НАУЧНО-ОБРАЗОВАТЕЛЬНЫЙ ЦЕНТР
ЮРИДИЧЕСКОГО ФАКУЛЬТЕТА МГУ ИМЕНИ М. В. ЛОМОНОСОВА
«ПУБЛИЧНЫЕ ЗАКУПКИ И ПРАВО»
(НОЦ МГУ «Публичные закупки и право»)

SCIENTIFIC-EDUCATIONAL PROCUREMENT LAW CENTER
OF LOMONOSOV MOSCOW STATE UNIVERSITY
(Procurement Law Center of MSU)

PUBLIC PROCUREMENT LAW AROUND THE WORLD

Collection of articles

ЭТП ГПБ
Электронная торговая площадка
Группа Газпромбанка

КАФЕДРА ПРЕДПРИНИМАТЕЛЬСКОГО ПРАВА юридического факультета МГУ

ЮСТИЦ ИНФОРМ

Юридический Дом «Юстицинформ» лауреат:

Высшей
юридической
премии «Фемида»

Национальной премии
«Открытая книга
России»

Адрес: 119607, г. Москва,
ул Лобачевского, д. 94, офис 7
Тел: (495) 232-12-42
http://www.jusinf.ru

ISBN978-5-7205-1557-7

УДК 346.22
ББК 67.402+67.404.2
Pu97

Pu97 **Public procurement law around the world.** Collection of articles. — M.: Yustitsinform, 2019. — 620 p.

ISBN 978-5-7205-1557-7

The book "Public procurement law around the world" is the first collection of articles in English coordinated by the Scientific-Educational Procurement Law center of Lomonosov Moscow State University (Procurement Law center of MSU), that functions as a structural unit of the Business Law Department.

The book consists of articles by legal scholars and practitioners from around the world, written in 2016-2019. A similar book was published in Russian in 2017.

The materials contained in the book will certainly be of interest to all professionals in procurement law including civil servants and representatives of the business community.

Keywords: public procurement, law enforcement, customer, supplier, ordering, bidding, tender.

УДК 346.22
ББК 67.402+67.404.2

ISBN 978-5-7205-1557-7

Content

Content

Introduction

Dear readers!

The book "Public procurement law around the world" is the first collection of articles in English by the Scientific-educational procurement law center of Lomonosov Moscow State University (Procurement law center of MSU), functioning as a structural unit of the Business law Department.

The collection is a result of hard work by legal scholars and practitioners from around the world. The articles in the book were written between 2016 and 2019 and a similar book was published in Russian in 2017[1].

There are sections on procurement law in Armenia, Belarus, Brazil, China, Donetsk people's Republic, France, Germany, Italy, Japan, Kazakhstan, South Korea, Kyrgyzstan, Luhansk people's Republic, Macedonia, Malaysia, Mongolia, The Netherlands, Norway, Russia, Turkey, Ukraine and Vietnam in this work. A separate section is devoted to the supranational regulation of the relations in the field of procurement in the European Union.

All articles are published in the authors edition.

If it wasn't for financial support of the Electronic Trading Platform of Gazprombank (ETP GPB) (etpgpb.ru) and Kondrashov Igor Valeryevich the incredible collection of research wouldn't be published. We are very grateful for their support of the academic thought.

The materials contained in the book will certainly be of interest to all professionals in procurement law including civil servants and representatives of the business community.

It should be noted that most of the authors who submitted materials for the book are permanent participants of the traditional International

[1] *See* Публичные закупки в зарубежных странах: динамика правового регулирования: монография / Отв. ред. О.А. Беляева, В.А. Вайпан, К.В. Кичик. М.: Юстицинформ, 2017 (Public procurement in foreign countries: the dynamics of legal regulation: monograph / Resp. Resp. Ed. O.A. Belyaeva, V.A. Vaipan, K.V. Kichik. - Moscow: Yustitsinform, 2017).

conference "Public procurement: problems of law enforcement," which is held annually in early June at the Lomonosov Moscow State University School of Law.

We look forward to continuing to work with all our partners on this topic and invite all specialists involved in public procurement law to join us in many events and collective projects in the future.

