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LEGAL NATURE OF RELATIONS IN THE FIELD OF PUBLIC PROCUREMENT THROUGH THE PRISM OF CIVIL LEGAL PRINCIPLES

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Abstract. Purpose. The purpose of the article is to identify core issues of civil relations in the field of public procurement legal regulation and to suggest ways to solve them. **Research methods**. The research was carried out using general and special methods of scientific knowledge, for example, the dialectical method allowed to analyze the legal regulation of relations in the field of public procurement as a dynamic legal phenomenon, to identify patterns of its improvement. **Results**. By its legal nature, public procurement is one of the competitive ways of concluding civil (commercial) contracts. When implementing the provisions of the Law of Ukraine "On Public Procurement" there are civil relations for the conclusion, implementation, amendment and termination of civil contracts. Relations in the field of public procurement shall be subject to the general principles of legal regulation of private legal relations, with the exceptions established by special law. The presence of restrictions and the purchase of goods, works and services for budget funds does not affect the private legal nature of relations in the field of public procurement. **Conclusions**. The use of public procurement as a special method of concluding contracts does not change the civil legal nature of relations in this area, but only indicates the need to comply with special requirements and criteria established by the legislation of Ukraine. First of all, it is a question of definition of clear criteria of defining the customers. At the same time, in the absence of clear wording concerning such customers in the legislation of Ukraine, it is the case law of the Supreme Court that should protect the rights and legitimate interests of all participants in relations in the field of public procurement.

Key words: public procurement, civil law principles, contract, customers, case-law.

1. Introduction

The state is a public entity that is responsible for financing the re-equipment of unprofitable state-owned enterprises, socially vulnerable groups and for performing of other socially important functions in the society. In this regard, it is necessary to legally define effective mechanisms for the state to exercise its powers to dispose of its property, which, in turn, determine the peculiarities of the civil status of the state as the owner.

On the one hand, the state provides state property in ownership of other entities on the basis of civil law agreements, use or management in order to obtain the greatest possible benefit (amount of money, re-equipment of existing single property complexes, etc.) On the other hand, the state cannot afford to spend money uncontrollably to purchase the necessary resources. In fact, these goals are provided by the regulatory framework in the field of legal regulation of public procurement.

The concept of public procurement first appeared in Ukraine on December 25, 2015, when the Law of Ukraine "On Government Procurement" was adopted. Previously, the legal acts used the concept of "supply of products for state needs", "state order", "purchase of goods, works, services for budget funds", "state procurement", "tender"[1]. The new version of the Law of Ukraine "On Government Procurement" changes the approaches to procurement procedures, their organization and conduct. However, the process of reforming legislation of Ukraine in the field of public procurement contin-

1 The terms « supply of products for state needs» and «state order» were contained in the first Law of Ukraine On Deliveries of Products for State Needs of December 22, 1995. Subsequently, on December 15, 2005, this law was amended, which was also reflected in its title (Law of Ukraine On Government Procurement to Meet Priority State Needs). The next Law of Ukraine On Government Procurement of Goods, Works and Services of February 22, 2000 introduced the concepts of «procurement of goods, works and services for budget funds», «tender». Instead, the Law of Ukraine On Government Procurement of April 10, 2014 used a single term «government procurement».

ues. In this regard, it is worth mentioning the adoption on December 16, 2021, of the Law of Ukraine "On Amendments to the Law of Ukraine "On Government Procurement" to create conditions for sustainable development and modernization of domestic industry" (website of the Verkhovna Rada of Ukraine).

The purpose of the article is to identify issues of legal regulation of civil relations in the field of public procurement and to suggest ways to solve them.

The materials and methods. Research on the legal regulation of relations in the field of public procurement is limited to separate articles by A. Olefir, T. Shvydka, etc., as well as a monograph by V. Malolitneva. Scientific research is based on the analysis of the current legislation of Ukraine and the current caselaw. The source base of research consistss also from articles and monographs of national and foreign researchers. Moreover, statistics in this area served as the empirical basis for the article.

The methodological component of the study consists of philosophical (dialectical), general and special research methods. The dialectical method helped to analyze the legal regulation of relations in the field of public procurement as a dynamic legal phenomenon, to identify patterns of its improvement. The general scientific methods used in the study include the systematic method, which was used to analyze and identify complex problems in the field of public procurement. The method of autopoiesis was used to study the institute of public procurement not only as a legal but also as an economic category. The structural-functional method provided an opportunity to study the institute of public procurement as a structural element of a holistic legal system. The analysis of the current legislative acts of Ukraine led to the use of the official legal method. The method of written sources analysis was used in the study of statistical data.

