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The Main Stages of Tenders in Ukraine and their Shortcomings

The number and volume of legal relations in the sphere of public procurements indicate about private and legal as well as public and legal relevance of research in this field. There were registered 183 544 users and 24 454 customers of tenders in Ukraine by November, 2014; there were 471 017 promulgated notices about procurements, but only 461 485 results of procurements were promulgated. The difference between promulgated notices about procurements and results of procurements is 9532 committed administrative offences.

Problem's setting in procurements in general form is in multifaceted legal nature of the relations (civil, commercial, institutional, administrative) arising in connection with the realization of public procurements and contradictions among the normative acts regulating these relations. Public procurements according to a general rule are used to all customers and purchases of goods, as well as works and services that are fully or partially realized by the state funds with a condition if the price of purchase of goods, service (s) is equal or exceed 100 thousand UAH (in the field of building – 300 thousand UAH) and works – 1 million UAH, except purchases according to the procedure of electronic reverse auction. However, there is a great number of special acts that directly refute the general rule.

The author of the article makes the following conclusions: (1) the author believes that the nature of relations of purchases – civil and legal; correspondently the Civil and Commercial Codes of Ukraine should be the general regulations to the orders and instructions of the Ministry of Economic Development and Trade on the stated issues; (2) legislation on public procurements requires standardization and improvement; (3) the author understands that stated above conclusions require careful consideration and he would appreciate rational criticism on these issues.

Keywords: *tenders, shortcomings, purchase, Civil Code, Commercial Code.*

The number and volume of legal relations in the sphere of public purchases indicate about private and legal as well as public and legal relevance of research in this field. There were registered 183 544 users and 24 454 customers of tenders in Ukraine by November, 2014; there were 471 017 promulgated notices about purchases, but only 461 485 results of purchases were promulgated. The difference between promulgated notices about purchases and results of purchases is 9532 committed administrative offences. Information about the number of contracts and their sum has been also removed from the open access [1]. Dissatisfaction of tenders' participants and mass of corruption schemes forced the legislators to begin work on improving the legislation in this field, which resulted in the adoption of amendments to the Law of Ukraine "On Public Purchases" [2] to strengthen the transparency of enterprises' purchases.

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The author notes that research in this sphere have been recently carried out. For example, dissertations of Yuditskyi O.L. "Legal Regulation of Purchases of Goods, Works and Services for the State Funds" [5] and Petrunenko Ya.V. "Economic and Legal Basis of Public Purchases in Ukraine" [4] initiate the solution of these problems as the tasks that will be addressed, are on the boundary of civil, commercial and administrative law, while other

publications have journalistic rather than scientific nature.

As the author has just begun his scientific research in this area the main objective of the article (tasks) is to define the basic contradictions in the laws regulating the contract of purchase of goods, works and services for the state funds, which is concluded by the results of the tender (hereinafter – the contract).

To simplify the analysis of the article's material and the nature of relations arising within public purchases, we would like to define the main stages of purchase. This is due to the fact that conclusion of the contract while appealing the procedure of purchase, and in case it is concluded with violations of the terms of promulgation of the information about purchase the contract is considered null and void, thus recognition of such a transaction as null and void under the Art. 215 of Civil Code of Ukraine is not required by the court. This result is widely used by the executive authorities responsible for implementing state policy in the field of treasury services of budget funds (servicing bank) for the refusal to pay concluded and executed contract.

Stage one (organizational). Public purchases are started with the approval of the annual purchase plan at the meeting of the Tender Committee (hereinafter – TC). Imperfect procedure at this stage is that the legislator did not provide a timeframe for TC for the annual plan's elaboration, responsibility for failure of publication, approval procedure of the annual plan with the main funds manager, etc. This stage is important for the future contract, because the annual plan contains the name of the purchase's subject – the goods, works or services purchased by the customer within a single purchase procedure for participation in which participants submit tender offers (qualification, price bids) or propositions during negotiations (in case of implementing purchase procedure from one participant) or application (in case of implementing the procedure of electronic reverse auction) and the procedure of defining the purchase's object approved by the Ministry of Economic Development and Trade of Ukraine.

Stage two (promulgation of information about purchase). Throughout the purchase procedure from the beginning and up to applying the documents for payment the customer makes periodic actions for public informing the community about the progress

of the purchase procedure. According to the general rule publications are free and are printed in the "Bulletin of Public Procurements" and for a fee in "Announcer of the public procurements" in a written and electronic form. Violation of publication rules, failure of publication of the listed information is punished by the Art. 164-14 of the Code of Ukraine on Administrative Offences. The main shortcoming of the legislation regulating this stage is reduced timeframes for free publications, inadmissibility of mistakes and complexity of their correction, lack of civil and legal consequences of non-compliance procedure of publishing by the customer, the lack of direct access to the publication of the central executive authorities that realize the state policy in the sphere of treasury services of budget funds.