Evgeny Gubin,
Head of the Business law Department
of the Lomonosov Moscow state University School of Law,
Scientific Director of the Procurement law center of MSU,
professor, Honored lawyer of the Russian Federation

Karen Sardaryan,
Member of the Council of the Chamber
of Advocates of the Republic of Armenia,
lawyer, Ph.D. in Law

Legal Regulation of Procurement by Organizations with State and Municipal Participation in the Republic of Armenia

In the present-day economic reality, a special relevance is given to the issue of saving public and municipal funds, along with the budget of companies with state participation, in particular, due to a more rational spending on the acquisition of the necessary goods and the elimination of corruption phenomena in the process of controlling the state and municipal order through organizing a competitive process of procurement.

The main goal of this work is to study the legal relationship established at the time of procurement and the subsequent conclusion (change, termination and fulfilment) of contracts by companies with state participation, as well as to explore the subject composition of such legal relationship, the procedure and method of procurement and other issues concerning procurement activity of companies with state participation.

This work considers the legal relationship in the sphere of procurement fulfilled by companies and associations with state participation, namely, by non-profit state and municipal organizations, organizations possessing more than 50 per cent of the government or municipal take, as well as some kinds of associations, legal entities and NGOs.

In addition to the above-listed entities in the Republic of Armenia (hereafter, Armenia, RA), procurement activity can be fulfilled by state-run public authorities, bodies of local self-government, state and municipal institutions, as well as the Central Bank of the Republic of Armenia.

The legal relationship in the sphere of procurement in Armenia is regulated through the system of interrelated legal acts.

Adem Sozuer,
Director of the Criminal Law and Criminology Research Center
at the Law Faculty of Istanbul University, Professor

Selman Dursun,
Associate professor of the Law Faculty of Istanbul University

The Legal Assessment of the Tender Fraud Crime in the Light of Turkish Criminal Law Reform

I. Introduction to Turkish Criminal Law Reform

The Turkish Criminal Law Reform is definitely not a short term process. It is a process of almost 175 years and still going on. The most important step was the passing of in the field of criminal law in 2005. In this year, Turkish Penal Code, Turkish Criminal Procedure Law and Law on the Execution of Sentences and Security Measures have been entered into force on 1st June 2005. This date is also accepted as the beginning date of Turkish Criminal Law Reform.

The 2005 Turkish Criminal Law Reform aims to improve the fundamental rights and freedom, democracy, rule of law and human rights by providing the necessary conditions and institutions. In parallel this, the main aims of the new code are clearly stated in first Article of Turkish Penal Code:

(1) The law aims at protecting individual rights and freedom, public order and security, State of law, public health and environment, social peace and the prevention of criminal offences. In meeting these purposes, basic principles of criminal responsibility and offences, penalties and types of security measures have been regulated within this law.

According to these aims, the new penal codes are based on the principles of the legality of crime and punishment, humanity, equality, and culpability.[817]

a. The Principle of Legality of Crime and Punishment

The legality of crime and punishment reflects the rule of law principle and it aims to protect the individuals against the State, especially against the arbitrary implementations of the State. The legality of crime and punishment means that no one can be punished for their actions which are not determined as a crime by the law and no one can be punished more than it is foreseen in the law.

This principle is regulated under Article 38 of the Turkish Constitution and also under Article 2 of the Turkish Penal Code. There are three fundamental elements of this principle which are regulated explicitly in the Turkish Penal Code:

(1) No one can be penalised for any act that is not being considered explicitly a crime by the law and cannot be subject to any security measures for such an act. Only those penalties and security measures that are in the law could be sentenced by jurisdiction.

(2) Crime and punishment cannot be imposed through administrative regulations.

(3) Application of the law articles those include crime and punishment provisions cannot be broadly interpreted in such a way so that will cause any anology

b. Equality Principles

The third basic principle in the new Code is the equality principle. These principles are regulated under the Article 3 of the Turkish Criminal Code which states:

(1) Any penalty and security measure imposed upon an offender should be proportionate to the gravity of the crime.

