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ON THE QUESTION OF THE CHARACTER OF PUBLIC PROCUREMENT

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Abstract. *The authors of the article considered the legal character of public procurement as one of the elements to ensure the implementation of the principle of information openness (public reliability) at all stages of this process. This process is aimed at observing the interests of procurement participants, as well as the state and society as a whole.*

This study puts forward and substantiates the thesis that an important aspect of the publicity of procurement is the need to ensure their openness and transparency (public reliability) or, in other words, to ensure the transparency of the procurement process. In this case, thanks to the open process of planning and involving a wide range of participants in procurement, their competitiveness increases, which makes it possible to reduce the initial (maximum) contract price and use the best conditions for its execution. This, in turn, contributes to the rational and economical use of funds allocated for procurement.

Keywords: *public procurement, public interest, information openness, public credibility, anti-corruption policy.*

Introduction

One of the main principles of the formation of the existing Russian procurement system is the principle of information openness (public reliability) of all stages of

this process, from procurement planning, determining the contract executor and ending with monitoring the effectiveness of their implementation.

This vector of system development is aimed at ensuring the unity of the economic space, creating conditions for the effective satisfaction of the social and economic needs of society, expanding the opportunities for the participation of business entities in procurement, developing fair competition, and preventing corruption.

In this regard, it seems necessary to consider the issue of public procurement as one of the elements to ensure the implementation of the above principle, aimed at observing the interests of procurement participants, as well as the state and society as a whole.

Public procurement is a fairly common term, but it has neither a legal definition nor a single doctrinal approach. The definition — public (publicus) has several meanings in the sources of Roman law. In some fragments there is a direct indication that publicus can mean both "belonging to the Roman people" (patrimonium populi), and "belonging to the Roman people and designated for public use"[1].

As E. A. Sukhanov, the traditional distinction between private and public interest, in turn, became the basis for the separation of private and public law[2]. In the Digests, according to Ulpian, public law refers to the position of the Roman state, private law to the benefit of individuals, since "there is public utility and private utility" (sunt enim quaedam publice utilia, quaedam privatum — D. I.1.2.)[3].

Questions of the ratio of public and private interest are analyzed from different positions. So, N. E. Tyurina, exploring different views on the delimitation of public and private interests, indicates that the concept of "public" is used most often in cases of manifestation of powerful state powers (public legal entities, public relations, etc.). As a result, the identity of the concepts of "public" and "state" arises, while the concept of "public" retains a special meaning[4].

In turn, R. I. Sitdikova notes that the identification of the definitions "public" and "public" is associated with their semantic similarity: the word "public" is synonymous with the word "society"). At the same time, attention is drawn to the position of Totiev K. Yu.: "in legal regulation, "public", "state" and "public" interests

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[1] Cit. according to *Karadzhe-Iskrov N. P.* Public things. Issue I / N. P. Karadzhe-Iskrov. Irkutsk: Edition of the Irkutsk section of scientific workers, 1927. VIII, 79 p. (A series of scientific monographs. Department of Law edited by Prof. G. Yu. Manns and Prof. B. B. Cherepakhin / Irkutsk Section of Scientific Workers of the Education; Issue X, No. 2). P. 1.

[2] *Sukhanov E. A.* On private and public interests in the development of corporate law // Journal of Russian Law. 2013. No. 1.

[3] Digests of Justinian. T. I. Books I–IV /ed. L. L. Kofanov. M., 2002. S. 82–83.

[4] *Tyurina N. E.* International trade as a factor in the development of international public law / Scientific editor G. I. Kurdyukov. Kazan, 2009. S. 101.

are actually distinguished. Continuing the reasoning about the character of public interests, the author means by them the positive interests that are inherent in society as a whole; they differ from public ones in that, in their content and orientation, they represent interests aimed at achieving good goals that correspond to general ideas of morality, morality, and justice[1].

Thus, the public interest should be distinguished from the public, acting wider than the public. So, P. Z. Ivanishin, exploring the issue of civil legal means aimed at protecting public interests, notes that public interest "is the totality of all existing interests aimed at the benefit of members of a particular community of persons", acting as an "ideal model of the needs of society". At the same time, public interest "reflects the functions of the state and is aimed at meeting the needs of society, i.e., satisfaction of the public interest" and is "a real model of the needs of society". According to the right opinion of the noted author, every public interest is public, but not every public interest is public, i.e., recognized and provided by the state[2].

