THE NECESSITY TO ADAPT THE PUBLIC PROCUREMENT CONTRACT TO PRIVATE LAW (EU LAW)

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ABSTRACT

In this article, the authors pointed out the way of emergence and consolidation of public procurement procedures in Ukrainian law. Scientific works devoted to the consideration of public procurement in various branches of Ukrainian law have been generalized. The main conceptual contradictions between the procurement contract and the civil law contract have been established and characterized. The main (invariable) conditions of public procurement for the entire existence of the independent legal system of Ukraine have been proposed. The generalized concept of the procurement contract has been inferred. A critical analysis of the procurement contract has been made from the viewpoint of understanding and essential terms of the general civil contract.

Key words: Tender, Public Procurement, Contract, Procurement Contract, Essential Terms of the Procurement Contract, Contract Form

INTRODUCTION

Public procurement was introduced into the national legislation of independent Ukraine by adopting an order of the Cabinet of Ministers of Ukraine dated August 12, 1993, #604-r "On measures to prepare and conduct an international tender to solve the problem of transforming the "Shelter Structure" of the Chernobyl NPP object into an environmentally safe system". The aim of this act of individual action was to authorize the Minister for Emergencies and the Protection of the Population from the Consequences of the Chernobyl Disaster and his deputies to act on behalf of the Government of Ukraine in the named international organizations during the implementation of measures for the preparation and conduct of the tender, as well as during international negotiations aimed at finding the necessary sources of funding for the aforementioned works. Following the order of the European Commission, a tender was announced for the development of a feasibility study for the stabilization of the existing "Shelter" and the construction of "Shelter-2" under the "Tacis" program. On September 12, 1994, the "alliance" consortium (led by the French

company "campenon Bernard SGe"), which won the tender, began to work on a feasibility study according to the contract.

The next step in the legislative consolidation of tenders was the "Regulations on the organization and conduct of international bidding (tenders) in Ukraine" dated October 21, 1993, #871. In accordance with it, the procedure for organizing and conducting exclusively international tenders for foreign and Ukrainian enterprises, institutions, and organizations in Ukraine was determined, which guaranteed the customer performance within the agreed cost of the necessary supplies of goods, works, and services.

And finally, since 1997, the procurement procedure is introduced on the home market of Ukraine in accordance with the resolution of the Cabinet of Ministers of Ukraine "On the organization and conduct of bidding (tenders) in the field of public procurement of goods (works, services)" dated June 28, 1997, #6941. Adopted on September 19, 2019, the Law of Ukraine "On Amendments to the Law of Ukraine "On Public Procurement" and Certain Other Legislative Acts of Ukraine on Improving Public Procurement" #114-iX1 contains the quintessence of 23 years of the work of the legislator on the constant and often unreasonable complication of the procurement procedure. That is, starting with the first (and only) tender caused by the global man-made disaster, we found ourselves in a situation where government agencies make all their purchases exclusively in public, and by announcing open bidding starting with 50 thousand hryvnias.

THEORETICAL BACKGROUND

In addition to consulting practitioners, scholars from various fields of law have been actively conducting researches in the field of public procurement. The result of the scientific research was the following dissertation researches in which the solution of public procurement issues has been initiated: "Legal regulation of procurement of goods, works and services for public funds" (Yudiskyi, 2013), "Economic and legal bases of public procurements in Ukraine" (Petrunenko, 2013), "Economic and legal support of public procurement in the field of healthcare" by (Olefir, 2014), "Methodology and organization of analysis and control of public procurement" (Pismennaya, 2018), and "Theoretical principles of public procurement" by (Soshnikov, 2015). Yet, the tasks to be solved in them are outside the scope of civil law, namely, at the intersection of economics with public administration, economic and administrative branches of law. The aforementioned information preconditions the attempt to solve the practical problems of the procurement contract through the prism of civil law analysis.

The Purpose and Objectives of the Research

The purpose of the article is to critically analyse the procurement contract with the help of civil law tools and develop criteria for identifying algorisms that directly contradict the rules of civil law on the contract in the norms of public procurement. The objective of the article is to generalize the main conceptual contradictions between the procurement contract and the civil law contract (Zaitsev et al., 2020).

