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THE METHODOLOGY FOR CONDUCTING A CONFORMITY ASSESSMENT REGARDING THE ABSENCE OF COMPETITION FOR TECHNICAL REASONS, WHICH MUST BE DOCUMENTED BY THE PROCURING ENTITY IN CASE OF PARTICIPATION OF A NON-RESIDENT PARTICIPANT IN THE PROCUREMENT

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The legal mechanism of procurement in Ukraine is defined by a number of regulatory documents, namely: The Law of Ukraine 'On Public Procurement' [1], Special Regulations No. 1178 [2], Special Regulations No. 1275 [3]. These regulations establish the legal and economic basis for the procurement of goods, works and services for contracting authorities, including ensuring their protection from military threats. Guided by them, procuring entities must proceed from the existing need for procurement or the need for the planned need for the next year.

According to the fourth paragraph of sub-clause 5 of clause 13 of the Specifics No. 1178 [2], the procuring entity may purchase goods and services (except for routine repair services) whose cost is equal to or exceeds UAH 100 thousand, routine repair services whose cost is equal to or exceeds UAH 200 thousand, works whose cost is equal to or exceeds UAH 1.5 million without using open tenders and/or an electronic catalogue for the procurement of goods in the event that goods, works or services can be supplied, performed or rendered exclusively by a certain entity.

In accordance with the first paragraph of clause 9 of the Specifics No. 1275 [3], the purchase by public customers of defence goods and services, other goods and services for guaranteed security and defence needs, the cost of which is equal to or exceeds UAH 200 thousand, defence works and works for guaranteed security and

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defence needs, if their cost is equal to or exceeds UAH 1.5 million (except for procurement of goods, works and services for defence purposes that constitute a state secret, as well as procurement of weapons, military and special equipment, ammunition and their components and services for the development, repair, modernisation of weapons, military and special equipment, ammunition and their components, goods, works and services for the construction of military engineering and fortification structures), without procurement in the electronic procurement system is allowed in the presence of one of the circumstances specified in clause 13 of the Specifics No. 1178 [2].

Therefore, the procurement of goods, works and services may be carried out without the use of open tenders and/or an electronic procurement catalogue under the following conditions: first, the value of the procurement subject must be as defined by the Specifics No. 1178 [2] or Specifics No. 1275 [3] (threshold); second, the procuring entity must have documented one of the legally defined grounds for procurement, namely, the absence of competition for technical reasons.

When applying this ground, the procuring entity shall publish the following documents in the electronic procurement system within 10 business days from the date of the contract conclusion: (1) a report on the procurement carried out without the use of the electronic procurement system, (2) the procurement contract and annexes thereto, (3) justification of the grounds on which the procurement was carried out. Such a justification in the form of an administrative decision of the procuring entity or other document shall be prepared by an authorised person or other official (officer) of the procuring entity and agreed (approved) by the head of the procuring entity or another person designated by the head of the procuring entity.

The practical implementation of the legal provision on confirmation by the procuring entity of the absence of competition for technical reasons is complicated by a number of problems, namely: (1) the document by which the procuring entity must confirm the absence of competition for technical reasons; (2) requirements for the body that should draw up such a document, in particular: an expert institution, since in practice such confirmation is provided by: certificates of a single manufacturer provided by chambers of commerce and industry; opinions, expert reports of various expert institutions, etc. and are mostly of low quality or of dubious legal validity.

At the same time, it is worth noting the legal conclusions of the courts that the only proper document to confirm the absence of competition for technical reasons is an expert opinion provided by an expert institution that: (1) has the appropriate authority under the charter; (2) the qualifications and competence of the experts of such an institution are confirmed by documents [4].

