

## THE LEGAL CHARACTERISTICS OF THE CONTRACT CONCLUDED AS A RESULT OF PUBLIC PROCUREMENT

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### **Zaiats O.S. The legal characteristics of the contract concluded as a result of public procurement.**

The relations in the field of procurement of goods, works and services for budgetary funds to meet the needs of enterprises, institutions and organizations in goods, works and services are one of the forms of cooperation between the state and subjects of economic activity. The use of public procurement involves certain procedures and mechanisms set out in the Law of Ukraine 'On Public Procurement' and a number of bylaws. For example, the specifics of public procurement of goods, works and services for customers provided for by the Law of Ukraine 'On Public Procurement' for the period of martial law in Ukraine and within 90 days from the date of its termination or cancellation are regulated by the Resolution of the Cabinet of Ministers of Ukraine No. 1178 dated 12.10.2022. The procurement agreement is the instrument and form that ensures the implementation of the regulation of relations in connection with the procurement of goods, works and services for budgetary funds. In this regard, the detailed theoretical analysis of the legal nature of this contract and its characterization have become urgent tasks of the national legal science.

The essential terms of the procurement contract shall not differ from the content of the tender offer of the winner of the procurement procedure / simplified procurement or the agreed price of the participant's offer in case of negotiation procedure, and shall not be changed after its signing until the parties have fulfilled their obligations in full, except in cases determined by law. The procurement agreement is a civil law, consensual, fixed-term, paid transaction by its legal nature and is bilateral. The procurement contract cannot be classified as a particular classification group of contracts (for the transfer of property, for the performance of works, for the provision of services, etc.) Depending on the subject matter, the respective procurement contract will be regarded as belonging to a particular group of

contracts. At the same time, when determining the thresholds (criteria) for the application of certain public procurement procedures, it is necessary to proceed from the conceptual framework of the Law of Ukraine 'On Public Procurement' (for example, lease will be treated as a service, however, the essential terms will be determined based on the legal regulation of this particular type of property transfer agreement).

**Key words:** contract, procurement contract, goods, works, services, budget funds, public procurement.

### **Заяць О.С. Правова характеристика договору, укладеного за результатами публічних закупівель.**

Відносини у сфері закупівлі товарів, робіт та послуг за бюджетні кошти задля забезпечення потреби підприємств, установ та організацій в товарах, роботах та послугах є однією із форм співробітництва між державою та суб'єктами господарювання. Застосування публічних закупівель передбачає певні процедури та механізми, що визначені Законом України «Про публічні закупівлі» та низкою підзаконних нормативно-правових актів. Так, особливості здійснення публічних закупівель товарів, робіт і послуг для замовників, передбачених Законом України «Про публічні закупівлі», на період дії правового режиму воєнного стану в Україні та протягом 90 днів з дня його припинення або скасування регламентовано Постановою Кабінету Міністрів України № 1178 від 12.10.2022. Інструментарієм і формою, який забезпечує імплементацію регулювання відносин у зв'язку із закупівлею товарів, робіт та послуг за бюджетні кошти є договір про закупівлю. У зв'язку з цим детальний теоретичний аналіз правової природи цього договору та здійснення його характеристики є актуальними завданнями вітчизняної правової науки.

Істотні умови договору про закупівлю не повинні відрізнятися від змісту тендерної пропозиції переможця процедури закупівлі / спрощеної

закупівлі або узгодженої ціни пропозиції учасника у разі застосування переговорної процедури, а також не можуть змінюватися після його підписання до виконання зобов'язань сторонами в повному обсязі крім випадків, визначених законом. Договір про закупівлю за своєю правовою природою є цивільно-правовим, консенсуальним, строковим, оплатним правочином і має двосторонній характер. Договір про закупівлю не може бути віднесено до якоїсь конкретної класифікаційної групи договорів (про передачу майна у власність, про виконання робіт, про надання послуг тощо). Залежно від предмета, відповідний договір про закупівлю й буде розцінюватися як той, що належить до тої чи іншої групи договорів. При цьому, при визначенні порогових показників (критеріїв) для застосування тих чи інших процедур публічних закупівель потрібно виходити із поняттєвого апарату саме Закону України «Про публічні закупівлі» (наприклад, оренда трактуватиметься як послуга, однак, істотні умови визначатимуться виходячи із правового регулювання саме цього виду договорів про передачу майна у користування).

