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FORMATION OF MAIN AREAS OF IMPROVING ADMINISTRATIVE AND REGULATORY FRAMEWORK FOR OVERSIGHT AND CONTROL OF PUBLIC PROCUREMENT IN UKRAINE

Abstract. Purpose. Conclusions. The purpose of the article is to formulate the areas of improving the administrative and regulatory framework for oversight and control in the field of public procurement in Ukraine. **Results.** The relevance of the article is that after the declaration of Ukraine's independence, the issue of reforming the regulatory framework, including the public procurement sector, which is being reformed on a systematic basis, has arisen. In determining the legal framework for oversight and control of public procurement in Ukraine, this study uses a hierarchical factor to classify them and analyses them according to the following scheme: constitutional provisions, laws of Ukraine and bylaws. Oversight and control in any sector are necessary to prevent shortcomings, detect them as early as possible and warn of possible negative consequences. It is clear that punishment for shortcomings is not the goal of oversight and control in itself. **Conclusions.** It is concluded that the main areas of improving the administrative and regulatory framework for oversight and control of public procurement in Ukraine are as follows: 1) harmonisation of oversight and control should be directed towards increasing its transparency; 2) the principles of oversight and control in the field of public procurement are determined not only by the importance of the principles as the fundamentals of such activities, but also to a greater extent by their practical component - they are intended to ensure the effective implementation of tasks and goals in the field of public procurement by the state; 3) for the purpose of establishing fair rules of conduct for controlling bodies, it is necessary to develop and adopt a 'Code of Integrity in Public Procurement' for all participants in procurement, as well as for officials of controlling and supervising entities; 4) creation of a single centralised executive body in the field of procurement with a branched structure at the local level, which also facilitates controlling bodies to carry out various control and supervisory activities in this area; 5) using the existing practice of conducting certified training courses for civil servants, it is necessary to create certified training courses for civil servants and law enforcement agencies in oversight and control of public procurement; 6) eliminate duplication of functions and powers of law enforcement agencies and strengthen coordination between all parties involved in oversight and control of public procurement; 8) in order to apply administrative liability to officials in charge of oversight and control of public procurement, it is necessary to: 1) establish clear boundaries of oversight and control over the entire cycle of public procurement; 2) develop a system of effective and enforceable sanctions.

Key words: public procurement procedure, budget funds, public finance management, competitive environment, competitive bidding.

1. Introduction

After the declaration of Ukraine's independence, the issue of reforming the regulatory framework, including the public procurement sector, which is being reformed on a systematic basis, has arisen. In determining the legal framework for oversight and control of public procurement in Ukraine, this study uses a hierarchical factor

to classify them and analyses them according to the following scheme: constitutional provisions, laws of Ukraine and bylaws. Oversight and control in any sector are necessary to prevent shortcomings, detect them as early as possible and warn of possible negative consequences. It is clear that punishment for shortcomings is not the goal of oversight and control in itself.

2. Principles of oversight and control in the field of public procurement in Ukraine

All over the world, states with different forms of government exercise control and influence the formation of relations in society, while the nature of oversight and control and the activities that accompany it indicate the nature of state power and its orientation, compliance with the proclaimed democratic principles of development (Kirika, 2012).

The public procurement system - its control, improvement, and reform - is one of the most important areas of the modernisation of economic policy in general. Procurement accounts for a significant portion of the state budget expenditures, so the use of an inefficient public procurement system leads to significant cost overruns (Recommendation of the OECD Council on public procurement, 2016).

