

ЗАКОНОДАВЧЕ ВРЕГУЛЮВАННЯ ПРАВОЗАСТОСУВАННЯ

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IMPROVEMENT CRIMINAL RESPONSIBILITY FOR CRIMES PUBLIC PROCUREMENT

In this article authors are ground the necessity of addition of the Criminal code of Ukraine by a new norm that would envisage criminal responsibility for offence in the field of the public purchasing.

Keywords: public purchasing; responsibility; counteraction; losses.

Обґрунтовано необхідність доповнення Кримінального кодексу України нормою, що б передбачала кримінальну відповідальність за правопорушення у сфері державних закупівель.

Ключові слова: державні закупівлі; відповідальність; протидія; збитки.

Обоснована необходимость дополнения Уголовного кодекса Украины нормой, которая бы предусматривала уголовную ответственность за правонарушения в сфере государственных закупок.

Ключевые слова: государственные закупки; ответственность; противодействие; убытки.

The modern period of development of Ukraine is characterized by the variety of problems, which need increased attention and immediate decisions, among which a special place is given to prevention of crimes in the field of public procurement.

Studies of the experience of the Ukrainian law enforcement bodies' activity, grounded analysis of criminogenic processes in our country give the grounds to consider, that the most widespread and socially dangerous unlawful acts are crimes, committed in the course of performing public procurement. As during the last years the field of public procurement attracts more and more attention of organized criminal groupings and corrupted officials, who started use them as a tool for quick and unpunished criminal wealth accumulation. It has almost become a regular thing, when certain officials start openly competing with the state, actually substituting it. Prevention of criminal offences in the course of performing public procurement has acquired not only economic, but also social and political countrywide nature. Such position results in weakening of social and legal control over the situation in the country, growth of executive and legislative power with the criminal structures, their invasion to the spheres of administration, etc. [1].

The long-standing need in practice of effective special investigative prevention of crimes in the field of public procurement have been studied in the works of national and foreign scientists: K. V. Antonov, V. I. Antypova, D. A. Balandina, V. T. Bilous, I. L. Blizniuk, Yu. N. Demidova, V. V. Daragan, V. S. Zelenetskyi, R. V. Illiukhina, O. V. Kopan, O. V. Kopitsa, Yu. V. Latova, V. V. Lysenko, V. N. Onyshchenko, O. B. Sakharov, S. V. Sobur, S. S. Cherniavskyi and others. However, the offered scientific concept do not make a single system, scientists and practitioners have no agreement as regards numerous key notions and categories, among which there is an issue of responsibility for crimes in the field of public procurement. This requires development of new approaches, critical thinking over the existing scientific doctrines.

The abovementioned circumstances stipulate the necessity of further improvement of prevention of criminal offences in the field of public procurement. In particular by way of strengthening responsibility for offences in this sphere.

The aim of preparation of this article is grounding the necessity of supplementing the Criminal code of Ukraine (CCU) with the new regulation, which would stipulate criminal responsibility for legal offence in the field of public procurement.

As it is evidenced by the analysis of statistical data from MIA subdivisions, within 2007–2011 there have been over 3 300 criminal proceeding initiated in the said filed.

This way, as the result of actions taken in 2013, the MIA subdivisions have detected over 1 870 criminal offences, committed in the course of performing public procurement. The detected amount of losses as of the moment of beginning of prejudicial inquiry within criminal proceedings in the field of public procurement makes over UAH 860 million.

Among the detected legal offences 464 (26%) are serious and particularly serious criminal offences, of which 382 (21%) are with material losses from UAH 100 thousand to UAH 1 million, and 82 (5%) – over UAH 1 million.

In particular, in the course of preparation and performing the procedure of procurement for public funds there were detected 859 (44%) criminal offences, and in the course of performing contractual obligations under agreements entered into as the result of performed procurement – 1 011 (56%) legal offences.

It is worth mentioning that last year the operating subdivisions of MIA of Ukraine in the said field detected 1 135 crimes, while only over 8 months of this year there were by 40 % more such crimes detected [2].