In our opinion, which is reflected in previous publications [5, p.61-62], the expert institution must also additionally prove to the procurement entity that: (3) the expert opinion (expert report) provided to confirm the absence of competition for technical reasons was created under controlled conditions in accordance with the requirements: DSTU EN ISO/IEC 17020:2019 (EN ISO/IEC 17020:2012, IDT; ISO/IEC 17020:2012, IDT) - Management system of the inspection body; ISO 9001:2015, IDT (DSTU ISO 9001:2015) - Quality management systems; ISO 37001:2016, IDT (DSTU ISO 37001:2018) - Anti-corruption management systems; DSTU ISO/IEC 27001:2023 (ISO/IEC 27001:2022, IDT) - Information security management systems. This means that the expert body must implement the requirements of the specified international ISO standards in its activities and be accredited and certified in accordance with the requirements of these standards. (4) the risks of professional activity of an expert institution should be covered by a voluntary professional liability insurance contract in case of damage to third parties caused by the conformity assessment (expert opinion). And such a third party is, first of all, the procuring entity as the consumer of the expert opinion.

The authorised body and document in the field of public procurement, which will serve, as noted by O. Krylova, as an expert assessment that provides transparency in procurement and is a kind of competitive mechanism in such procurement [6, p.161], since they are carried out without the use of open tenders and/or an electronic procurement catalogue, are outlined.

In the modern scientific and legal doctrine, the term 'competition' is understood as rivalry (competition) between different participants in the market economy for the most favourable conditions for the production and sale of goods and services, for the appropriation of the largest profit. It acts as a force that mobilises personal economic interest and entrepreneurial potential and is aimed at their maximum realisation, which ensures the interaction of supply and demand that balances market prices. Therefore, the 'absence of competition' is the actual absence of rivalry (competition) between different participants in the market economy for the most favourable conditions for the production and sale of goods and services, for the appropriation of the largest profit [7, p.102].

The Great Encyclopaedic Dictionary of Law defines economic competition as the competition of business entities when their independent actions limit the ability of each of them to influence the general conditions for the sale of goods on the market, stimulate the production of these goods (works, services) that are needed by the consumer [8].

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Therefore, the conformity assessment regarding the absence of competition for technical reasons, which must be confirmed by the procuring entity, must be ensured, given that the conceptual framework of state regulation of the country's sustainable development is based on the harmonious (balanced) development of economic, social (public), environmental and institutional components, which is implemented through the development, approval and implementation of relevant conceptual regulatory documents.

An expert study of the absence of competition for technical reasons is carried out by conducting a thorough analysis and obtaining conclusions and justifications through research scientific procedures with the use of specialised legal and/or specialised knowledge possessed by experts, using empirical methods, including comparative analysis and synthesis, induction and deduction, abstraction, generalisation, analogy and others.

The methodology for proving the absence of competition for technical reasons, if the procurement participant is a resident of Ukraine, is based on the following analysis processes:

First, the study should establish a correspondence between the data on the subject matter of the procurement planned by the procuring entity and the data on the probable supply of goods (performance of works and provision of services) that can be provided by the participant as an exclusively defined business entity. A document containing initial data on the subject matter of procurement may be an order for an expert opinion, if the procurement customer directly applies to an expert institution for an expert opinion, or a letter from the procurement customer sent to the procurement participant, if the probable procurement participant directly applies to the expert institution for an expert opinion, fulfilling a kind of

order given to it by the procurement customer to obtain an expert opinion on the basis of the said letter. The data on the procurement planned by the procuring entity must contain a clear name of the procurement item with reference to a single procurement classifier, for example, procurement of goods under DK 21:2015 42120000-6 - Pumps and compressors; procurement of services under DK 021:2015 - 72310000-1 Data processing services; procurement of services under DK 021:2015: 85320000-8 Social services (under the Classifier of Social Services 015.3 «Day care» for persons with disabilities (except children) and the elderly), etc. In such documents, the procuring entity, announcing its intention to carry out the procurement and to study the issue of the probable participation of the tenderer, must also outline the technical requirements for the subject of procurement, as well as determine which qualification criteria provided for in part two of Article 16 of the Law of Ukraine «On Public Procurement» [1] must be met by the tenderer.

