

# WAYS TO IMPROVE THE LEGAL REGULATION OF DEFENSE PROCUREMENT IN UKRAINE

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**Abstract.** The article examines problematic issues of the functioning of defense procurement and their impact on the state's defense capability. The issue of improving the current norms of the Law of Ukraine «On Defense Procurement» was considered. It was emphasized that in the conditions of a full-scale invasion of the Russian Federation on the territory of Ukraine, the prompt adjustment of state policy in the field of providing for the Armed Forces of Ukraine and other components of the security and defense forces depends on the quality of the current legislation of Ukraine.

In domestic science and practice, the issue of defense procurement is new and insufficiently studied, since the relevant legislative act, which regulates the specified sphere, – the Law of Ukraine “On Defense Procurement” – de jure entered into force only on January 1, 2021, and de facto – partially began to be applied from January 1, 2022, since with the beginning of the full-scale invasion of the Russian Federation on the territory of Ukraine, procurement procedures, stipulated by the specified legal document, were not applied.

Inadequate and/or low-quality legislation in the field of defense procurement leads to a decrease in the effectiveness of the security and defense sector in performing its functional duties, and therefore decreases the level of the state's defense capability. The full-scale invasion of the Russian Federation on the territory of Ukraine requires prompt adjustment of state policy in the field of logistical support of the Ministry of Defense of Ukraine, the Armed Forces of Ukraine, territorial defense forces in their composition, the Security Service of Ukraine, other subjects of the security and defense sector, the introduction of non-standard approaches to the introduction of the latest technologies with the aim of increasing the capacities of these structures. In this regard, legislation in this area should be immaculate and meet modern requirements.

**Keywords:** legal regulation, defense procurement, logistical support, security and defense sector of Ukraine, defense capability, state security.

## INTRODUCTION

The process of improving the current legislation of Ukraine is dynamic and is always carried out in parallel with the development of civil society. After all, the driving force behind any changes, including legislative changes, is precisely the active position of citizens who want to live in better conditions and develop together with the world community. The analysis of the current

legislative acts shows that during the period of their validity changes are constantly made to them, the majority of which improve these norms.

Legislation in the field of defense procurement is no exception to this. Despite the fact that the Law of Ukraine «On Defense Procurement» was adopted on July 17, 2020, it also contains norms that need to be improved, contradict each other, and therefore must be coordinated and brought into line.

The main goal of the article is to study current issues related to the improvement of defense procurement as a component of the state security of Ukraine. In addition, it is necessary to find out which norms of the current legislation in the field of defense procurement do not meet the modern requirements of the development of society and require appropriate changes.

## **MATERIALS AND METHODS**

To achieve the goal of this scientific work, the author used a set of methods. First, the historical and legal method, with the help of which the genesis of the formation of defense purchases was investigated. Using the system and structural method, it became possible to propose directions for improving the current legislation in the field of defense procurement. The method of system analysis made it possible to single out and analyze the conflicting norms that exist in the normative legal acts that regulate the field of defense procurement and to propose ways to solve them.

## **RESEARCH RESULTS AND DISCUSSION**

In recent decades, many countries, including European ones, have initiated reforms in the field of public procurement. One of the main reasons for carrying out these reforms was the reduction of budget expenditures, the fight against corruption and the stimulation of market competition (Dolhyi, Lyseiuk, 2021).

From the time of Ukraine's independence until December 31, 2020, the main legislative act in the field of procurement for defense needs was the Law of Ukraine "On State Defense Order".

Since 2014, after the first acts of armed aggression by the Russian Federation, the volume of purchases of weapons, ammunition and other military goods has been constantly increasing. In 2021, the budget expenditures of the Ministry of Defense of Ukraine within the framework of the state defense order reached UAH 26.4 billion, which is almost five times more than the similar expenditures in 2014. That year the Ministry of Defense of Ukraine spent UAH 5.6 billion on the modernization and purchase of weapons.

Until 2024 inclusive, the Ministry of Defense planned to spend more than UAH 95 billion on the modernization of weapons and military equipment.

At the same time, most defense procurement procedures were carried out in violation of the principles of competition, openness and transparency, which led to the existence of a number of corrupt practices. Thus, during the execution of the state defense order, intermediaries who did not have a production base and did not perform real work were often used. Often, the price of the state contract was artificially increased, and the supply of products was fictitious, either with a replacement for a lower-quality analogue, or with used equipment. Corruption schemes that have arisen in this area are constantly being the subject of analytical studies, as well as resulting from investigations

conducted by the National Anti-Corruption Bureau.

All this became a decisive factor for the initiation and introduction of changes in the field of defense procurement.

Currently, significant reforms are taking place in the defense sector of Ukraine, but it still does not meet modern requirements. Problems and challenges arising in the field of defense are fundamentally new and scientifically based approaches to the formation of national military organizations, the search for more effective methods and mechanisms for protecting national interests from real and potential threats of a military nature (Murashko, 2021).

