UDC 342.951
DOI https://doi.org/10.32849/2663-5313/2021.10.05

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Karabin, Tetyana, Bilash, Oleksandr (2021). The legal institute of public procurement in the system of special administrative law. *Entrepreneurship, Economy and Law*, 10, 30–36, doi https://doi.org/10.32849/2663-5313/2021.10.05

THE LEGAL INSTITUTE OF PUBLIC PROCUREMENT IN THE SYSTEM OF SPECIAL ADMINISTRATIVE LAW

Abstract. ***Purpose.*** The article deals with the study of the legal institute of public procurement, which is newish but actively developing in Ukraine. The express purpose of the research is to understand and arrange the adopted legislation on public procurement, separate the relevant legal institute, and substantiate its branch attribution.

Research methods. Research methodology is conditioned by the article's purpose; thus, it is used both general scientific and special methods of scientific cognition. Research logic involves processing and studying the application scope of the law: the procedure of procurement and administrative appeal, and the mechanism of control and legal protection to achieve the purpose and tasks set by the authors.

Results. The conducted study of the legal institute of public procurement has made it possible to conclude that the institute of administrative law comprises a set of rules regulating decision making about the need for procurement, preparation for procurement, appeal, and control. In particular, the entities entering into legal relations (customers) are subjects which are established by the state or a territorial community to meet public needs. The procurement procedure and grounds for a refusal to participate in the procurement procedure are compulsorily regulated by the law, and the method of determining the expected value of the procurement item and the rules for setting the procurement item by the customer are regulated by the act of the Ministry. Moreover, appeals against actions and decisions in public procurement procedures can be carried out both in administrative and court proceedings, in which the Antimonopoly Committee of Ukraine is the body of administrative appeal, and the administrative court – the body of judicial appeal.

Conclusions. Everything mentioned in the article as a whole allows asserting the formation and becoming of a new institution of special administrative law – the institute of legal regulation of public procurement.

Key words: public procurement, public procurement procedure, institute of administrative law, PROZORRO.

1. Introduction

The current stage of the development of laws on public procurement is characterized by rapid growth. On the one hand, this is stipulated by the general purpose of public procurement – the introduction of efficient and transparent procurement (Arrowsmith, 2010, 150; Muñoz, 2016, 13-37), the creation of a competitive environment in public procurement, and the reduction of corruption risks as part of the implementation of public procurement. Thus, the evidence of procurement efficiency is the full meeting of public needs and the rational use of budget funds because of the implementation of such orders (Yaremenko, Shatkovs'kyy, 2014).

On the other hand, the development of the legal institute of public procurement is

determined by the signing of the Association Agreement, the provisions of which provide for the consistent approximation of Ukrainian legislation on public procurement to the EU Public Procurement Law acquis[1]. That kind of approximation is supported by institutional reform and the introduction of an effective system of public procurement based on the principles governing the European Union's public procurement, as well as the concepts and definitions set out in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

Therefore, science faces the task of understanding and arranging the adopted legislation on public procurement, the separation of the relevant legal institute, and the justification of its branch affiliation. The authors of this article pursue the same goal.

Research methodology is conditioned by the article's purpose and thus, both general and special methods of scientific cognition are used. The logic of the research involves processing and studying the scope of the legislation, the very procurement and administrative appeal procedures, as well as the mechanism of control and legal protection to achieve the goals and objectives set by the authors.

2. Scope of public procurement laws

The scope of public procurement laws is specified by two factors: entities entering into the relevant legal relations and the subject of such relations.

Special procedures for public procurement are applied in case when legally identified customers carry out the procurement of goods, works and services. By relying on the provisions of the Law of Ukraine "On Public Procurement" No 922-VIII as of 25.12.2015, it follows that they are entities that are created by the state or amalgamated community (hromada) to meet public needs, including taxpayers, which must be provided by the state and which spend public finances for purchase. In the practical application of procurement legislation, customers are conventionally divided into "ordinary" (public administration entities) and those who carry out activities in individual areas of management.

An important focus of public procurement reform is professionalization, i.e., the establishment of a rule according to which persons, who have sufficient expertise in public procurement, carry out organization and conduct of procurement. It will improve the quality and manageability of the procurement procedure, save budget funds, enhance customer accountability, and allow the integrating of the function of public procurement into a comprehensive system of public finance management. In fact, the above is prescribed by the Strategy for reforming the system of public procurement ("route map") approved by the Decree of the Cabinet of Ministers of Ukraine dated February 24, 2016, No. 175-p. Starting from January 1, 2022, exclusively authorized persons, who are employees of the customer and put in charge of conducting procurement procedures, will be responsible for procurement.

