

НАПРЯМ 6. АКТУАЛЬНІ ПРОБЛЕМИ ТЕОРІЇ І ПРАКТИКИ ПРАВА, УПРАВЛІННЯ ТА ВРЯДУВАННЯ У ВОЄННИЙ І ПОВОЄННИЙ ПЕРІОД

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BALANCING NATIONAL SECURITY AND PROCUREMENT EFFICIENCY: COMPETITIVE VS. NON-COMPETITIVE PROCEDURES

Defense procurement is a critical aspect of any country's national security strategy, particularly during times of conflict. The legal framework governing defense procurement is a balancing act between national security imperatives and the efficient use of public funds. This thesis explores the challenges and strategies involved in balancing national security with procurement efficiency, focusing on the trade-offs between competitive and non-competitive procedures.

Defense procurement is the backbone of a nation's military readiness. It encompasses the acquisition of equipment, goods, and services essential for the operation of the armed forces, including weaponry, uniforms, fuel, and construction of military infrastructure. For Ukraine, which has been in a state of war since 2014 and more intensively since the full-scale Russian invasion in 2022, efficient and timely procurement has become even more critical. Any delays or inefficiencies in the procurement process can have significant implications for military operations, soldier welfare, and overall national security.

However, defense procurement is also an area that requires a high level of scrutiny. Governments must ensure that public funds allocated for defense are spent efficiently and that procurement processes are free from corruption and abuse. This need for oversight must be balanced against the urgency of national security requirements, particularly in wartime when rapid acquisition of resources can be critical to survival.

The Ukrainian government, like many others, employs both competitive and non-competitive procurement procedures. Each has its advantages and drawbacks, particularly in the context of national defense.

Competitive procurement is widely regarded as the most transparent and cost-effective method for acquiring goods and services. Under competitive procedures, contracts are awarded based on a fair and open bidding process where multiple suppliers compete to offer the best value for money. This process reduces the risk of corruption, and encourages innovation by fostering competition among suppliers.

In Ukraine, competitive procedures have been a cornerstone of public procurement, especially with the introduction of the "ProZorro" electronic procurement system in 2016. ProZorro has become a hallmark of transparent procurement, allowing government contracts to be advertised publicly and ensuring that bidders are treated fairly. Competitive procedures are particularly suitable for acquiring non-sensitive defense-related goods, such as uniforms, fuel, and food supplies, where time is not a critical factor and a broader pool of suppliers exists.

While competitive procurement is generally preferred for its transparency and cost-effectiveness, there are circumstances in which non-competitive procurement procedures are necessary. These procedures, also known as direct or sole-source procurement, involve the awarding of contracts without a competitive bidding process. In the context of defense, non-competitive procurement is often used when the goods or services required are of a sensitive or urgent nature, where the need for security or speed overrides the benefits of competition.

Recent reforms in Ukraine have attempted to strike a balance between these two procurement methods. Considering the principle of reasonableness and expediency, under martial law, the obligation to carry out procurement activities depending on the value of the subject of procurement on a competitive basis for goods and services over UAH 200 thousand and works over UAH 1.5 million has been established [1, clause 8]. The above does not apply to the procurement of defense goods, works and services that constitute a state secret, as well as the procurement of weapons, military and special equipment, ammunition and their components and services for the development, repair, modernization of weapons, military and special equipment, ammunition and their components, goods, works and services for the construction of military engineering and fortifications.

The use of competitive procedures has also become mandatory in the following cases: 1) public procurement of goods, works and services is carried out for mobilization and civil protection measures; construction, reconstruction, overhaul and arrangement of places of residence of internally displaced and evacuated persons; construction, reconstruction, overhaul or current repair, arrangement of civil protection structures, including dual-purpose, simple structures, shelters; preparation for the heating season (except for the purchase of energy); 2) procurement of goods, works and services to ensure the functioning of critical infrastructure facilities [1, clause 9].

It worth to do analysis of procurements by two leading independent procurement organizations – State Enterprise of the Ministry of Defense of Ukraine "Defense Procurement Agency", specializes in the procurement of weapons and military equipment and State Enterprise of the Ministry of Defense of Ukraine "State Logistics Operator" or "The State Operator For Non-Lethal Acquisition" (DOT), which meets the needs of the Armed Forces of Ukraine in food, fuel and lubricants, clothing and medical supplies.

According to the Unified State Register of Legal Entities, Individual Entrepreneurs and Public Organizations, the company was registered as a legal entity under public law on June 17, 2022, and its first procurement through the ProZorro electronic system was dated January 11, 2023. The total number of announced procurements is 273, of which 58 were made without the use of the electronic procurement system (non-competitive procedures) [2].

According to the Unified State Register of Legal Entities, the individual entrepreneur was registered as a legal entity under public law on November 4, 2022, and the first procurement under the ProZorro electronic system was made on December 07, 2023. The total number of announced procurements is 586, of which 128 made without the use of the electronic procurement system (non-competitive procedures) [3].

While Ukraine's defense procurement system has made significant strides, several challenges remain. The most prominent issue is the risk of over-reliance on non-competitive procedures, which can undermine efforts to maintain transparency and efficiency in defense spending. In wartime, the pressure to expedite procurement can often result in bypassing competitive procedures, even in cases where competition could be feasible.

Another challenge is the potential for corruption. Non-competitive procurement, by its nature, provides fewer safeguards against corruption, as contracts are often awarded without the checks and balances that competition provides. In Ukraine, where corruption has historically been a significant issue, ensuring accountability in non-competitive procurement is vital. Recent reforms have aimed to address this by introducing caps on profit margins for defense contractors and requiring detailed cost breakdowns in contracts, but the effectiveness of these measures remains to be seen.

Additionally, the dynamic and rapidly changing nature of Ukraine's defense needs during the war makes it difficult to maintain a consistent procurement strategy. Legislative changes and emergency decrees can create confusion among procurement officials, suppliers, and oversight bodies, potentially leading to mismanagement or delays in critical acquisitions.

Striking the Right Balance. The key to balancing national security and procurement efficiency lies in a flexible yet accountable system that can

adapt to the specific needs of wartime while maintaining a commitment to transparency and cost-effectiveness. Competitive procedures should be prioritized whenever possible, particularly for non-sensitive goods and services where time is not of the essence. For more sensitive or urgent procurements, non-competitive procedures should be used judiciously, with strong oversight mechanisms in place to prevent abuse.

To improve procurement efficiency while ensuring national security, Ukraine could consider several measures: enhancing oversight mechanisms for non-competitive procurement, including the use of independent audits and parliamentary review; streamlining competitive procedures to reduce the time required for bidding and contract awards, ensuring that competition can still occur even in a time-sensitive environment; introducing penalties for inflated pricing or failure to meet contract specifications, particularly for suppliers awarded contracts through non-competitive processes.

Balancing national security and procurement efficiency is a complex task, particularly in times of war. Competitive procurement offers the best means of ensuring transparency and accountability, but in some cases, non-competitive procedures are necessary to meet urgent defense needs. The challenge for Ukraine is to develop a procurement system that maximizes efficiency without compromising security or transparency, ensuring that public funds are spent wisely even in the most difficult circumstances.

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