With the entry into force of the Law of Ukraine «On Defense Procurement», the Law of Ukraine «On State Defense Order» became invalid. In this regard, the conceptual apparatus in the specified field was changed and significantly expanded, completely new mechanisms and procedures for providing defense customers with defense goods, works and services were established.

As noted by A.V. Dimich, «in the modern period of radical changes and reforms in all spheres of social activity, the problem of regulatory and legal regulation of logistical support of the state security of Ukraine in a special period is urgent. After all, the impact on all spheres of society depends on effective regulatory and legal regulation. Therefore, only with the help of the legal norms enshrined in the relevant regulatory legal acts, the subjects of the state security of Ukraine can not only function within the limits established by the current legislation, but also effectively solve the tasks they face. The law itself should clearly regulate the activities of the said bodies, grant them the appropriate powers necessary for administration, define their tasks and functions.» (Dimich, 2019).

We agree with the opinion of O.I. It was mentioned that «given the limited state funds, there is an urgent need to increase the efficiency of their use. On the one hand, the important tasks of the state should be to increase the level of socio-economic development of the country, ensure sustainable economic growth, support the national security of the country, and on the other hand, to promote the development of a perfect competitive environment, the implementation of the tasks of integration into the world economic space, which actualizes the need for appropriate institutional changes regarding the mechanism of public procurement of goods and services in the national economy in order to consolidate the trends of positive dynamics of economic growth» (Miniailo, 2011). The full-scale invasion of the Russian Federation on the territory of Ukraine requires prompt adjustment of state policy in the field of logistical support of the Armed Forces of Ukraine, the Territorial Defense Forces as part of them, the Security Service of Ukraine, other components of the defense forces, the implementation of non-standard approaches to the introduction of the latest technologies in the interests of building the capabilities of the specified structures.

All this is possible under the condition of the presence of a qualitative regulatory and legal component of the specified social relations.

In this regard, the author proposed the following ways of improving defense procurement, which can be conditionally divided into 2 categories:

I. Inconsistency of the conceptual apparatus.

1. Some norms of the articles of the Law of Ukraine «On Defense Procurement» operate simultaneously with the concepts of «goods, works and services of defense purpose» and «other goods, works and services for the

guaranteed provision of security and defense needs» (e.g., preamble to the Law, part one of Article 2 etc).

Instead, clauses 24, 25, 29 of the first part of Article 1 of the Law of Ukraine «On Defense Procurement», which define the concepts of «defense services», «defense works» and «defense goods», respectively, provide that goods, works and services for the guaranteed provision of security and defense needs are components of the specified concepts and do not require separate allocation according to the text of the Law of Ukraine «On Defense Procurement».

In this regard, and with the aim of bringing the conceptual apparatus of the Law of Ukraine «On Defense Procurement» in line with each other, the author suggested making the following changes:

1) the first paragraph of the preamble to the Law of Ukraine «On Defense Procurement» shall be amended as follows:

«This Law defines the general legal principles of planning, the procedure for forming the scope and features of procurement of defense goods, works and services to meet the needs of the security and defense sector, as well as the procedure for state and democratic civil control in the field of defense procurement»;

2) clauses 21, 26 of the first part of Article 1 of the Law of Ukraine «On Defense Procurement» shall be amended as follows:

«21) defense procurement — procurement by the state customer of goods, works and services of defense purpose, intended for the implementation of state programs in the spheres of national security and defense;

26) service of the state customer — a business entity that belongs to the sphere of management of the state customer, or a structural unit of the state customer, authorized by him to carry out purchases and conclude state contracts (agreements) for the purchase of goods, works and services for defense purposes»;

3) Paragraph 2 of Part One of Article 2 of the Law of Ukraine «On Defense Procurement» shall be amended as follows:

«the value of the procurement item for defense goods and services equals or exceeds 200,000 hryvnias, for defense works — 1.5 million hryvnias, to the state customers specified by this Law who carry out defense procurements»;

4) the first part of Article 24 of the Law of Ukraine «On Defense Procurement» shall be amended as follows:

«1. Simplified bidding using an electronic procurement system is a procedure used by the state customer during a special period in Ukraine or during the introduction of a state of emergency, or during an anti-terrorist operation, or during the implementation of measures to ensure national security and defense, repulse and deterring the armed aggression of the Russian Federation in the Donetsk and Luhansk regions, in the event that information on the purchase of goods, works and services for defense purposes does not constitute a state secret.»

II. Problematic issues of the application of current legislation in the field of defense procurement.

1. Part eight of Article 18 of the Law of Ukraine «On Defense Procurement» stipulates that the consideration of proposals for the procurement of defense goods, works and services under closed procurement is conducted by a collegial body formed by the state customer and consisting of at least five official or official persons of such customer. Decisions of the collegial body

are recorded in protocols indicating the roll-call voting of all its members. The order of formation and the organizational and legal status of a collegial body are determined by the state customer.

In addition, in the fifth part of Article 38 of the Law of Ukraine «On Defense Procurement» it is fixed that for violation of the requirements established by this Law in the part of making decisions on the selection and application of types of procurement, members of the tender committee, authorized person(s), members of the collegial body of the state customer are personally liable in accordance with the laws of Ukraine.