The cost of the item or service of procurement and the category of goods or services specify the application scope of public procurement laws. Customers may at sole discretion use or determine their methods of calculation of the expected value of the procurement item, but the approximate method of identifying the expected value of the procurement item was approved by the Order of the Ministry of Economic Development as of 18.02.2020, No. 275.

The rules for defining the procurement item by the customer are regulated by the Procedure for determining the procurement item approved by the Order of the Ministry of Economy No. 708 as of 15.04.2020.

The procurement of goods, works and services, the value of which does not exceed 50 thousand hryvnias, requires compliance with the principles of public procurement and publication of the report on the procurement contract in the e-procurement system. At the same time, the use of the e-procurement system is also practicable in the case of procurement, the cost of which is less than 50 thousand hryvnias, conducted by a business entity, which is not a customer in the eye of the law "On Public Procurement", for any amount. Such procurements are called "pre-threshold procurements"; they are used at the customer's request as an alternative to the report on the procurement contract concluded without using the electronic system. The procedure for "pre-threshold procurement" is regulated by the Order of SE "Prozorro" No. 11 dated 20.03.2019.

3. Procurement procedure

The public procurement procedure is carried out under the following principles: 1) a fair com-

1 Prior to the adoption of the Law "On Public Procurement" No. 922-VIII as of 25.12.2015, the legal and economic principles of procurement of goods, works and services to meet the needs of the state and an amalgamated community (hromada) were regulated by the Law "On Government Procurement" No. 1197-VII as of April 10, 2014. Accordingly, the Agreement uses the term "public procurement" to refer to what is currently understood as government procurement.

petition among participants; 2) maximum economy, efficiency, and proportionality; 3) openness and transparency at all procurement stages; 4) non-discrimination of participants and equal treatment of them; 5) objective and impartial identification of the tender winner; 6) prevention of corruption and abuse. The practical significance of the above principles is growing, as they are relevant not only to a proper interpretation of the rules but are also applied by the courts when rendering decisions in cases (Case No. 902/347/20).

Study and analysis of the principles have already been subjected to scientific discussion (Karabin, 2021, 222-227), but some issues should also be covered in this article. Thus, the principle of openness and transparency of public procurement envisages openness and transparency of data on procurement, free and unrestricted access, as well as the completeness and accuracy of relevant information (Bondarenko, Pustova, 2016, 154). Customers provide all participants with free access to procurement data. In Ukraine, there is a web portal of the Authorized Procurement Agency (the Ministry of Economic Development, Trade and Agriculture of Ukraine), which is an online service for creating, storing, publishing full information about procurement, electronic auction, automatic exchange of information and documents, and use of services with automatic exchange of information, that is accessed via the Internet. The information and telecommunication system "PROZORRO" available at www.prozorro.gov.ua (Order of the Ministry of Economy, Trade and Agriculture "On the Web Portal of the Authorized Body for Procurement" dated 07.04.2020, No. 648) is the web-portal for public procurement. Requirements for the functioning of the electronic procurement system are regulated by the Procedure for the functioning of the electronic procurement system and authorization of electronic platforms approved by the Resolution of the Cabinet of Ministers of Ukraine No. 166 as of 24.02.2016.

The principle for preventing corruption and abuse is essential for many countries (Gnoffo, 2021, 75-96). In Ukraine, the public procurement procedure is also not without corruption risks (Typovi koruptsiyni ryzyky u publichnykh zakupivlyakh). In particular, some discretionary powers in procurement planning, preparation of tender documents, consideration of bid proposals can create conditions for corrupt practices, as the very customer can adequately determine the need for particular goods, specify technical, qualitative, and quantitative characteristics of the procurement item, set requirements for suppliers and terms of the contract.

Procurement activities can be exercised through one of the following procedures:

1) open bidding (it is the basic procurement procedure and is conducted for procurement exceeding 200 thousand hryvnias for goods and services and 1.5 million hryvnias for works);

2) selective tendering (a new procurement procedure, which has been commenced on 19.10.2020, is applied when the customer needs to pre-qualify participants, and the expected purchase value exceeds the amount equivalent to 133 thousand euros – for goods and services, 5150 thousand euros – for works);

3) competitive dialogue (applied when it is impossible to identify the required technical or qualitative characteristics of goods or services, as well as when the item of procurement is counselling, legal services, development of information systems, software products, use of new innovative technologies, etc.);

4) simplified procurement (it is used while procuring goods, works and services, the value of which is equal to or exceeds 50.000 hryvnias per procurement item per year and does not exceed 200.000 hryvnias for goods and services and 1.5 million hryvnias for works).

Article 17 of the Law "On Public Procurement" outlines the grounds for refusing to participate in the procurement procedure. Thus, the law includes two types of grounds for the refusal: some lead to the participant's refusal to participate in the procurement procedure, and others result in a decisive ban on participation.