The above methods necessitated the use of research techniques. The following techniques were used in scientific research: induction, deduction, theoretical synthesis, analysis, description, characterization, explanation, proof.

2. Basic material statement

The Substance of Public Procurement Institute. According to a study conducted by The Organization for Economic Cooperation and Development (OECD), the amount of money spent in OECD countries on public procurement in 2016 is equivalent to 12% of gross domestic product. Thus, in 2015, this amount in monetary terms amounted to 6.3 trillion US dollars, conducting public procurement, the OECD received savings of 1%, equal to 63 billion US dollars. At the same time, according to the same site, states may lose from 10% to 30% of investment in construction due to violations of public procurement procedures (OECD website).

These data illustrate that public procurement performs several functions, both economic and legal. From the economic point of view, public procurement should ensure the efficient use of budget funds that are formed, including through the payment of taxes. From a legal point of view, public procurement should ensure transparency in the use of budget, primarily public, funds by reducing corruption risks.

By its legal nature, public procurement is one of the competitive ways of concluding civil (commercial) contracts. The main difference between public procurement and auction, tender and other special (competitive) methods is that the contract is concluded with the person who offers the most cost-effective price, provided that the tender documents meet the criteria and conditions specified by the customer. However, the low price should not affect the quality of goods, works, services, contracts for which are concluded in accordance with the Law of Ukraine "On Public Procurement".

Thus, while executing the provisions of the Law of Ukraine "On Government Procurement" there arise civil relations for the conclusion, implementation, amendment and termination of civil contracts. Relations in the field of public procurement shall be subject to the general principles of legal regulation of private law relations, with the exceptions established by special law. In the context of

updating the Civil Code of Ukraine, the general principles established in it cover the functioning of all private law and are fundamental to all its spheres (Kuznietsova, 2021, p. 194). Thus, the principles of legal regulation of civil relations, including contractual, should be reflected in the general provisions of the Civil Code of Ukraine (hereinafter the CC of Ukraine). It should be noted that the principle of freedom of contract is fundamental to the regulation of private law relations, and therefore reflected in the current CC of Ukraine. The priority of the CC of Ukraine regulations is also mentioned in caselaw. Thus, the Supreme Court in its judgement of June 22, 2021, in case № 334/3161/17 pointed out that in cases where the CC of Ukraine and the other act regulate the same relations differently, the application of the Code takes precedence. At the same time, such a legal position of the Supreme Court indicates the possibility of establishing the specifics of the settlement of civil relations in a particular area. The CC of Ukraine reflects the general principles and directions of regulation not only of civil but also of private relations in general. However, it cannot contain all the exceptions and peculiarities in all areas, which necessitates the adoption of laws that would reflect them. This conclusion is confirmed by Part 1 of Art. 41 of the Law of Ukraine "On Government Procurement", which states that the procurement contract is concluded in accordance with the Civil and Commercial Codes of Ukraine. However, the Commercial Code of Ukraine provisions on the conclusion of commercial contracts contains a reference to the CC of Ukraine, which once again emphasizes the priority of the latter in the settlement of private relations, including contractual.

Public Procurement as an Exception to the Principle of Freedom of Contract. Despite the subordination of the conclusion of a public procurement contract to the rules set by the CC of Ukraine, public procurement limits the principle of freedom of contract. At the same time, the existence of restrictions and the purchase of goods, works and services at the expense of the budget does not affect the private nature of relations in the field of public procurement. The same opinion is held by V. Vasilieva, while analyzing the legal nature of investment relations with the participation of government agencies (Vasilieva, 2021, p. 13). Thus, Art. 650 of the CC of Ukraine contains a rule on the peculiarities of the conclusion of civil agreements with the use of special (competitive) methods, which is governed by the relevant acts of civil law of Ukraine. The Law of Ukraine "On Government Procurement" is such a special act for concluding contracts with the use of tender procedures. The preamble to the Law states that it was adopted in order to adapt Ukraine's public procurement legislation to the acquis communautaire in pursuance of the Association Agreement between Ukraine, of the one part, and the European Union, the European Atomic Energy Community and their Member States, on the other part.

The use of public procurement is mandatory due to two criteria: the range of entities for which public procurement is mandatory, and the cost of procurement. These criteria are substantiated not only in the Law of Ukraine "On Government Procurement", but also in the Public Procurement Agreement of April 15, 1994. In the list of annexes to the Public Procurement Agreement, the differentiation of the obligation to conduct open or selective tender procedures is related to the status of the entity that substantiates the determination of the marginal value of the contract in special drawing rights (hereinafter, SDR, currency code XDR), starting from which tender procedures are mandatory. For example, the maximum contract value is different for the Verkhovna Rada of Ukraine (for goods: 130 thousand XDR), for the Lviv City Council (for goods: 200 thousand XDR) and for the state enterprise "Lviv Railway" (for goods: 400 thousand XDR). Thus, the subjective criterion is crucial for conducting tender procedures, while the cost criterion is ancillary.