Judicial practice gives us its vision of public interest. For example, in the Review of judicial practice in the application of the legislation of the Russian Federation on the contract system in the field of procurement of goods, works, services to meet state and municipal needs[3] (hereinafter — the Review of the Supreme Court of the Russian Federation on the contract system dated 28.06.2017) cases affecting the public interest include:

1. the condition of the additional agreement, according to which the price of the contract increases in excess of 10%, is void in the relevant part as contrary to the law, and at the same time infringing on public interests, rights, and interests of third parties — other participants in the procurement (clause 11);
2. violation of the principles of openness, transparency, restriction of competition, unreasonable limitation of the number of participants in the procurement, and, consequently, infringing on public interests and (or) the rights and legitimate interests of third parties (clause 18);
3. infringing on public interests is, among other things, a transaction in the course of which an explicit prohibition established by law was violated (paragraph 75 of the Resolution of the Plenum of the Supreme

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[1] *Sitdikova R. I.* Private and public interest in copyright. M.: Statute, 2013. 159 p.

[2] *Ivanishin P. Z.* On the issue of delimitation of public and public interests. Scientific notes of the Kazan branch of the Russian State University of Justice. T. 10. Kazan: Otechestvo, 2014. S. 129–132. 296 s.

[3] Decree of the Presidium of the Supreme Court of the Russian Federation dated June 28, 2017 "Overview of the judicial practice of applying the legislation of the Russian Federation on the contract system in the field of procurement of goods, works, services to meet state and municipal needs" // Herald of the Supreme Court of the Russian Federation. 2017. No 12.

Court of the Russian Federation of June 23, 2015, No. 25[1]) (paragraph 18 paragraph 5);

4. the absence of public procedures contributed to the creation of a preferential position of the sole supplier and made it impossible for other economic entities to exercise their right to conclude a contract, in connection with which the disputed contract is a void transaction that violates the express prohibition established by law (clause 18 paragraph 9);
5. the transfer of funds to the customer according to the third notice (in this case, we are talking about three bids filed by one participant) is not aimed at compensating for the losses of the customer himself, but pursues the public law goal of maintaining the discipline of procurement participants, encouraging them to properly comply with the requirements of legislation on the contract system (paragraph 32);
6. delaying the auction procedure may cause damage to the state in the form of failure to perform the relevant work within the time limits established by the auction documentation and violate public interests (paragraph 43).

According to A. V. Spirin, "public interest (the boundaries of which are defined in the law) can be limited — private. The opposite situation (priority of private interest over public interest) is possible only in cases expressly provided for in the law"[2]. A similar point of view is expressed by O. Yu. Kravchenko: "In order to achieve a public goal, some limitation of private interests in the interests of society is possible. However, such a restriction must have limits and be implemented strictly within the framework established by law, in compliance with all constitutional principles"[3].

This is especially true in the area of procurement. For example, a restriction on procurement participants, which can only be small businesses, socially oriented non-profit organizations (Article 30 of Law 44-FZ[4]); it is not allowed to include a number of requirements in the procurement documentation (article 30 of the

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[1] Resolution of the Plenum of the Supreme Court of the Russian Federation of June 23, 2015 No. 25 "On the application by the courts of certain provisions of Section I of Part One of the Civil Code of the Russian Federation" // Bulletin of the Supreme Court of the Russian Federation. 2015. No. 8.

[2] *Spirin Alexander Vladimirovich*. Public Interest in Criminal Proceedings // Bulletin of the East Siberian Institute Ministry of Internal Affairs of Russia. 2019. No. 1 (88). URL: https://cyberleninka.ru/article/n/publichnyy-interes-v-ugolovnom-sudoproizvodstve (Date of access: 02/17/2020).

[3] *Kravchenko O. Yu.* Public and private interests in law: political and legal research: abstract dissertation … candidate of legal sciences: 12.00.01. Kazan, 2004. P. 10. 27 p.

[4] Federal Law of April 5, 2013 No. 44-FZ "On the contract system in the field of procurement of goods, works, services to meet state and municipal needs" // Collected Legislation of the Russian Federation. 2013. No. 14. Art. 1652.

Law 44-FZ, article 3 part 6.1, article 30 of the Law 223-FZ[1]); prohibition of advance payment in case of application of anti-dumping measures during the competition and auction (Article 30 part 13 of the Law 44-FZ); choice of the method of purchase if the goods are included in the list established by the Government of the Russian Federation (in the form of only an electronic auction — article 59 part 2 of Law 44-FZ, purchases in electronic form — article 3 part 8, article 30 of Law 223-FZ), etc.

Methods

The main methods that were used in the course of writing this work are: the comparative legal method, the method of complex analysis, the method of interpretation, the method of system analysis and the method of intersectoral approach.