(2) In the implementation of the Penal Code no one shall receive any privilege and there shall be no discrimination against any individual on

[817] It is important to emphasize that the principles of legality and equality, which are regulated in Turkish Criminal Code, were inspired by Article 3 and 4 of the Criminal Code of the Russian Federation dated 1996.

the basis of their race, language, religion, sect, nationality, colour, gender, political (or other) ideas and thoughts, philosophical beliefs, ethnic and social background, birth, economic and other social positions.

As a result of this principle, discrimination among people due to difference of language, race, color, sex, political view, philosophical belief, religion, religious sect etc. was inserted.

To achieve this goals and principles, the Code has regulated many types of crime. In this respect, one of the areas that is handled by the Turkish Criminal Code are the contradictions to law that emerged during tender process. Art. 235 of the Turkish Criminal Code criminalizes fraud in public procurement (it can be named as tender fraud offence). Actually, tendering in public procurement tendering in public procurement is regulated by special laws/acts, which are included many administrative rules, principles and also prohibitions about tendering process. But in the presentation titled *"The Legal Assessment of the Tender Fraud Crime in the light of Turkish Criminal Law Reform"*, we will mainly analyze this criminal provision and refer to the related administrative regulations.

Tender fraud crime

I. In general

In general, it is possible to say that public and private organizations often count on a competitive bidding/tendering process to achieve better value for money. Low prices and/or better products are desirable because they come to fruition of resources either being saved or made available for use on other goods and services.

The competitive process can achieve lower prices or better quality only when companies genuinely compete, i.e., set their terms and conditions honestly and independently. But tender (procurement) fraud (also known as bid rigging or collusive tendering) hinders the achievement of this goal. First of all, the fraudulent or coercive behaviors distort the competition. Especially collusive tendering occurs when potential tenderers, that would otherwise be expected to compete, secretly conspire to raise prices or lower the quality of goods or services.

Tender fraud can be particularly harmful if it affects public procurement. Such conspiracies or fraudulent behaviors take resources from purchasers

and tax payers, diminish public confidence in the competitive process, and undermine the benefits of a competitive marketplace. Bid rigging is an illegal practice in many countries and can be investigated and sanctioned under the competition law. Some countries also penalize these behaviors as criminal offence. As it has been mentioned earlier the tender fraud crime is regulated by Article 235 of Turkish Criminal Code.

II. Protected legal value and tendering principles& prohibitions

According to legal ground of Art. 235, the public confidence in the fairness of the tendering process is the protected legal value by this provision. The offence of tender fraud diminishes the social belief in the transparent and competitive process. In the last analysis, this offence protects also the economic interests of the public.

Basic tendering principles, which also guide in interpretation of protected legal value and the elements of the tender fraud, are regulated by the public procurement/tender act Pursuant to Art. 5 of this act, the contracting public authorities are liable for ensuring the following 8 principles:

- Transparency,
- Competition,
- Equal treatment,
- Reliability,
- Confidentiality,
- Public supervision,
- Fulfilment of needs appropriately and promptly
- Efficient use of resources.

Actually, the behaviors which constitute the offence of the tender fraud are direct or indirect violations of these tendering principles, especially transparency, competition, equal treatment and confidentiality principles.

Art. 17 of the public tender act foresee also some prohibitions related tender process. The following acts or conducts are prohibited in tender proceedings:

a) to conduct or attempt to conduct tender fraud by means of fraudulent and corrupt acts, promises, threats, unlawful influence, undue interest, agreement, malversation, bribery or other actions,

b) to cause confusion among tenderers, to prevent participation, to offer agreement to tenderers or to encourage tenderers to accept such offers, to conduct actions which may influence competition or tender decision,

c) to forge documents or securities, to use forged documents or securities or to attempt these,

d) to submit more than one tender by a tenderer on his own account or on behalf of others, directly or indirectly, as the principal person or as representative of others, apart from where submitting alternative tenders is allowed,

e) to participate in procurement proceedings although prohibited pursuant to relevant article.

Most of these prohibitions, not all of them, fall under the offence of tender fraud.