The Law of Ukraine "On Government Procurement" also uses these criteria. Criteria for assigning the subject to the range of customers under Art. 2 of this Law, as well as in the Agreement on Public Procurement, is considered permanent. Instead, determining the type of competitive procurement procedure depends on its value. The legislator divides competitive procedures into general and simplified ones. Simplified procedures, regardless of the status of the subject, are mandatory if it costs

50 thousand hryvnias or more. General tender procedures are differentiated depending on the status of the customer. As a general rule, they are mandatory if the cost of purchasing goods and services is UAH 200 thousand, and – works UAH 1.5 million. An exception is established for customers identified in certain areas of public relations. For them, the general tender procedures are applied provided that the purchase price is equal to or exceeds UAH 1 million for goods and services, and UAH 5 million for works. The cost criterion is also used for the need to publish tender purchases in English (for goods and services the purchase price must be equivalent to at least EUR 133 thousand, for works – 5 EUR 150 thousand). There are no problems with the application of the cost criterion. Instead, the subjective criterion necessitates its interpretation in caselaw.

Thus, the Law of Ukraine "On Government Procurement" restricts the application of the principle of freedom of contract in this area in order to ensure competition and transparency in the use of budget funds. These restrictions are to determine the range of entities for which public procurement in the manner prescribed by law is mandatory, given the value of the contract. At the same time, sanctions for violating the procedure for concluding procurement contracts are determined not only by civil, but also by administrative and criminal legislation of Ukraine.

Issues of Determining the Subjective Composition of Customers

The Law of Ukraine "On Government Procurement" defines four groups of customers. The first group includes state authorities, authorities of the Autonomous Republic of Crimea and local governments, associations of territorial communities. At the same time, the status of the customer does not affect the presence in the public authority of the status of a legal entity under public law. The second group of customers consists of social insurance bodies, namely the Pension Fund and target state insurance funds for insurance against temporary disability, accidents at work and occupational diseases, health insurance and unemployment insurance. Targeted state insurance funds are essentially non-profit self-governing organizations that perform the functions assigned to them by the laws of Ukraine in the field of accumulation and administrative management of insurance premiums in the field of compulsory state social insurance and insurance payments.

The legislator outlines the third group of customers using a certain list of criteria. Firstly, these are legal entities (enterprises, institutions, organizations) and their associations that meet the needs of the state or local community. Secondly, the presence of one of these features is required:

1) such legal entity is the administrator or recipient of budget funds;

2) public authorities or other customers have a majority of votes in the supreme governing body of such legal entity or the share of shares (units) of the state, territorial community in the authorized capital of such legal entity is more than 50 percent.

At least one of the listed features is enough to classify a legal entity as a customer of the third group. However, the activity of such a legal entity on a commercial or industrial basis excludes the possibility of classifying it as a customer.

It is reasonable to agree with V. Malolitneva, who emphasizes that the Ukrainian legislator sets stricter criteria for determining customers. In particular, the status of the administrator, recipient of budget funds (grants, subsidies, compensations, etc.) should be taken into account. In European legislation, in order for a legal entity to be recognized as a customer, budget financing must predominate in the total amount of financial revenues. Instead, the Law of Ukraine "On Government Procurement" does not contain a specific indication of the amount of budget funding. Even if such budget funding is insignificant, the legal entity falls under the characteristics of the customer (Malolitneva, 2020, p. 119).

The Budget Code of Ukraine defines the concept of administrator, recipient of budget funds. Thus, the administrator is a budgetary institution authorized to receive budget allocations, budget commitments, long-term energy service commitments, medium-term health commitments and budget expenditures. At the same time, the recipient is a business entity, public or other organization that does not have the status of a budgetary institution, authorized by the budget manager to

implement the activities provided for in the budget program, and receives budget funds for their implementation.

The main difference between the administrator and the recipient of budget funds is that the administrators are public authorities, local governments, non-profit organizations established by them in accordance with the laws of Ukraine, which are fully supported by the budget of appropriate level. Chapter 8 of the Commercial Code of Ukraine provides for two types of state and municipal property, depending on the purpose of economic activity: commercial and non-commercial. At the same time, there are state non-profit or state-owned enterprises.