Results and discussion (results and discussion)

In relation to the field of procurement, "public interest" is associated with the concept of "public procurement". However, the character of the latter in legislation, jurisprudence and doctrine is not currently properly disclosed. It should also be noted that along with the above concepts, the concept of "public needs" is also used.

Public procurement in Russia is regulated by two blocks of legislation: on the contract system and procurement of certain types of legal entities[2]. At the same time, despite the different regulation, the convergence of these two systems has recently been clearly visible. So, for example, the availability of the possibility for budgetary, autonomous institutions, state, municipal unitary enterprises and other legal entities to conduct purchases in a number of cases under Law 223-FZ (Article 15 of Law 44-FZ). In procurement by certain types of legal entities, from 07/01/2018, competitive procedures have been introduced and regulated, the object of procurement is described, as in the law on the contract system[3] and more.

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[1] Federal Law of July 18, 2011 No. 223-FZ "On the Procurement of Goods, Works, Services by Certain Types of Legal Entities" // Collected Legislation of the Russian Federation. 2011. No. 30 (part 1). Art. 4571.

[2] See *Kovalkova E. Yu*. Features of the legal regulation of procurement for state and municipal needs in the book "Public Procurement: Problems of Law Enforcement". Proceedings of the VI International Conference (June 8, 2018, Lomonosov Moscow State University). M.: Yustitsinform, 2018. 352 p. P. 92–104.

[3] Federal Law No. 505-FZ of December 31, 2017 "On Amendments to Certain Legislative Acts of the Russian Federation" // Rossiyskaya Gazeta. 2018. No. 1.

It is important to note that the connecting elements of these two blocks of legislation are the existence of a public interest in ensuring the unity of the economic space, creating conditions for the effective satisfaction of the social and economic needs of society, expanding the opportunities for the participation of business entities in procurement, developing fair competition, and preventing corruption. In this connection, the term "publicity" is generic for the regulation of this sphere.

In international practice, it is the term "public procurement" that has become more widespread. Thus, in accordance with the UNCITRAL Model Law on Public Procurement (hereinafter referred to as the Model Law), it is stated that it "applies to all public procurement", "procurement" or "public procurement" means the acquisition by the procuring entity of goods, works or services", "in most states, procurement accounts for a significant part of public spending", "related to the public interest", "public notification and provision of adequate opportunities … are necessary for the implementation of the socio-economic policy of this state …"[1].

It should be noted that at present, "purchase" means not only the actual supply of goods, but also the performance of work, the provision of services for state and municipal needs, including the acquisition of real estate or the lease of property[2].

Pursuant to Article 3 of Law 44-FZ, the purchase of goods, work, services to meet state or municipal needs (hereinafter referred to as "purchase") means a set of actions carried out in accordance with the procedure established by the Federal Law by the customer and aimed at meeting state or municipal needs. The purchase begins with the identification of the supplier (contractor, performer) and ends with the fulfillment of obligations by the parties to the contract. If, in accordance with the Law, there is no provision for posting a notice of procurement or sending an invitation to take part in determining the supplier (contractor, performer), the procurement begins with the conclusion of the contract and ends with the fulfillment of obligations by the parties to the contract (part 1 of subparagraph 3 of Law 44-FZ).

Note that Law 223-FZ does not contain a definition of the concept of "purchase", this is left to the consideration of the customers themselves, which are legal entities with a "public element". So, for example, in the Model Regulations on Procurement of the Ministry of Culture of the Russian Federation, procurement is understood as "acquisition by the Customer by the methods specified in this Procurement Regulation of goods, works, services for the needs

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[1] UNCITRAL Model Law on Public Procurement (Adopted in Vienna on 01.07.2011 at the 44th session of UNCITRAL) // Consultant (accessed 15.01.2020).

[2] Article 3, Part 1 of Law 44-FZ as amended by Federal Law No. 449-FZ of December 27, 2019 "On Amendments to the Federal Law" On the Contract System in the Procurement of Goods, Works, and Services to Ensure State and Municipal Needs"// Collection of Legislation Russian Federation. 2019. No. 52 (Part I). Article 7767.

of the Customer"[1]; Ministry of Digital Development, Communications, and Mass Media of the Russian Federation — "the actions of the Customer, provided for by this Regulation, by definition of suppliers (performers, contractors) in order to conclude contracts with them for the supply of goods, performance of work, provision of services, as well as the acquisition and lease of property"[2]. Note that there are no special differences in the concept of "purchase", the term is revealed through "the actions of the customer in accordance with the Regulations …"

Thus, public procurement should be understood as the activities of public legal entities, as well as legal entities with a "public element", aimed at satisfying public interests in the field of procurement of goods, works and services, in ensuring the unity of the economic space, creating conditions for the effective satisfaction of social and economic needs of society, expanding opportunities for the participation of business entities in procurement, development of fair competition, and prevention of corruption.