Secondly, the study must establish the compliance of the tenderer's powers in the procurement. In support of this, the participant must provide an extract from the Unified State Register of Legal Entities, Individual Entrepreneurs and Public Organisations regarding its state registration in Ukraine, which is used to study the compliance of its economic activities with the subject of procurement. If the tenderer is not directly the manufacturer of the goods (contractor, service provider), the authorized company must have exclusive rights granted by the manufacturer of the goods (contractor, service provider), which are documented by.

Thirdly, given the conclusions of the courts that the documentary justification of the 'lack of competition for technical reasons' is considered more objective if it is based on external regulatory and/or technical documents adopted and/or approved by the competent authority in accordance with the law [9], the study should be based on the documents available to the procurement participant that confirm the uniqueness of its goods (works, services). Such documents may be, for example, (1) an expert opinion provided by a competent departmental institution that the equipment on which the service is provided meets the requirements of regulatory documents on technical information protection; (2) an expert opinion provided by a competent departmental institution on the organisational and technical solution for the deployment of a comprehensive information protection system (3) a certificate of compliance with the requirements of ISO/IEC 27701:2019 and/or ISO/IEC 27001:2013, etc.

A separate feature in establishing the uniqueness of the procurement subject, according to the documents provided by the customer of the conformity assessment (independent professional examination), is the expert composition of the expert group. The practical experience of such expert work [10] allows us to draw attention to the expediency of conducting a comprehensive scientific

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examination in such cases, which involves both scientists in the fields of legal sciences and technical sciences. It is the results of such a comprehensive scientific examination that do not raise doubts about the objectivity of establishing the uniqueness of goods (works and services), since they are studied from the standpoint of knowledge that is the field of legal and technical sciences.

Therefore, establishing the uniqueness of the procurement tenderer's goods (works, services) allows to distinguish it in the statement that the tenderer is the only supplier of goods (contractor, service provider) in Ukraine that are the subject of the procurement planned by its customer, and can only be ensured by a comprehensive scientific examination with the participation of scientists in the fields of legal sciences and technical sciences.

Fourthly, the study must establish the tenderer's compliance with the qualification criteria set by the procurement customer in accordance with part two of Article 16 of the Law of Ukraine «On Public Procurement» [1]. Compliance is established on the basis of documents provided by the tenderer. The scientific literature notes that a clear definition by the procurement customer of the qualification criteria and the list of documents confirming them avoids practical problems and ambiguous understanding of the legal provision, namely: «...a method of documentary confirmation of the tenderer's compliance with the qualification criteria in accordance with the law...» [1, c.62]. In the absence of a method of documentary confirmation by the tenderer of the relevant qualification criterion established by the procurement customer, the study is based on the documents provided by the tenderer at its own discretion.

Conclusions. The developed methodology allows to ensure the proper assessment of compliance with the absence of competition for technical reasons, which must be confirmed by the procurement customer, in accordance with the fourth paragraph of subparagraph 5 of paragraph 13 of the Specifics No. 1178 or the first paragraph of paragraph 9 of the Specifics No. 1275, with the participation of a resident participant in the procurement, by an expert institution that meets the following requirements: (1) has the appropriate powers in accordance with the charter; (2) the qualifications, competence and authority of its experts are confirmed by documents; (3) is accredited and certified in accordance with the requirements of DSTU EN ISO/IEC 17020:2019 (EN ISO/IEC 17020:2012, IDT; ISO/IEC 17020:2012, IDT) - Management systems of the inspection body; ISO 9001:2015, IDT (DSTU ISO 9001:2015) - Quality management systems; ISO 37001:2016, IDT (DSTU ISO 37001:2018) - Management systems for combating corruption; DSTU ISO/IEC 27001:2023 (ISO/IEC 27001:2022, IDT) - Information security management systems; (4) the risks of its professional activity are secured by a voluntary professional

liability insurance contract in case of damage to third parties, which is primarily the procurement entity as a consumer of the expert opinion.

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