III. Elements of tender fraud

A. Material Elements (Actus Reus)

1. Object of the act

According to just mentioned legal definition of tender fraud, the object of the act and at the same time object of the crime is a *public tender* or in words of the criminal code, a tender on behalf of a public institution or corporation that relates to purchase or sale of goods or services, rent and construction (art. 235/1). The public tender process is mainly regulated by public tender act. Furthermore this general act, there are also some special acts that include provisions on public tender.

If there is not any public tender in the meaning of relevant legislation, this crime cannot be committed. In the other words, this crime does not cover above-mentioned all types of public procurement, i.e. purchasing directly a good or service without a tender. It does not also involve all public tenders. Only purchase, sale, rent and construction tenders constitute the objects of the tender crime.

Paragraph (5) of Art. 235 expands the scope of application of this provision. Pursuant to that paragraph some *auctions* and *procurements* that have indirectly public character constitute also the object of the crime. The auctions that are realized through *the intermediary of public institutions or corporations* (i.e. debt enforcement offices), and purchases or sales of goods or services or rents that are performed on behalf of *professional institutions in the statute of public institution* (i.e. professional chambers,

bar associations)*companies incorporated with the participation of public institutions or corporations or professional organizations in the statute of public institution* (i.e. public banks or companies), or *foundations* operating within this frame (i.e. social assistance and solidarity foundation), or *associations acting in the public interest*(i.e. Turkish red crescent), or *cooperatives* are in scope of this crime.

2. Acts and Results

Typical act of the tender fraud in a very general term, such as *rigging a public tender* regulated by the first paragraph of Art. 235. However, second paragraph of Art. 235 defines properly what may be understood as tender rigging/fraud in public procurement. This paragraph consists of four subparagraphs, which include different act types and results.

a) **Fraudulent Conducts and their results**

Pursuant to Art. 235, paragraph 2, subparagraph (a), by engaging in fraudulent conducts/behaviors;

1. Preventing a person from participating in the process of the tender or the tender itself, who is capable of participation in such or who has met the criteria for such;

2. Securing the participation of a person in the tender who lacks the capability to participate in such or who fails to meet the criteria required for such;

3. Eliminating from consideration such offered goods which conform to the tender specifications by stating that such goods do not so conform;

4. Placing, in the evaluation, goods which do not conform to the tender specifications by stating that such goods do so conform constitute the first type of tender rigging.

These behaviors are also the violation of basic principles of tender, such as competition and equal treatment.

b) **Disclosure of the confidential information**

Enabling the access of another to information related to any offers, which is to be kept confidential according to tender legislation or the tender specifications is second group typical act of the tender fraud (Art. 235/2-b).

Pursuant to relevant provisions of the public tender act, estimated cost and offers/bids must be kept confidential. This act is a clear example for the violation of the confidentiality principle.

c) **Coercive or other unlawful conducts and their result**

Prevention of a person, who is capable of participating in a tender or having met the criteria for such, from participating in the process of tender or the tender itself, by the use of force, threats, or any other behaviors contrary to law constitute third group typical acts, which are particularly the violation of competition principle.

Where the tender fraud is committed by use of force and threat, minimum limit of the main penalty cannot be less than five years (qualified form of the crime). However, if there occur any qualified circumstances of the offence of intentional injury or threat which require more severe penalty, an additional punishment shall be imposed on account of these offences (Art. 235/3-a).

"Other unlawful conducts" term, which is criticized in terms of certainty principle, may cover all tender prohibitions (i.e. written in Art. 17 of public tender act), provided that typical result (prevention of a capable person from participating in the tender) is targeted and realized.

d) **Conspiring on Tender**

Fourth and the last criminal act is concluding an open, or secret, agreement among themselves by persons who are willing to participate in the tender or those who have already participated in the tender, in order to influence the conditions of a tender and particularly the price.

In general, conspiring to raise prices or reduce the quality of goods is also typical prohibited behavior of tender fraud, which constitute also the main example of the violation of the competition principle of tender.

e) **Common result: Harm of Public Institution or Organization**

Harm as a result is a relatively new element. Until the amendment of Art. 235, the harm was not a material element of basic form of the tender fraud (it was an endangerment crime), rather it was a qualified element that aggravates the penalty. The old version of paragraph (3) of Art. 235 had provided one half increase in sentence in the event that damage ensues through tender fraud to the relevant public institution, also when the amount of damage cannot be determined.