Over recent years, Ukrainian legislation has undergone many fundamental changes in the procurement sector. Paper-based government tenders have been replaced by the ProZorro electronic public procurement system. The media started talking about efficient and transparent procurement, creating a competitive environment and focusing on preventing corruption in this sector. However, the electronic procurement system can only ensure the safety and proper protection of information, as well as the exchange of data and documents, and has no impact on the corruption component. In fact, the updated law has not solved the key problem of transparency of procurement in Ukraine and does not ensure rational and efficient use of budget funds. The most common grounds for rejection of tender proposals by contracting authorities are: "non-compliance of the tender proposal with the terms of the tender documentation." Since the Procuring Entity develops and approves the tender documentation directly and then assesses the compliance of tender proposals with the terms of the tender documentation, this ground is a universal one for abuse by the Procuring Entity, which is interested in reducing the number of tenderers without any grounds for corruption schemes. According to ProZorro's analytics module, procurement procedures suspended by appeals account for only 0.6% of the total number of procedures. The low percentage indicates that the administrative appeal system is not effective, and the lack of guidance on the application of rules and best practices in public procurement contributes to violations in public procurement. At this stage of the public procurement reform in Ukraine, the creation and development of the e-procurement system, preparation of the relevant regulatory framework, establishment of requirements for structuring and standardisation of informa-

tion at all stages of public procurement, ensuring equal access to electronic technologies used for public procurement procedures have been completed. (Levchenko, 2018).

As for the improvement of administrative and regulatory framework for oversight and control in the field of public procurement, it should be noted that this framework includes a system of measures: institutional, legislative and executive.

At the present stage, the instability of legislation is one of the main problems of the public procurement system, which leads to ambiguous interpretation of the principles and rules of public procurement and ineffective law enforcement. Therefore, one of the areas of improving the administrative and regulatory framework for oversight and control in the field of public procurement is to ensure predictability and stability of the regulatory framework through harmonisation of national legislation with EU rules, adaptation of key concepts and notions and bringing procurement procedures in line with international standards (Resolution of the Cabinet of Ministers of Ukraine On the Strategy for Reforming the Public Procurement System ("Roadmap"), 2016).

First and foremost, the harmonisation of oversight and control activities should be aimed at increasing their transparency. After all, transparency of activities means not only their 'transparency', but also that such activities are understandable to most stakeholders.

The term 'transparency' usually covers all aspects of the organisation and activities of a modern state - from the procedure for forming state bodies to the procedure for adopting and publishing texts of laws for a wide range of readers, from biographies of candidates for positions in the state apparatus to media coverage of all the details of their tenure. It is obvious that the transparency of a state institution such as oversight and control is an important part of the system of state and legal values in the modern world. In other words, transparency of the authorities implies informing the public about all the processes in the government bodies (Resolution of the Cabinet of Ministers of Ukraine On the Strategy for Reforming the Public Procurement System ("Roadmap"), 2016).

Ukrainian legal and social practice has developed certain forms of public control over oversight and control of public procurement: transparency of the procurement procedure; public awareness of the mechanism of the procurement process, of the decisions made, of the purpose of the monitoring procedure, as well as publicity and openness of the entire process. Together, all of this constitutes openness and transparency

of oversight and control in the field of public procurement (Lukash, 2019).

The work in the field of public procurement requires highly qualified oversight and control by the officials and imposes a huge responsibility. On the one hand, their activities are subject to close scrutiny by the public and the media, and on the other hand, they are subject to various influences from procurement participants who are dissatisfied with the 'attention' of the controlling authorities. Therefore, everyone is interested in having clear procurement rules and procedures in place to ensure their own professional safety. In addition to establishing clear and transparent procurement rules, an important area of the administrative and regulatory framework for oversight and control of public procurement is the establishment of fair rules of conduct for controlling authorities. For example, back in 1976, the Federal Procurement Institute was established in the United States to train and improve the skills of employees in this profile, and given the 'sensitivity' of the position of a public procurement officer, the US Congress established requirements for the integrity of this category of employees (standards of ethical behaviour) in 1988 (Brodovska, 2016).

Therefore, in our opinion, it is necessary to develop and adopt a 'Code of Integrity in Public Procurement' for all procurement participants, as well as for officials of oversight and control entities.

Public procurement in Ukraine is carried out on a decentralised basis. The system covers about 15,000 customers of various levels. Specifically, the decentralised model ensures that the needs of local communities and end users of procured goods and services are met, and that local producers are supported and encouraged to participate in public procurement. At the same time, modern international practice effectively uses the centralised procurement model, which is characterised by a reduction in total costs in the system (Resolution of the Cabinet of Ministers of Ukraine On the Strategy for Reforming the Public Procurement System ("Roadmap"), 2016). For example, an analysis of public procurement in the United States has shown the effectiveness of creating a single centralised procurement authority with a branched local structure. This also facilitates the controlling authorities to conduct various control and supervisory activities in this sector.