4. Appeal

An appeal is an important stage of the public procurement procedure, which is focused on protecting the participants' rights and improving the quality of the customers' procurement procedure. The appeal procedure is regulated by Article 18 of the Law "On Public Procurement" and the Decree of the Cabinet of Ministers of Ukraine "On establishing the fee for filing a complaint and approving the Procedure for making a fee for filing a complaint with the appellate body through the electronic procurement system and returning it to the subject of the appeal" No. 292 dated April 22, 2020. However, the law explicitly prohibits the abuse of rights, including the right to appeal against decisions, actions, or omissions of the customer.

The Antimonopoly Committee of Ukraine acts as the appeal body in these categories of cases; its participation in protecting rights is so significant that it is also called a "kind of judicial body" (Fayizov, 2018, 31) for bidding. The complaint is submitted in the form of an electronic document via the e-procurement system; the complaint is also charged via the e-procurement system. The fee for filing a complaint varies

depending on the expected value of the procurement item and the ground being challenged, in particular, conditions of the procurement procedure or the customer's decision or action.

Following the complaint's consideration, the appeal body is entitled to render the following decisions:

1) on the establishment or absence of violations of the procurement procedure;

2) on measures which the customer is obliged to take to eliminate the violations. Such measures include full or partial cancellation of the customer's decisions, the provision of required documents, explanations, the elimination of any discriminatory conditions, bringing the tender documents in line with the law, or the cancelation of the procurement procedure in the case of impossibility to correct the violations. It is worth mentioning that the Antimonopoly Committee is not authorized to determine the winner – only the procuring entity has such authority.

The decision on the complaint's consideration is disclosed in the Prozorro system and sent to the complainant and the customer. It takes effect from the date of adoption and is binding on all persons concerned. The total number of appeals against procurement procedures is relatively small: according to official statistics of the Antimonopoly Committee, the number of appeals against decisions in judicial authorities does not exceed 5% of the total number of decisions, and courts often refuse to satisfy claims on procedural grounds without referring to the point in discussion (delay beyond deadlines, a lawsuit filed with the unauthorized court, etc.) (Hadzaman, Overko, 2020, 59).

As for judicial appeals against decisions, actions or omissions of executive authorities or local governments in the procurement procedure, the well-established case law states that "... the executive body or local government acts as a power entity in terms of the organization and procedure of bidding (tender), and disputes about the appeal of decisions or inaction of these bodies fall within the jurisdiction of administrative courts before the emergence of contractual relations between the tendering authority and the tender winner. However, after concluding an agreement between the tendering authority and the tender winner, the dispute over the legality of the tender committee's decision is subject to civil (commercial) proceedings, as it affects the property interests of the winning bidder" (Case № 918/843/17 of 14.05.2019). In other words, all legal relations before the emergence of contractual ones between the tendering authority and the tender winner of the competition based on their essence are public and fall under the jurisdiction of administrative courts.

5. Control

Control in the field of public procurement is carried out at all stages of the procedure to prevent violations of the law and bring violators to justice. The entities of control activities comprise the Ministry of Economic Development, Trade and Agriculture of Ukraine, the State Audit Office of Ukraine, the State Treasury Service of Ukraine, the Accounting Chamber, the Antimonopoly Committee of Ukraine, banks, citizens, public organizations and their unions. Statistics of procurement activities are highlighted and analyzed (Rusin, 2020).

Procurement control can take the following forms: monitoring, procurement verification, inspection (revision), and audit. Article 8 of the Law "On Public Procurement" regulates the monitoring procedure. Control and inspection are conducted under the provisions of the Law "On Basic Principles of Public Financial Control in Ukraine" and the Procedure for Conducting Procurement Checks by the State Audit Service of Ukraine and Its Interregional Territorial Bodies (Decree of the Cabinet of Ministers of Ukraine No. 631 as of 1.08.2013), and the Procedure for Inspections by the State Audit Office of Ukraine and Its Interregional Territorial Bodies (Decree of the Cabinet of Ministers of Ukraine No. 550 as of April 20, 2006).

The central executive body implementing the state policy on state financial control (State Audit Office of Ukraine) monitors the procurement procedures (analysis of the customer's compliance with the legislation during the procurement procedure, conclusion of the procurement contract and its effect to prevent violations of laws on public procurement) and supervision of the observance of procurement legislation.

The state financial control body shall publish a notice about the decision to start monitoring the procurement procedure in the e-procurement system within two working days from the date of such decision. The term of monitoring the procurement procedure shall not exceed 15 working days from the next working date from the day of publication of the notice of commencement of monitoring of the procurement procedure in the e-procurement system. The report of the controlling body shall specify what measures the customer must take and identify ways to eliminate the violations found during the monitoring (Case No. 640/467/19 as of 5 March, 2020).