The Scientific Novelty of the Research

The scientific novelty of the results of the research is derivative in nature, as it is a further development of the author's ideas, which on the basis of comprehensive research but from the viewpoint of civil science analyzes the issue of civil law procurement and develops new scientific provisions and proposals to improve public procurement legislation.

Presentation of the Main Material

Since the appearance of public procurement in the law of Ukraine, the legislator has repeatedly changed their form, content, and procedure, but the two main conditions of bidding have not changed, namely:

Firstly, the transfer of state budget funds for the payment of agreements (contracts) concluded with suppliers (contractors) - winners of bidding (tenders), is carried out through the Main Department and territorial bodies of the State Treasury or authorized banks on the basis of the report on the results of bidding (tenders) for the purchase of goods (works, services). When paying under procurement contracts, banks check the availability of a report on the results of the procurement by viewing it in the electronic procurement system. In the absence of a report on the results of the procurement, the payment order is considered improperly executed.

Secondly, the cost of procurement had to be equal to or exceed the equivalent of $100,000. At the beginning of the century, the NBU exchange rate was 189.6000 hryvnias per $100, *i.e.* the sum of about 200,000 hryvnias. Nevertheless, ignoring the original logic of the legislator and the actual level of inflation of hryvnia, since then in Ukraine this requirement continues to apply to all customers and the purchase of goods, works, and services, provided that the purchase price of goods, service (services) is equal to or exceeds 200 thousand UAH, and 1 million 500 thousand UAH for works (Zaitsev, 2018).

In accordance with Para 5 of Art. 1 of the Law of Ukraine "On Public Procurement" (hereinafter the Law), a procurement contract is a contract concluded between the customer and the participant based on the results of the procurement procedure and involves the provision of services, performance of works, or acquisition of ownership of goods. Also, Para 1 of Art. 36 of the Law stipulates that the procurement contract is concluded in accordance with the provisions of the Civil Code of Ukraine (here in after the CC of Ukraine) and the Commercial Code of Ukraine, taking into account the features defined by the Law. The legal concept of the contract, which is contained in Para 1 of Art. 626 of the CC of Ukraine defines a contract as an agreement of two or more parties aimed at establishing, changing, or terminating civil rights and obligations. The Commercial Code of Ukraine does not contain a definition of the contract, so mechanically combining the two definitions we get the third one, in which the procurement contract is an agreement of two or more parties that is aimed at establishing, changing, or terminating civil rights and obligations between the customer and the participant based on the results of the procurement procedure and provides for the provision of services, performance of works, or acquisition of ownership of goods. The imperfection of this approach of the legislator is obvious and is as follows:

The concept of agreement between the parties (as the basis of contractual obligations), on which all private law is based, is replaced by the results of the procurement procedure (report on the results of procurement by its automatic generation in the electronic procurement system), *i.e.* the procurement contract is concluded not on the basis of an agreement, but on the basis of a report in the electronic procurement system.

The agreement of two or more parties in the abovementioned concept is limited to the defined and named status of the customer and the participant, *i.e.* the parties cease to be legally equal. Customers are public authorities, local governments, and social insurance bodies established in accordance with the law, as well as legal entities (enterprises, institutions, organizations) and their associations that meet the needs of the state or local community, if such activity is not carried out on an industrial or commercial basis, in the presence of one of such signs. Participant in the procurement procedure (hereinafter the

participant) is a natural person, including a natural person – entrepreneur, a legal entity (resident or non-resident), who submitted a tender offer or participated in negotiations in the case of a negotiated procurement procedure. It is clear that for the most part, the statuses of the customer and the participant are relevant at the stage "until the winner is determined". And although Art. 627 of the CC of Ukraine provides that the parties are free to enter into an agreement, choose a contractor, and determine the terms of the agreement…, but their obvious inequality is clearly traced in Art. 17 of the Law, giving the Customer the importance at their discretion to cancel the procurement in case of 1) lack of further need to purchase goods, works, and services; 2) impossibility to eliminate violations that have arisen due to identified violations of public procurement legislation; 3) reduction of costs for the purchase of goods, works, and services. Thus, in violation of the civil law principle of equality of the parties, the Customers will always be in a predominant position ahead of the Participants in the public procurement.