**Ключові слова:** договір, договір про закупівлю, товари, роботи, послуги, бюджетні кошти, публічні закупівлі.

**The statement of problem.** The relations in the field of procurement of goods, works and services for budgetary funds to meet the needs of enterprises, institutions and organizations in goods, works and services are one of the forms of cooperation between the state and subjects of economic activity. The use of public procurement involves certain procedures and mechanisms set out in the Law of Ukraine 'On Public Procurement' [1] and a number of bylaws. For example, the specifics of public procurement of goods, works and services for customers provided for by the Law of Ukraine 'On Public Procurement' for the period of martial law in Ukraine and within 90 days from the date of its termination or cancellation are regulated by the Resolution of the Cabinet of Ministers of Ukraine No. 1178 dated 12.10.2022 [2]. The procurement agreement is the instrument and form that ensures the implementation of the regulation of relations in connection with the procurement of goods, works and services for budgetary funds. In this regard, the detailed theoretical analysis of the legal nature of this contract and its characterization have become urgent tasks of the national legal science.

**The analysis of scientific publications.** The problems of legal regulation of the procurement contract have been analysed to varying degrees by many scholars, including M. Vovk, V. Kossak, O. Fefelov, R. Shyshka, V. Shcherbyna, Yu. Yurkevych and others. At the same time,

taking into account the role and importance of the institution of public procurement in Ukraine, there is a need for the further study of this issue.

**The purpose** of this article is to provide a legal description of the contract concluded as a result of public procurement.

**The summary of the main material.** The system of state protection of economic competition that has developed in Ukraine provides, in particular, for the detection and suppression of unlawful actions that cause or may cause distortion of competition as a result of actions of the subjects of economic activity (unfair competition) or state bodies [3, p. 82]. According to the clause 6 of part 1 of Article 1 of the Law of Ukraine 'On Public Procurement' of 25.12.2015, a procurement contract is an economic contract concluded between the customer and the participant based on the results of the procurement procedure/simplified procurement and provides for the paid provision of services, performance of works or purchase of goods. At the same time, it supports the conclusion that the concepts of 'goods', 'works' and 'services' in civil law and Ukrainian public procurement legislation are different in content. In particular, the meaning of the terms used in the Law of Ukraine 'On Public Procurement' should be determined solely by the purpose of this law and can not be the subject to an extended interpretation by extending it to the other areas of regulation of public relations [4, p. 276].

As we can see, the definition of a procurement contract comes down to its definition as an economic contract. As V. Shcherbyna has pointed out, the term 'economic contract' was introduced into Ukrainian law by the Arbitration Procedure Code of Ukraine (now called the Economic Procedure Code), which regulates the procedure for consideration and resolution of economic disputes. Thus, the categories of 'contract' and 'economic contract' are correlated as general and special. As a special category of economic legislation and law of Ukraine, an economic contract has a certain legal basis [5, p. 298]. According to the part 1 of Article 181 of the Economic Code of Ukraine, economic contract is concluded in accordance with the procedure established by the Civil Code of Ukraine [6], taking into account the specifics provided for by the Economic Code [7]. The above provision has given grounds to conclude that a procurement contract, as an economic contract, is by its legal nature a civil contract with a special feature of the subject composition, since its parties may be subjects of economic activity (economic organisations and individual entrepreneurs) and/or non-economic entities with the status of a legal entity.

Classically, when determining the legal nature of any contract, it is customary to determine

its consensual or real nature, payment or gratuitousness, term or indefinite duration, unilateral or impartiality.

At the same time, R. Shyshka stated that the need for real and consensual contracts had disappeared due to the institutions and forms of contract enforcement [8, p. 68]. However, according to the other authors, the issue of determining the moment of conclusion of a contract, which is the basis for characterising contracts as consensual or real, should not be underestimated [9, p. 69].

Therefore, taking into account the peculiarities of concluding contracts based on the results of public procurement, we support the view that such contracts are consensual, paid, fixed-term (however, the procurement contract may be extended for a period sufficient to conduct a procurement procedure/simplified procurement at the beginning of the next year in an amount not exceeding 20 per cent of the amount specified in the initial procurement contract concluded in the previous year, if the expenditures for this purpose are approved in accordance with the established procedure) and bilateral.