This way, obvious increase of the number of criminal offences in the field of public procurement in Ukraine gives rise to serious concern, as they are of great danger for social security in the country.

Pursuant to the requirements of article 7 of the Law of Ukraine «On performing public procurement», state regulation and control in the field of procurement are carried out by: Authorized body (central body of executive power, which carries out the state policy in the field of public procurement – currently: the Ministry of economic development); State treasury service of Ukraine; State financial inspection of Ukraine; Counting chamber; Antimonopoly committee of Ukraine, as well as under article 9 of the Law, it is civil control in the field of public procurement contemplated, which is to be

provided through free access to all information concerning public procurement, which is subject to public disclosure [3]. So, the law enforcement bodies are not at all included into the list of bodies for state regulation and control in the field of procurement.

Today, responsibility for violation of the legislation on performing procurement of goods, works and services for state funds, is stipulated by article 164¹⁴ (Violation of legislation on performing procurement of goods, works and services for state funds) of the Code of Ukraine on administrative offences (CUAO).

This way, in accordance with the information of the State statistics service of Ukraine, during 2005–2012 the regulatory authorities have detected and documented 8 666 offences in the course of performing procurement of goods, works and services for state funds under article 164¹⁴ CUAO. Under results of proceedings, 6 112 (70%) of administrative proceedings are closed under of article 247 (Circumstances. Excluding proceedings in the case on administrative offense) CUAO.

Therewith in 2012, out of 1 556 administrative offenses, 83% are closed on the basis of article 247 CUAO and only under the results of consideration of 186 (16%) cases, penalties are imposed as regards the offenders [4].

As it is envisaged by analysis of practice and scientific researches, modern legislation does not establish direct dependence between the amount of losses caused to the state as the result of violation of competitive legislation and the scope of responsibility. So, for violation of the legislation on performing procurement of goods, works and services for state funds, the participant of the procurement procedure may be convicted under part 1 article 164¹⁴ CUAO with the maximum penalty of UAH 17 thousand, and in case of repeated offence during one year after imposing the administrative penalty for the offence, stated in part 1 article 164 CUAO – just UAH 25 thousand [5]. In line with this, committing the offence in the field of public procurement, namely by way of exceeding the price of the agreement entered into with the winner of the tender over the real price by 2–5 percent in a 500-thousand order shall allow the persons concerned to pay for the possibility of imposing a penalty enough and to spare.

At the same time, in CC of Ukraine there is a number of criminal legal regulations concerning responsibility for actions,

stipulated by description of article 164¹⁴ CUAO, which cause harm to social relations, protected by the said Code. In particular, these regulations are supported by articles, which qualification relates to both – official criminal offenses (articles 358, 364, 366, 367 CC of Ukraine), and offenses against the property (articles 190, 191 CC Ukraine) [6]. Analysis of the practice testifies to the fact that qualification of actions of officials under the said articles not always covers all publicly dangerous acts, related to violation of legislation in the field of public procurement.

This way, there is absolutely no punishment for participants of procurement procedures, having conspired with the customer (administrator of state funds, who carries out procurement in the order, established by the Law of Ukraine «On carrying out public procurement») with the purpose of avoiding competitive selection. The term «competition» itself means competition in any field between individuals and legal entities (competitors), interested in achievement of one and the same aim [7].

Besides, the biggest problem in the course of detecting losses in the event there are violations of legislation in the field of public procurement for example under qualification of a criminal offence, stipulated by article 191 (Assumption, waste of property or possession of it by way of abuse of position) CC of Ukraine there is no single method for calculation of such losses (last attempt of the State financial inspection to bring for consideration of the Cabinet of Ministers of Ukraine of draft methods was adopted in February this year). This leads to impossibility of reimbursement of losses detected. The guilty persons may be actually brought to administrative responsibility (for example, imposing maximum penalty in case of repeated violation in the amount of UAH 25 500 in the event of causing actual losses for billions). One more consequence of absence of a legal mechanism for calculation of losses in this field is often impossibility to start a criminal procedure [1].