The law for unknown reasons restricts the establishment, change, or termination of civil rights and obligations only to the provision of services, performance of works, or acquisition of ownership of goods. In turn, the CC of Ukraine in Section III "Certain types of obligations" contains 26 chapters that enshrine certain types of contractual obligations (from purchase-and-sale to joint activities). Even such a common civil contract as a lease one cannot be attributed to the provision of services, performance of works, or acquisition of ownership of goods.

Yet, such conceptual contradictions between the procurement contract and the civil law contract, which are already in the definition, continue to grow in special differences such as:

Let us suppose that according to the logic of the legislator, the parties of the procurement contract reach an agreement through the procurement procedure. That is when the Customer has included the conditions in the draft of the contract, based on the provisions of Para 1 of Part 1 of Art. 638 of the CC of Ukraine, such conditions are the conditions on which, at the request of the customer, an agreement must be reached. Thus, if the participant submitted a tender proposal in which they agreed with the draft contract, and was recognized as the winner of the procurement procedure, they must enter into a procurement contract, the content of which should not contradict the draft of the procurement contract included in the tender documentation. At the same time, procurement contracts based on the results of the negotiated procurement procedure are concluded in a special manner. After all, in Art. 35 of the Law, there is no clear requirement for the obligation of the customer to agree with the participant (participants) during the negotiations of the draft of the contract. In accordance with Part 3 of Art. 631 of the CC of Ukraine, the parties may establish that the terms of the contract shall apply to the relationship between them which arose before its conclusion (Iasechko et al., 2020). The obligations that arose from the parties before the conclusion of their business agreement are not subject to the terms of the agreement unless the agreement provides otherwise (Part 7 of Art. 180 of the CC of Ukraine). However, this rule can be applied only when the parties to the contract have a relationship before its conclusion (Melnyk et al., 2020).

The next difference lies in determining the price of the contract. The price of the procurement contract is the price of the goods, works, or services specified in the bidding of the winning bidder (taking into account the results of the electronic auction). The terms of the procurement contract should not differ from the content of the tender offer based on the results of the auction (including unit prices) of the winner of the procurement procedure or the bidding price of the participant in the case of a negotiated procedure (Gusarov & Melnyk, 2021). The essential terms of the procurement contract may not be changed after its signing

until the fulfillment of obligations by the parties in full, except as provided by the Law (Melnyk, 2020).

This provision directly contradicts Art. 651 of the CC of Ukraine, which provides that the change or termination of the contract is allowed only with the consent of the parties unless otherwise provided by contract or law. It is clear that no customer can conclude a contract for the sum of more than the result of the winner of the auction, but the author does not share the position of the legislator, which explicitly prohibits the parties in accordance with their consent to enter into a contract for the sum of less than the result of the auction.

The next difference is related to the form of the contract. In accordance with Para I of Part I of Art. 638 of the CC of Ukraine, the contract is concluded if the parties have duly agreed on all the essential terms of the contract. Art. 205 of the CC stipulates that a transaction may be made orally or in writing (electronically). The parties have the right to choose the form of the transaction unless otherwise provided by law. As we can see, following the norms of the CC, which provides for the possibility of concluding contracts in electronic form, the customer and the winner of the bidding may enter into procurement contracts in electronic form, if they have the appropriate technical and organizational prerequisites. Since the Law does not contain a direct indication of the form of the procurement contract, we can assume that the procurement contract is possible in electronic form. However, the notice of intent to conclude a procurement contract must be published within one day from the decision to determine the winner of the procurement procedure, and within two days from the date of its conclusion for the procurement contract. The procurement contract is concluded in accordance with the norms of the CC of Ukraine and the Commercial Code of Ukraine, taking into account the features defined by the Law.

CONCLUSION

The concept of the procurement contract does not correspond to the concept of civil law contract. The procedure for concluding a procurement contract does not correspond to the procedure for concluding a civil contract. The form of the procurement contract partially corresponds to the form of concluding a civil contract. The moment of occurrence of legal relations of the procurement contract does not correspond to the order of occurrence of legal relations of the civil law contract.

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