The legislation entitles the customer – not the participant of the procurement procedure, or its winner, or the contractual counterparty– to appeal the monitoring report. This is the position of the court (Case No. 540/686/19).

As it stands, the Antimonopoly Committee of Ukraine is the appeal body. According to the law, it establishes Commissions for Complaints of Violations of Public Procurement Legislation, which make decisions on behalf of the Antimonopoly Committee of Ukraine. At present, Commissions for Complaints of Violations of Public Procurement Legislation have not been established, and procedures for appointing complaints commissioners take place.

In addition to state control in public procurement, public control is exercised. It is ensured through free access to the entire data on public procurement, which is subject to disclosure, or informing controlling bodies about violations of the procurements laws via the e-procurement system or in writing. Public control is also carried out via the DOZORRO system (https://dozorro.org/). It is a platform where each participant of the system (supplier, customer, controlling body, citizen) can get feedback from the state customer or supplier, discuss and evaluate the conditions of a particular item to be procured, analyze the procurement items of a particular government agency or institution, prepare and submit a formal application to regulatory authorities, and other issues.

6. Conclusions

Consequently, the institute of administrative law comprises a set of rules governing the decision on the need for procurement, preparation for procurement, as well as the procedure for procurement, appeal and control. During these stages, "the administrative method of legal regulation" is manifested (Tsybulnyk, 2018, 196), the implementation and protection of the public interest are realized.

In particular, entities entering into the relevant legal relations (customers) are entities that are created by the state or an amalgamated community to meet public needs, including taxpayers, which must be provided by the state and public finances which are spent to purchase. The Law "On Public Procurement" obligatorily regulates the procurement procedure and grounds for a refusal to participate in the procurement procedure. The Order of the Ministry of Economic Development adopted the method of determining the expected value of the procurement item, and rules for determining the procurement item by the customer are regulated by the Procedure for determining the procurement item approved by the order of the Ministry of Economy.

Appeals against actions and decisions in public procurement procedures can be made in administrative and court proceedings. The procedure for administrative appeal is regulated by the Decree of the Cabinet of Ministers of Ukraine "On establishing the fee for filing a complaint and approving the Procedure for making a fee for filing a complaint with the appellate body through the electronic procurement system and returning it to the subject of the appeal". The Antimonopoly Committee of Ukraine is the administrative body of appeal in the relevant cases, and the administrative court – the body of judicial appeal.

All the above give ground to assert the formation and becoming of a new institute of special administrative law – the institute of legal regulation of public procurement.

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ПРАВОВИЙ ІНСТИТУТ ПУБЛІЧНИХ ЗАКУПІВЕЛЬ У СИСТЕМІ ОСОБЛИВОГО АДМІНІСТРАТИВНОГО ПРАВА

Анотація. Статтю присвячено дослідженню питань правового інституту публічних закупівель, який є відносно новим, проте таким, що останнім часом стрімко розвивається в Україні. Безпосередньою ***метою*** дослідження є осмислення та систематизація прийнятого законодавства щодо публічних закупівель, виокремлення відповідного правового інституту законодавства, а також обґрунтування його галузевої приналежності.

Методи дослідження. Методологія дослідження зумовлена метою роботи, тому використовуються як загальнонаукові, так і спеціальні методи наукового пізнання. Логіка дослідження полягає в опрацюванні та вивченні сфери застосування законодавства, власне процедури закупівель та адміністративного оскарження, а також механізму контролю і правового захисту для досягнення мети й завдань, що поставлені авторами.

Результати. Проведене дослідження щодо правового інституту публічних закупівель дало змогу дійти висновку, що сукупність норм, які регулюють прийняття рішення про необхідність закупівлі, підготовку до проведення закупівлі, а також процедуру проведення закупівлі, її оскарження й контроль, є інститутом адміністративного права. Зокрема, суб'єктами, які вступають у відповідні правовідносини (замовниками), є суб'єкти, що створені державою або територіальною громадою для забезпечення потреб суспільства. Процедура закупівель та підстави для відмови в участі у процедурі закупівлі імперативно регламентовані законом, методику визначення очікуваної вартості предмета закупівлі та правила визначення замовником предмета закупівлі врегульовано актом

міністерства. Крім того, оскарження дій і рішень у процедурах публічних закупівель може здійснюватися як в адміністративному, так і в судовому порядку, при цьому органом адміністративного оскарження в зазначених категоріях справ є Антимонопольний комітет України, а органом судового оскарження – адміністративний суд.

Висновки. Усе викладене у статті в комплексі дає підстави говорити про формування та становлення нового інституту особливого адміністративного права – інституту правового регулювання публічних закупівель.

Ключові слова: публічні закупівлі, процедура публічних закупівель, інститут адміністративного права, PROZORRO.

The article was submitted 10.10.2021
The article was revised 01.11.2021
The article was accepted 22.11.2021