Thus, the use of a centralised model with optimal preservation of the advantages of the decentralised model, which is currently in place, will contribute to standardisation, professionalisation, legal certainty and the introduction of flexible methods of oversight and control

in the field of public procurement (Resolution of the Cabinet of Ministers of Ukraine On the Strategy for Reforming the Public Procurement System ("Roadmap"), 2016).

One of the important tasks of the institutional reform of public procurement is to professionalise this procurement. This will help improve the quality and manageability of public procurement procedures, ensure budgetary savings, strengthen the accountability of customers and allow the integration of the public procurement function into the overall public finance management system. Practitioners consider professionalisation of public procurement as a necessary component of adaptation to international standards and optimisation of public procurement. This process should be combined with in-depth training of both specialists involved in public procurement and control and supervisory authorities based on the use of modern methods and technologies (Selivanova, 2017).

One of the areas of the public procurement reform strategy is the development of a system of professional training of public procurement specialists and professionalisation of the public procurement sector. Professionalisation of the public procurement sector is a prerequisite for the adaptation of international standards in Ukrainian procurement practice. The main goal of professionalising public procurement is to build a highly professional public procurement market. This will allow the public procurement sector to move to a higher level - a level where effective planning is carried out and goods, works and services of the required quality are purchased in a timely manner (Selivanova, 2017).

The Public Governance Committee in the OECD Council Recommendations on Public Procurement stated that Adherents, when developing their national requirements in the field of professionalisation of public procurement, should: 1) Ensure that procurement officials meet high professional standards for knowledge, practical implementation and integrity by providing a dedicated and regularly updated set of tools, for example, sufficient staff in terms of numbers and skills, recognition of public procurement as a specific profession, certification and regular trainings, integrity standards for public procurement officials and the existence of a unit or team analysing public procurement information and monitoring the performance of the public procurement system; 2) Provide attractive, competitive and merit-based career options for procurement officials, through the provision of clear means of advancement, protection from political interference in the procurement pro-

cess and the promotion of national and international good practices in career development to enhance the performance of the procurement workforce; 3) Promote collaborative approaches with knowledge centres such as universities, think tanks or policy centres to improve skills and competences of the procurement workforce. The expertise and pedagogical experience of knowledge centres should be enlisted as a valuable means of expanding procurement knowledge and upholding a two-way channel between theory and practice, capable of boosting application of innovation to public procurement systems (Recommendation of the OECD Council on public procurement, 2016).

It should be noted that in the field of public procurement professionalisation, it is planned to introduce the qualification of 'Specialist in Public Procurement' at various levels. At the same time, qualification requirements will be established for persons who will be involved in the relevant procurement functions for customers at various stages of procurement (in particular, financial planning, preparation of specifications of the subject of procurement, marketing, organisation of procurement procedures, legal support of the public procurement process, contractual work) (Selivanova, 2017).

2. Fundamentals of oversight and control in the field of public procurement in foreign countries

Using the US experience of certification based on the established qualification requirements for officials of control and supervision entities in the field of public procurement and creating conditions for their professional growth during their tenure, it is necessary to introduce state certification of specialists in oversight and control in the field of public procurement in Ukraine. For its part, using the technical support of various international institutions, to create, on the basis of post-graduate education centres of higher education institutions, advanced training courses for employees of bodies and institutions engaged in oversight and control in the field of public procurement. Moreover, advanced training courses for civil servants, local government officials, and representatives of the authorities responsible for organising and implementing procurement of goods, works and services have been established at a number of educational institutions and are successfully operating.

For example, the National Agency of Ukraine on Civil Service has established centres for retraining and advanced training of employees of state authorities, local self-government bodies, state-owned enterprises, institutions and organisations. In addition, the Knowledge Management Portal is an educational platform

for professional training of civil servants, heads of local state administrations, their first deputies and deputies, and local self-government officials (Increasing the level of professional competence in the field of public procurement? 2020), which regularly publishes information on various types of training courses, including those on public procurement.