This way, it would be feasible that establishing the amount of losses as the result of violation by the customers of requirements of the legislation in the field of public procurement was applied by bodies, authorized to carry out control in the field of public procurement, in the course of performing by them controlling events. In particular, there shall be established the amount of losses, caused

as the result of: a) procurement of goods, works or services without implementing respective procurement procedures, including as the result of division of the subject of procurement for the purpose of avoiding performing procurement procedures; b) failure to perform by the customer of the requirements of the Law of Ukraine «On carrying out public procurement» concerning cancellation of goods (other procurement procedures); c) unlawful application by the customer of procurement procedure with one participant; d) entering into agreement on procurement with essential terms (except prices), which differ from the terms, stated in the offer of the participant, selected by the winner of the procurement procedure, and subsequent change of such essential terms of agreement on procurement not in conformance with the Law of Ukraine «On carrying out public procurement»; e) detecting other violations of the order of performing public procurement, under the formula: $A_l = (P_a - I_p) \times Q_a$, where: A_l – the amount of losses caused; P_a – the actual price of a unit of the subject procurement; I_p – the index of price of a unit of the subject procurement; Q_a – the actual quantity of purchased units of procurement [8].

Characterizing modern legislation in the field of public procurement from the general point of view, it is possible to make conclusions, that it is too complicated, rather nontransparent and too gentle to the violators.

Taking into account the abovementioned and the significant danger of violations in the field of public procurement, we consider that availability of only administrative responsibility in the legislation contributes to decriminalization of the field of public procurement not in full scope.

The abovementioned circumstances, at put opinion, reason the necessity of supplementing the Criminal code of Ukraine with the regulation, which would stipulate criminal responsibility for offenses in the field of public procurement, namely it is offered that articles of section VII of Criminal code of Ukraine (Crimes in the field of economic activity) shall be supplemented with article 210¹ «Violation of legislation on public procurement» read as follows:

1. Intentional, for mercenary purpose, other personal interests or in the interest of any third parties violation of the legislation, which governs public procurement, if such actions have caused great

material damage to the customer of public procurement, state or local budget, or commitment of it repeatedly within a year after imposition of administrative penalty for one of offences, stated in part one article 164¹⁴ of the Code of Ukraine on administrative offences,-

Shall be punished with penalty from ten thousand up to twenty five thousand of personal exemptions of citizens or imprisonment for the term up to three years, with the prohibition to hold certain positions or to be engaged in any activity for the term up to three years.

2. Actions, stipulated by part one of this article, committed repeatedly or by previous concert of a group of persons,-

Shall be punished with penalty from twenty five thousand of personal exemptions of citizens or restriction of freedom for the term up to five years, with the prohibition to hold certain positions or to be engaged in any activity for the term up to three years.

3. Actions, stipulated by parts one or two of this article, committed by an organized group or if they have caused material damage of particularly large amounts , -

Shall be punished with imprisonment for the term from five up to ten years, with the prohibition to hold certain positions or to be engaged in any activity for the term up to three years with forfeiture of property.

Pursuant to this article material damage shall be deemed large, if it is 6 thousand times exceeds personal exemption of citizens, and particularly large amounts – such which 17 thousand and more exceeds personal exemption of citizens.

Therewith we propose to exclude part 2 article 164¹⁴ CUAO.

This way, criminal influence in the field of public procurement shall be considered as a certain accumulation, set of special facilities of methods, stipulated by the law. Let us notice, that the variety of types and forms of social and economic relations objectively stipulates also respective variety of facilities and their protection. To this specter also belong not only civil and administrative legal facilities, but also, mandatorily, criminal instruments, which in their essence represent the exceptional guarantor from violations in the field of economic activity on possible kinds of unlawful conduct, including in the field of public procurement.

As well as, coming forward with an initiative of improvement of criminal legal regulation in the field of public procurement, we

make it closer to existing realities and supplementing to the existing register of criminal legal prohibitions

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