The preservation in the progressive Law of Ukraine «On Defense Procurement» of such an institution as the «collegial body of the state customer» returns the sphere of procurement to the past, since both the tender committee and the collegial body of the state customer (which is essentially the same tender committee, with one the difference is that it functions to conduct closed procurements) provide for collective irresponsibility.

That is why the author proposes to exclude from the text of the Law of Ukraine «On Defense Procurement» such a concept as «collegial body of the state customer» and to state in the new version:

1) part eight of Article 18:

«8. Consideration of proposals for the purchase of defense goods, works and services under closed procurement is carried out by an authorized person (persons). Decisions of the authorized person are recorded in protocols.»

2) part five of Article 38:

«5. For violation of the requirements established by this Law at the time of making decisions on the selection and application of procurement types, the authorized person (persons) shall be responsible in accordance with the laws of Ukraine.»

2. Defense purchases, as a socially significant sphere of legal relations, are based on legally defined principles that are inherent only to them.

Article 3 of the Law of Ukraine «On Defense Procurement» establishes the principles of defense procurement, which include the following:

– timeliness and compliance with decisions made regarding the protection of Ukraine's national interests, ensuring security and defense needs;

– the sequence of making and implementing decisions regarding the development and procurement of goods, works and services for defense purposes, the systematicity of their implementation;

– competitiveness;

– efficiency of use of funds, effectiveness;

– openness and transparency (except for information that constitutes a state secret and the disclosure of which may harm national security);

– prevention of corruption, abuse and discrimination;

– integrity, coherence, systematic planning and financing of defense purchases, taking into account priorities and limitations established by state programs in the spheres of national security and defense.

– In addition, all possible candidates who, in accordance with the law, submitted the necessary documentation within the specified time limits, may be admitted to the electronic auction. For enterprises admitted to bidding, there is a declarative announcement regarding the parameters, and then the main parameter is the price. On the one hand, this principle is a good tool to ensure competition in the procurement process. At the same time, in the

case of procurement for the needs of the defense and security sector, it can become a tool for all kinds of manipulation and disruption of trades, which can entail negative consequences (Riabykh, 2020).

Taking into account that any participants can be admitted to participate in electronic auctions solely on the basis of the provided documents, unscrupulous participants who offer their products can provide an offer with obviously overstated parameters and an understated price. Thus, according to the results of the bidding, such a participant will be the winner, but will a supply contract be concluded and will the equipment meet the stated requirements in practice. Re-trafficking takes time, and when it comes to defense matters, this can be a critical factor (Riabykh, 2020).

In this regard, such gaps in the current legislation may be subject to manipulation by the relevant participants in defense procurement, which are subordinate to the aggressor country. They can fictitiously participate in procurement, offering the lowest price, while having no real intention to fulfill their obligations.

In the process of procurement for defense needs, participants can be required to undergo departmental tests in order to confirm the tactical and technical characteristics of the products, which as a result gives permission to participate in the bidding. For example, in the USA, only certified manufacturers who have passed a number of serious inspections along the entire control vertical are allowed to trade. This approach makes it possible to exclude the possibility of participating in supplies for an army of unreliable companies (Riabykh, 2020).

Thus, the Law of Ukraine «On Defense Procurement» also provides for the possibility of using a «multi-level process» of checking participants for compliance with the requirements of the procurement customer. However, the legislator granted discretionary powers to the state customer in the field of defense during the selection of evaluation criteria for the participant's proposals.

In this regard, the author proposes to supplement Article 3 of the Law of Ukraine «On Defense Procurement» with the following principle — «*good faith and trustworthiness of the procurement participant*», since the acquisition of equipment, ammunition, military equipment for defense needs has its own characteristics, which are significantly different from procurement, which are carried out in other areas.

## **CONCLUSIONS**

Despite the fact that the Law of Ukraine «On Defense Procurement» was adopted relatively recently (July 17, 2020), some of its provisions need to be improved and brought into line with each other. The field of defense procurement is in a state of formation and development, and therefore the quality of the provision of the security and defense sector, and therefore the defense capability of the state, depends on the quality of the legislative framework in this field.

It is worth noting that defense procurement solves not only the issue of current support for the activities of relevant state authorities, but is also one of the effective tools of state policy. The Law of Ukraine «On Defense Procurement» provides for conceptual changes to the rules of procurement

for defense needs, compared to the previously valid Law of Ukraine «On State Defense Procurement», starting from the planning stage and up to the control of the activities of state customers.

The proposed changes to the current legislation will bring the conceptual apparatus of the Law of Ukraine «On Defense Procurement» into conformity with each other, which will exclude the possibility of different interpretations of the same norms, will provide for the final introduction of the institute of «authorized person» in the field of procurement to replace any collegial bodies, including the tender committee, the activity of which should have been terminated as early as January 1, 2022.

## RECOMMENDATIONS

The practical significance of the obtained research results can be used in the law enforcement sphere (for the improvement of the current legislation in the field of defense procurement) and in the scientific research sphere (can be the basis for further improvement of the legal regulation of the sphere of defense procurement).

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