Therefore, using the existing practice of conducting certified training courses for civil servants, it is necessary to create certified training courses for civil servants and law enforcement agencies in oversight and control of public procurement.

In addition to the professionalisation of oversight and control in public procurement, practitioners and academics argue that the current system of state and municipal control in procurement is not coordinated, with no clear division of powers between the controlling bodies while some of them are enshrined in different bylaws. In practice, these circumstances do not always allow organising effective and efficient oversight and control activities. Therefore, we propose to regulate the issues of both state and public control at the legislative level and finally adopt the Law of Ukraine "On Public Control in Ukraine" and develop and adopt the Law of Ukraine "On Public Audit in Ukraine." In the Law "On Public Control in Ukraine," the procedures for appealing against the actions and decisions of officials in administrative and judicial proceedings should be defined and clearly prescribed.

For example, in the Austrian legislation, namely subpara. 6 of Art. 354 of the Law of Austria "On Public Procurement," a complaint to the Federal Administrative Court against actions and decisions of public procurement officials shall specify "the rights in respect of which the applicant claims that violations (objections) have been found, as well as the evidence on which the allegation of unlawfulness of actions and decisions is based" (Bundesrecht konsolidiert: Gesamte Rechtsvorschrift für Bundesvergabegesetz, 2018). In other words, the complaint shall contain specific facts of abuse or violations, and not just information that members of the public believe that the public procurement was conducted with violations. This prevents the procurement process from being delayed and reduces the risk of abuse by civil society organisations.

Iryna Bykovska, Deputy Head of the Policy Division of the Department of Public Procurement, pointed out these abuses and argued that the introduction of a fee for filing a complaint with the appeal body would help to remedy the situation. She emphasised that "since the so-called tender trolls file complaints not

to restore justice and protect their rights, but to delay the procurement procedure, influence the decision of the Procuring Entity and achieve satisfaction of their interests. However, we know that in the procurement sector you can find not only unscrupulous Bidders, but also unscrupulous Procuring Entities, and when they see that so-called 'not their' Bidders have come to the tender, they can cancel the procurement procedure, and Bidders cannot challenge this fact" (Hrubá, 2020).

In addition, the Law of Ukraine 'On the Basic Principles of State Oversight (Control) in the Field of Economic Activities' should be amended as follows: 1) to amend the title of the law by replacing it with 'On the Fundamentals of Public Oversight and Control in the Field of Economic Activities'; 2) to define: the concept and types of oversight and control; the actors (principles, tasks and their powers); and the qualification requirements for oversight and control officials.

The next area of improving the administrative and regulatory framework for oversight and control in public procurement is to eliminate duplication of functions and powers of law enforcement agencies. Duplication can be eliminated by developing and adopting a joint order 'On Interaction between Law Enforcement Bodies in the Field of Prevention and Counteraction to Offences in Public Procurement', which would clearly define the rights, duties, powers and responsibilities of law enforcement officers in the field of public procurement. Therefore, ensuring the proper level of coordination of internal control tools (including financial control, internal audit and administrative control), external control and audit, staffing of the relevant units and their functional integration will optimise 1) the monitoring of the functioning of the public procurement system; 2) reliability of reporting on violations; 3) system of channels for reporting reasonable suspicions of violations of applicable laws and regulations; 4) legislative and regulatory policy on public procurement; 5) oversight and control in line with national priorities; 6) independent assessment of oversight and control activities.

Handle complaints in a fair, timely and transparent way through the establishment of effective courses of action for challenging procurement decisions - the next area of improving the administrative and legal support for oversight and control in the procurement sector. This procedure is necessary to correct defects, prevent wrong-doing and build confidence of bidders, including foreign competitors, in the integrity and fairness of the public procurement system. Additional key aspects of an effective complaints system are dedicated

and independent review and adequate redress (Recommendation of the OECD Council on public procurement, 2016).

