competition. This is particularly important to bear in mind that, in principle, obligations arising from a public remuneration pledge may not be associated with the game. For example, from the general promise of reward to someone who finds a lost thing, there is also an obligation. Still, it will not be based on the competition, instead of the public promise of remuneration to the author's best architectural project. Different people, better or worse, can make an architectural project, but you cannot find a lost item, «better or worse». It can only be seen or not found.

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