Stage three (direct purchase). Purchase can be done by using one of the following procedures: open bidding; two-stage tenders; quotation; participants prequalification; purchase from one participant; electronic reverse auction. It should be noted that the criteria for their separation by the legislator are not more legal, but economic. If the main criterion of the purchase realization is traditionally the cost of the contract's object, and the purchase procedures are intentionally not standardized.

Stage four (acceptance of an offer). Even it has traditional civil name, but it is characterized by certain features. Acceptance of the tender's offer or quotation (offer based on the results of implementing the procedure of purchase from one participant) – acceptance of the tender's offer or quotation by the customer, which is considered the most economically advantageous by the results of evaluation (based on the results of implementing the procedure of purchase from one participant) and consent to be bound to pay purchase's subject or its part (lot). Tender's offer, quotation, offer based on the results of implementing the procedure of purchase from one participant is considered accepted, if the customer submitted to a participant a written confirmation of acceptance of the offer in the determined time. Disadvantages of legislation regulating this stage are: legislator deliberately ignores clause 1 of the Art. 642 of the Civil Code of Ukraine, according to which the answer of a person about its acceptance, whom the offer is addressed to sign a contract, must be complete and unconditional. Acceptance in purchases is realized not by signing the contract, but promulgating "the notice about

acceptance of the tender's offer" (see stage two). Thus, acceptance does not necessarily entail the conclusion and signing of the contract.

Stage five (contract's signing). The purchase contract – is a contract concluded between the customer and a participant by the results of the purchase procedure and provides services, works or acquiring ownership of the goods for the state funds. The purchase contract is signed in a writing form and, if the purchase procedure is realized according to electronic reverse auction – in the form of an electronic document in accordance with the provisions of the Civil and Commercial Codes of Ukraine, the Laws of Ukraine "On electronic digital signature", "On electronic documents and electronic record-keeping". The legislator took a step towards customers only at this stage, because referred to the Civil and Commercial Codes not only formally, but canceled the order of the Ministry of Economic Development and Trade "On approving the Pattern contract on the purchase of goods (works or services) for the state funds and the Instruction on filling the Pattern contract on the purchase of goods (works or services) for the state funds" dated from July 27, 2010 p. № 925. It is clear that the contract's parties had difficulties and sometimes it was impossible to invest in "Procrustean bed" of one form of the contract all the versatility and diversity of civil and legal relations. But simplifying the contract's form is elimination of obstacles by the form. But still there is some inconsistency in the legislation regulating these relations. Since it is the topic of this paper we would like to consider it more detailed.

First, the contract is not "the result of the purchase procedure" because the central body of the executive power that implements the state policy in the field of treasury services of budget funds checks the existence and compliance of the concluded contract with the report on the results of conduction of the purchase procedure and the annual purchase plan before the payment under the purchase contracts. Thus, the contract should match the report on purchases, and not vice versa. The report will be "the result of the purchase procedure".

Secondly, the construction "terms of the contract" is not used correctly in the legislation about purchases. Thus, the conditions of the purchase contract shall not differ from the content of the tender's offer or quotation (including unit prices) of the winner of purchase procedure. Essential terms of the purchase contract can not be changed after it is

signed before the parties fulfill obligations in full, except as expressly provided. That is the legislator referred only the conditions about the subject and price to essential conditions in all purchase contracts. How should we deal with other terms, should we refer them to normal ones? The issue of "essential conditions" in the science of civil law was thoroughly studied by Zozuliak I.I. [3] under the supervision of Michurin Ye.O. Therefore, based on this work, we can point to the fact that the tender's offer (quotation) does not contain terms of the contract, it contains information about the subject of purchase (lots) and the bid price.

Thirdly, there is a new legal structure "term for the contract conclusion" for specialists in civil law. Each procedure is characterized by its own terms, but the procedure of their determining is approximately the same. For example, the customer concludes the contract on a purchase with the participant, whose offer in the open tender was accepted not later than 30 days from the date of an offer's acceptance in accordance with tender documents and the accepted offer.

In order to guarantee the right to appeal the customer's decisions the contract cannot be concluded earlier than 14 days after the publication of the notice about the acceptance of the offer in the state official printed publication on public purchases. Considering the schedule of publications and the date of acceptance the parties actually have a "window" in 5-6 working days to sign the contract. This unreasonably short term actually limits the parties in time and legal space and has no direct analogues in civil law.

Stage six (contract execution). Contract execution is realized by the general rules of the Civil and Commercial Codes of Ukraine. Based on the characteristics of the budget legislation the customer of public purchases is preferred to the contractor: the contract price may only be reduced; the customer can get the products in volumes of funding, but not specified in the contract; the payment may be done no later than 90 days from the date of the fee application, etc.

As a conclusion we can note the following:

- first, the author believes that the nature of relations of purchases – civil and legal; correspondently the Civil and Commercial Codes of Ukraine should be the general regulations to the orders and instructions of the Ministry of Economic Development and Trade on the stated issues;

- secondly, legislation on public purchases requires standardization and improvement;
- thirdly, the author understands that stated above conclusions require careful consideration and he would appreciate rational criticism on these issues.

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