4. Specific features of regulatory and legal framework for oversight and control in the field of public procurement in Ukraine

The legislation of Ukraine provides for legal liability of civil servants, including disciplinary, administrative, material and criminal liability, as necessary. Civil servants are liable for violations of the law and official discipline, failure to perform or improper performance of their official duties (Khomyk, 2016).

The provisions of Law of Ukraine 'On Public Procurement' No. 922-VIII of 25 December 2015, namely Article 44, stipulate that authorised persons, officials of procuring entities, officials and members of the appeal body, officials of the Authorised Body, officials of the central executive body implementing public policy on state financial control, officers (officials) of the bodies that provide treasury services for budget funds (servicing bank) shall be liable for violation of the requirements established by this Law and regulations adopted pursuant to this Law, in accordance with the laws of Ukraine (Law of Ukraine On Public Procurement, 2015). However, the law does not specify what types of liability and for what specific actions they will be held liable.

The Code of Ukraine on Administrative Offences No. 8073-X of 7 December 1984 reveals the conditions for bringing officials to administrative liability for violations of procurement legislation by tenderers. In particular, Art. 164-14 of the CAO stipulates that "Violation of the procedure for determining the subject of procurement; untimely provision or failure to provide clarifications by the customer on the content of the tender documentation; tender documentation is not drawn up in accordance with the requirements of the law; the amount of the tender offer security set out in the tender documentation exceeds the limits established by law; failure to publish or violation of the terms of publication of procurement information; failure to publish or violation of the procedure for publishing information on procurement carried out in accordance with the provisions of the Law of Ukraine "On Amendments to Some Legislative Acts of Ukraine Aimed at Preventing the Occurrence and Spread of Coronavirus Disease (COVID-19)"; failure to provide information, documents in cases stipulated by law; violation of the terms of consideration of the tender proposal - shall entail imposition of a fine on officials (officers), authorised persons of the customer in the amount of one hundred tax-free minimum incomes of citizens" (Code of Ukraine on Administrative Offences, 1984).

Therefore, officials of the control and oversight bodies are not administratively liable for violations of the public procurement legislation and there is virtually no practice of bringing them to criminal liability for such violations.

In our opinion, it is necessary to amend Article 164-14 of the CAO and supplement it with parts 7 and 8. Thus, part 7 should be worded as follows: "Failure to provide, or untimely provision by officials of the Accounting Chamber, the Antimonopoly Committee of Ukraine, the central executive body implementing public policy on state financial control, of information necessary for risk assessment in the field of public procurement, or provision of knowingly false information to the authorised body regulating and implementing public policy on procurement, shall result in a fine on officials in the amount of two hundred tax-free minimum incomes. As for Part 8 of Article 164-14 of the CAO, it should be amended as follows: "Failure of the persons referred to in part seven of this article to take measures in the field of oversight and control provided for by law shall entail a fine on officials in the amount of three hundred tax-free minimum incomes."

Thus, in order to apply administrative liability to officials of oversight and control activities in the field of public procurement, it is necessary to: 1) establish clear lines for oversight of the public procurement cycle; 2) develop a system of effective and enforceable sanctions.

Such sanctions should be in proportion to the degree of wrong-doing to provide adequate deterrence without creating undue fear of consequences or risk-aversion in the procurement workforce or supplier community (Recommendation of the OECD Council on public procurement, 2016).

5. Conclusions

As a result, the analysis of the current state of oversight and control in the field of public procurement in Ukraine has enabled to identify areas of improving the administrative and regulatory framework for implementing such activities and to state the following: 1) harmonisation of oversight and control should be directed towards increasing its transparency; 2) the principles of oversight and control in the field of public procurement are determined not only by the importance of the principles as the fundamentals of such activities, but also to a greater extent by their practical component - they are intended to ensure the effective implementation of tasks and goals in the field of public procurement by the state; 3) for the purpose of establishing fair rules of conduct for controlling bodies, it is necessary to develop and adopt a 'Code of Integrity in Public Procurement' for all participants in procurement, as well as for officials of controlling and supervising