The amended version states that if the tender fraud does not lead to any damage to the relevant public institution or organization, the offender shall be sentenced to lighter penalty than basic form of the crime, except for situations, where tender fraud is committed by use of force or threat. Thus, apart from coercive acts, the harm of public institution or organization is a

material element of tender fraud. This amendment is criticized in doctrine. Because determining of the damage is very difficult in most tender fraud cases and this element narrows the scope of crime.

3. **Perpetrator**

Actually tender fraud is a general crime that everybody (officials, tenderers or other persons) can commit. As a rule, it does not require a special perpetrator's status. But some typical acts (due to their nature) can only be committed by certain perpetrators. For example, fraudulent conducts and disclosure of the confidential information can be perpetrated by the tender officials. Likewise, conspiring on tender can only be realized by the tenderers. However, coercive or other unlawful conducts does not require any special perpetrator.

4. **Victim**

In criminal code, tender fraud is regulated in the chapter of crimes against the public. Therefore, generally the victim of the tender fraud is the public. As a result of this crime, public intuitions can be damaged. But the persons, who are unlawfully prevented from participating in tender process are also victim of tender fraud.

B. **Moral Elements (Mens Rea)**

The moral element of tender fraud is intent. In the other words, tender fraud can only be committed intentionally. The material elements must be committed knowingly and willingly (*direct intent, dolus directus*) or at least the perpetrator must foresee and accept (*indirect/probable intent, dolus eventualis*) these elements.

The negligence or any other purpose or motive are not moral elements of tender fraud. However, the last typical act group of the crime (conspiring on tender) must be perpetrated with the purpose of affecting the conditions of a tender and particularly the price.

IV. Conclusion

As a conclusion, we would like to underline some points. It is very clear that a competitive tender process in public procurement is one of the most important legal values, which must be protected not only by regulations of administrative law, but also criminal law. On the other hand, criminal

law and its tools (serious sanctions, like imprisonment) should be the last resort (*ultima ratio*). Therefore, each violation of competition and other principles of a fair tender process should not (and in Turkish law does not) constitute the crime of tender fraud. Turkish tender fraud regulation is in one aspect relatively wide. Because any unlawful conduct with the result of prevention of a capable person from participating in the tender may fall under this crime. In other words, the offense can only be committed with the typical acts listed in the second paragraph of the Article 235. But from another point of view, this regulation, with the amendment in 2013 about the damage/harm requirement, is also relatively narrow.

(The article was received on May 18, 2018)

Natalia Cherkasskaya,
Leading research associate of State Institution «Economic Research Institute» (Donetsk), associate professor, Ph.D in Law (section 1 – 4)

Lyubov Kushch,
Leading research associate of State Institution «Economic Research Institute» (Donetsk), associate professor, Ph.D in Law (section 5)

*Translation from Russian into English was done by **I.S. Kozlova**, senior editor of State Institution «Economic Research Institute»*

Legal regulation of public procurement in Ukraine

1. Legal basis for conducting public procurements

With the adoption of the Law of Ukraine "On Public Procurements" (2015) [1] (hereinafter referred to as "Public Procurement Law"), Ukraine opened the period of updating the legislation regulating the public (government) procurement, which is caused by the signing of the Association Agreement between the EU and Ukraine (June 24, 2014).

The mentioned law is conceptually harmonized with the EU Directives 2014/23 / EC, 2014/24 / EC, 2014/25 / EC, 92/13 / EC and 89/665 / EC and established the legal and economic framework for procurement of goods, works and services to ensure the needs of the state and territorial community, as well as it determined the prerequisites for creating an electronic procurement system and an electronic appeal system. The Law of Ukraine "On the Specifics of Procurement of Goods, Works and Services for Guaranteed Assurance of Defense Needs" [2] (2016) additionally determined the grounds and features of the procurement of goods, works and services. At the same time, this normative legal act is subject to application by a set of subjects, namely: the Ministry of Defense of Ukraine and its intelligence agency, the Ministry of Internal Affairs of