Non-profit enterprises are established in areas of economic activity where entrepreneurship is prohibited, in order to achieve economic, social and other results without the purpose of obtaining and distributing profits. Regarding the grounds for establishing a state-owned enterprise, the legislator sets clear requirements: the main consumer of products is the state; free competition is impossible in this sphere of activity; production of socially necessary products (works, services) is not profitable; privatization of property complexes of state enterprises is prohibited by law; the law allows only state-owned enterprises to carry out economic activities in this area. Thus, non-profit enterprises *a priori* need budget revenues, and therefore are customers according to certain criteria.

Unlike non-profit ones, commercial enterprises operate on a commercial or industrial basis and this excludes the possibility of assigning such a legal entity to customers of the third group, except when commercial state or municipal enterprises receive funds for budget programs. At the same time, it is necessary to differentiate the funds provided by the administrator for the implementation of budget programs and replenishment of the authorized capital of a state or municipal enterprise by the founder (state or local community represented by authorized bodies). In the latter case, the commercial enterprise is not a recipient of budget funds within the meaning of the Budget Code of Ukraine, which excludes the possibility of public relations on the disposal of budget funds. Private, civil law relations arise between the founder and the relevant commercial enterprise.

However, the State Audit Office of Ukraine does not differentiate between these relations, but only takes into account their subjective composition. The position of judicial authorities is similar. Thus, in the Resolution of June 11, 2020, in case No. 160/6502/19, as well as the Resolution of March 31, 2021, in case No. 260/1666/19 the Supreme Court rightly emphasizes that at the time of the disputed legal relationship the Law of Ukraine "On Government Procurement" did not specify other criteria for assigning enterprises to customers than the presence of state or municipal share of more than 50 percent in the authorized capital. However, the Supreme Court also emphasized that state forestry enterprises are entrusted with the function of the state in protecting, safeguarding, rationally using and reproducing forests; as well as protection, reproduction and rational use of the state hunting fund on the territory of hunting grounds, which determines their status as customers. The position of the higher court is similar in relation to enterprises whose economic activity is related to the development, manufacture, sale, repair, modernization and disposal of weapons, military equipment, military weapons and ammunition, which is valid indefinitely.

At the same time, in the caselaw regarding the Law of Ukraine "On Government Procurement", the Supreme Court does not justifiably give preference to the criteria for classifying state and municipal enterprises as customers over those that exclude such a possibility. Thus, in the Resolution of July 8, 2021, in the case No. 620/56/19, the Supreme Court considers it erroneous to assess the utility company as a customer, based on the criteria of commerciality of the contract and the lack of budget funds for its implementation. Instead, it outliness the evaluation of the constituent documents, in particular, information on the authorized capital, the composition of the founders, governing bodies, etc., as the determining criteria.

This position seems to be contradictory, based on the new version of the Law of Ukraine "On Government Procurement". Indeed, prior to its entry into force, the previous version of the Law

should be applied in resolving disputes, which did not provide for exceptions for state and municipal enterprises as customers. However, the current Law of Ukraine "On Government Procurement" requires the development of new approaches to the interpretation of the concept of the customer in the light of European and world developments in the field of public procurement.

The fourth group of customers is determined by the areas of activity that, in the opinion of the legislator, are the most important or strategic. The list of such industries is determined by law. A legal entity acquires the status of a customer provided that:

1) the share of the state or territorial community in the authorized capital is more than 50 percent or other customers have a majority of votes in the highest body of the legal entity or the right to appoint more than half of the executive body or supervisory board of the legal entity;

2) the existence of special or exclusive rights granted by the authorized body within its powers on the basis of any legal act and/or act of individual action that restrict the activities in the areas defined by this Law, one or more persons that significantly affect on the ability of others to conduct activities in these areas.

3. Conclusions

The influence of European and world trends on the legislation of Ukraine is undeniable. At the same time, in the course of the adaptation of national legislation it shouls be taken into account the specifics of the transition period, as emphasized in the Association Agreement between Ukraine, on the one part, and the European Union, the European Atomic Energy Community and their Member States, on the other part. In such circumstances, legislative approaches to establishing exceptions to generally private principles, in particular, the principle of freedom of contract, are changing. One of these exceptions is the mandatory application of tender procedures when concluding civil contracts.

First of all, it is a question of definition of clear criteria of assignment of subjects to customers. The existence of criteria that exclude the plurality of options for their interpretation, allows to ensure their uniform application by all regulatory and judicial authorities. At the same time, in their absence, it is the caselaw of the Supreme Court that should protect the rights and legitimate interests of all participants in public procurement. The judicial practice of the Supreme Court is the tool that eliminates their unequal application, taking into account the principle of the rule of law and other principles, including those of private law, mainly the principle of freedom of contract. For the correct application of the Law of Ukraine "On Government Procurement" it is necessary to take into account the nature of relations that arise between entities, clarify their features and outline the criteria for assigning entities to customers that ensure balance of interests of participants in these relations.

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