According to the Article 41 of the Law of Ukraine 'On Public Procurement', the procurement contract shall be concluded in accordance with the provisions of the Civil and Economic Codes of Ukraine, taking into account the established peculiarities. Thus, the winner of the procurement procedure/simplified procurement, when concluding the procurement contract, must provide: relevant information on the right to sign the procurement contract; a copy of a licence or permit (if any) for a certain type of economic activity, if obtaining a permit or licence for such activity is provided for by law and if this was specified in the tender documentation/announcement of a simplified procurement or required by the customer during the negotiation. At the same time, it is prohibited to conclude procurement contracts that provide for payment by the customer for goods, works and services before/without procurement procedures/simplified procurement, except in cases specified by law [1].

The essential terms of the procurement contract shall not differ from the content of the tender offer / offer based on the results of the electronic auction (including the price per unit of goods) of the winner of the procurement procedure / simplified procurement or the agreed price of the participant's offer in case of application of the negotiation procedure, except for cases of determining the monetary equivalent of the obligation in foreign currency and/or cases of recalculation of the price based on the results of the electronic auction towards reduction of the price of the tender offer / offer of the participant without reducing the volume. The essential terms of the procurement

contract shall not be changed after its signing until the parties have fulfilled their obligations in full, except in cases specified by the Law of Ukraine 'On Public Procurement', for example, in case of reduction of the procurement volume, in particular, taking into account the actual amount of the customer's expenses [1]. In particular, the Ministry of Economy of Ukraine, in connection with the peculiarities of public procurement for the period of martial law, clarified that there is a list of cases of changing the essential terms of the contract, including the right to change the price per unit of goods in the procurement contract in proportion to the fluctuation of the price of such goods on the market, subject to documentary evidence of such fluctuation, etc. At the same time, according to the legal position set out in the resolution of the Grand Chamber of the Supreme Court of 24.01.2024 which is relevant in this regard it is stipulated that in any case the price per unit of goods cannot be increased by more than 10% of the price of goods determined by the parties in the contract based on the results of the procurement procedure, regardless of the number and timing of price changes during the term of the contract. In other words, during the term of the procurement contract, the parties may repeatedly change the price of the goods upwards, subject to the conditions set out in the Article 652 of the Civil Code of Ukraine and paragraph 2 of part 5 of the Article 41 of the Law of Ukraine 'On Public Procurement', but the total increase in such price shall not exceed 10 % of the price of the goods determined by the parties when concluding the contract based on the results of the procurement procedure [11]. At the same time, O. Fefelov rightly focused on the reduction of the timeframe for consideration of complaints by the panel of the Antimonopoly Committee of Ukraine and that it currently ranges from 7 to 12 business days [12].

It is generally agreed that the procurement contract should be based on the draft of this contract (as part of the tender documentation and the offer) and contain similar terms and conditions. However, this does not deny that the terms of the draft may be subject to editing at the time of contract conclusion, especially when errors (misprints) in the draft are obvious. The Law of Ukraine 'On Public Procurement' requires that the terms of the procurement contract do not differ from the content of the tender proposal, and its essential terms do not change after signing (with certain exceptions). The terms of the procurement contract must not go beyond the tender proposal in its essence. Insignificant differences between the terms of the procurement contract and its draft, which in their content do not define new contractual obligations, do not narrow or, conversely, do not expand the contractual

obligations of the parties arising from the tender offers and tender documentation, and do not contradict the latter, cannot lead to the nullity of the procurement contract [13, p. 85-86].

**Conclusions.** Summing up the above, it should be noted that a procurement contract by its legal nature is a civil law, consensual, fixed-term, paid transaction and is bilateral in nature. The procurement contract cannot be classified as a particular classification group of contracts (for the transfer of property, for the performance of works, for the provision of services, etc.) Depending on the subject matter, the respective procurement contract will be regarded as belonging to a particular group of contracts. At the same time, when determining the thresholds (criteria) for the application of certain public procurement procedures, it is necessary to proceed from the conceptual framework of the Law of Ukraine 'On Public Procurement' (for example, lease will be treated as a service, but the essential terms will be determined based on the legal regulation of this type of property transfer contract).

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