entities; 4) creation of a single centralised executive body in the field of procurement with a branched structure at the local level, which also facilitates controlling bodies to carry out various control and supervisory activities in this area; 5) using the existing practice of conducting certified training courses for civil servants, it is necessary to create certified training courses for civil servants and law enforcement agencies in oversight and control of public procurement; 6) eliminate duplication of functions and powers of law enforcement agencies and strengthen coordination between all parties involved in oversight and control of public procurement; 8) in order to apply administrative liability to officials in charge of oversight and control of public procurement, it is necessary to: 1) establish clear boundaries of oversight and control over the entire cycle of public procurement; 2) develop a system of effective and enforceable sanctions.

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ФОРМУВАННЯ ОСНОВНИХ НАПРЯМІВ УДОСКОНАЛЕННЯ АДМІНІСТРАТИВНО-ПРАВОВОГО РЕГУЛЮВАННЯ ЗДІЙСНЕННЯ КОНТРОЛЬНО-НАГЛЯДОВОЇ ДІЯЛЬНОСТІ У СФЕРІ ПУБЛІЧНИХ ЗАКУПІВЕЛЬ В УКРАЇНІ

Анотація. Мета статті полягає у формуванні напрямів удосконалення адміністративно-правового регулювання здійснення контрольно-наглядової діяльності у сфері публічних закупівель в Україні. **Результати.** Актуальність статті полягає в тому, що після проголошення незалежності України постало питання реформування нормативно-правової бази, зокрема й сфери публічних закупівель, реформування якої здійснюється на систематичній основі. При визначенні правових засад забезпечення контрольно-наглядової діяльності у сфері публічних закупівель в Україні використано ієрархічний чинник для їх класифікації та здійснено аналіз за наступною схемою – конституційні норми, закони України і підзаконні акти. Контрольно-наглядова діяльність в будь-якій сфері необхідна, щоб не допускати прорахунків, по можливості завчасно їх виявляти та попереджати про можливі негативні наслідки. Зрозуміло, що покарання за вчиненні прорахунки не є самоціллю контрольно-наглядової діяльності. **Висновки.** Зроблено висновок, що основними напрямками удосконалення адміністративно-правового регулювання здійснення контрольно-наглядової діяльності у сфері публічних закупівель в Україні є: 1) гармонізація контрольно-наглядової діяльності повинна відбуватися в бік збільшення її транспарентності; 2) визначення принципів здійснення контрольно-наглядової діяльності у сфері публічних закупівель зумовлена не тільки значенням принципів як основних засад здійснення вказаної діяльності, а в більшій мірі вони стосуються практичної складової – вони покликані забезпечити ефективне виконання державою завдань і цілей у сфері публічних закупівель; 3) встановлення доброчесних правил поведінки контролюючих органів необхідно розробити та прийняти «Кодекс доброчесності у сфері публічних закупівель» для всіх учасників закупівель, а також для посадових осіб суб'єктів контрольно-наглядової діяльності; 4) створення єдиного централізованого органу виконавчої влади у сфері закупівель з розгалуженою структурою на місцях, що в свою чергу також спрощує органам контролю проводити різні контр-

ольно-наглядові заходи у вказаній сфері; 5) використовуючи існуючу практику проведення сертифікованих курсів підвищення кваліфікації для державних службовців необхідно створити сертифіковані курси підвищення кваліфікації для державних службовців та правоохоронних органів контролюю-наглядової діяльності у сфері публічних закупівель; 6) усунення дублювання функцій і повноважень у правоохоронних органів та посилення координації між усіма суб'єктами контролюю-наглядової діяльності у сфері публічних закупівель; 8) для застосування адміністративної відповідальності до посадових осіб контролюю-наглядової діяльності у сфері публічних закупівель необхідно: 1) встановити чіткі межі контролюю-наглядової діяльності за здійсненням всього циклу публічних закупівель; 2) розробити систему дієвих і реалізованих на практиці санкцій.

Ключові слова: процедура публічних закупівель, бюджетні кошти, управління державними фінансами, конкурентне середовище, конкурсні торги.

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