An important aspect of the publicity of procurement, in our opinion, is the need to ensure their openness and transparency (public reliability) or, in other words, to ensure the transparency of the procurement process.

This direction of development of legal relations is typical for most developed countries. For example, the Norwegian Freedom of Information Act provides for public disclosure of documents of public interest, including documents related to public procurement. The Freedom of Information Act is binding on all entities subject to the regulation of public procurement laws. As a rule, documents of public importance (and, consequently, documents related to public procurement) are available to an unlimited circle of people[3].

In turn, in the existing Russian law, this line of development of relations is most characteristically reflected in such basic principles as the principle of openness and transparency, the principle of information openness[4].

The implementation of these principles provides not only for the public identification of contract executors, but also for the mandatory publication of

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[1] Regulations on the purchase of goods, works, services, developed as a Model for institutions of the Ministry of Culture of the Russian Federation of January 21, 2014 and posted on the Official website of the Ministry of Culture of the Russian Federation [Electronic resource]. URL: https://www.mkrf.ru/documents/tipovoe-polozhenie-o-zakupkakh/ (date of access: 02/11/2020).

[2] Model Regulations on the Procurement of Goods, Works, Services for Institutions of the Ministry of Digital Development, Communications and Mass Media of the Russian Federation [Electronic resource]. URL: https://digital.gov.ru/ru/documents/5030/ (date of access: 02/11/2020).

[3] Article: Legal regulation of public procurement of companies with state participation in Norway (*Arendt T., Nordby F.* "Journal of Business and Corporate Law", 2017, No. 4).

[4] Article 7 of Federal Law No. 44-FZ of 05.04.2013 "On the contract system in the field of procurement of goods, works, services to meet state and municipal needs".

procurement plans, reports on the execution of contracts, publication of the results of monitoring, audit, control, implementation of significant customer actions (substantiation of the contract price, selection of the procurement procedure, change, or termination of the contract), conducting public control of purchases.

Results

In our opinion, ensuring the openness of procurement is one of the key conditions for increasing its efficiency.

Thus, in specialized printed publications[1], ensuring maximum transparency and openness in the field of procurement is also put at the forefront along with ensuring the effective functioning of the procurement system and rightly attributed to the basis of socio-economic development.

In this case, thanks to the open process of planning and involving a wide range of participants in procurement, their competitiveness increases, which makes it possible to reduce the initial (maximum) contract price and use the best conditions for its execution. This obviously contributes to the rational use of funds allocated for procurement.

In addition, the openness of procurement is also directly related to the need to ensure their public credibility.

According to the fair opinion of V. V. Gladky, the content of the principle of public certainty is the presumption of validity and compliance with the law of a legally significant action[2]. In other words, public placement in the Unified Information System (www.zakupki.gov.ru) of procurement plans, tender documentation, the contract itself, as well as other mandatory information ensures their compliance with reality and the ability of participants in civil legal relations to rely on them.

O. A. Belyaeva, Yu. V. Truntsevsky, A. M. Tsirin quite rightly associate the transparency of the procurement cycle with the basis of anti-corruption policy[3].

Conclusions

Thus, the publicity of procurement, in our opinion, seems to be the most key task aimed at ensuring transparency and information openness of all stages and

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[1] *Sheshukova T. G.* Efficiency of Public Procurement in Budgetary Institutions: Methodical Aspect // International Accounting. 2008. No. 2 (issue 3). P. 149–158).

[2] *Gladky V. V.* Evolution of the principle of public certainty in civil law // Izvestiya vuzov. North Caucasian region. Series: Social Sciences. 2013. No. 6 (178). URL: https://cyberleninka.ru/article/n/evolyutsiya-printsipa-publichnoy-dostovernosti-v-grazhdanskom-prave (Date of access: 05/23/2020).

[3] Legal mechanisms for combating corruption in the field of corporate procurement: scientific and practical guide / ed. I. I. Kucherov. M.: IZiSP; KONTRAKT, 2019. 160 p.

procedures of this process. This, in turn, will ensure the creation of conditions for the effective satisfaction of the social and economic needs of society, expand the opportunities for the participation of business entities in procurement, have an impact on the development of fair competition, and prevent corruption.

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