

Abnormally Low Prices in Prozorro:

Is the Procuring Entity Protected?

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AUTHOR

Artem Davydenko

TEAM

Illia Bibov, Artem Davydenko, Valeriia Zalevska, Khrystyna Zelinska, Ivan Lakhthonov, Serhii Paviuk, Yaroslav Pylypenko, Andrii Tymofeiuik, Anastasiia Ferents, and Oleksii Yarylchenko

LITERARY EDITOR

Mariana Doboni

DESIGN

Kateryna Kysla

REVIEWERS

Oleksandr Shatkovskiy,
UNDP public procurement consultant

Serhii Yaremenko,
public procurement expert

Oleksandr Nakhod,
deputy CEO of the Ukrposhta JSC for procurement

Taras Tovstopyat,
senior project manager of the Reform Support Team under the Ministry for Development of Economy, Trade and Agriculture of Ukraine

The report has been prepared by the team of Transparency International Ukraine's innovation projects program within the USAID/UK aid project "Transparency and Accountability in Public Administration and Services/TAPAS." The views expressed herein do not necessarily reflect the position of the leadership or the Board of Transparency International Ukraine. The data and sources used in the report may change after its publication.

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We have verified the accuracy of the information in the report. We believe it accurate as of September 2020. However, Transparency International Ukraine shall not be responsible for the consequences of its use for another purpose or in another context.

This report was made possible by the support of the Eurasia Foundation, funded by the US Government through the United States Agency for International Development (USAID) and the UK Government through UK aid. The contents of this publication are the sole responsibility of Transparency International Ukraine and do not necessarily reflect the views of USAID, the U.S. Government, the U.K. Government or the Eurasia Foundation.

We are thankful to everyone who contributed to this study. In particular, to Iryna Bykovska and Denys Kudriavtsev

Transparency International Ukraine
37-41, Sichovykh Striltsiv street,
Kyiv, Ukraine, 04053
tel.: +38 044 360 52 42
website: ti-ukraine.org
e-mail: office@ti-ukraine.org



THE STUDY HAS BEEN PREPARED BY THE DOZORRO TEAM

[DOZORRO](#) — is a project of civil society organization Transparency International Ukraine which aims to ensure fair play in public procurement.

The project team has created and administers the [dozorro.org](#) monitoring portal, as well as the [public](#) and [professional](#) BI modules, BI Prozorro. In addition, DOZORRO is developing the DOZORRO community, a network of civil society organizations which monitor public procurement and report violations to supervisory and law enforcement agencies.

Our other studies can be found in the section Research Public Procurement on Transparency International Ukraine's website: bit.ly/DOZORRO-research



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ABBREVIATIONS

ALP abnormally low tender bid price

Law Law of Ukraine “On Public Procurement” of December 25, 2015, No. 922 (as amended from April 19, 2020)

EU European Union

AMCU Board Permanent Administrative Board for Consideration of Complaints on Violations of Public Procurement Legislation of the Anti-Monopoly Committee of Ukraine

MEDT the Ministry for the Development of Economy, Trade and Agriculture of Ukraine

INTRODUCTION

If a procuring entity was able to purchase an item that meets their quality requirements, and at the same time spend minimal amount, such a procurement transaction can be called effective. This is exactly the purpose of the efficiency formula common in the European Union (hereinafter referred to as the EU) — “Best value for money,” that is, “best quality for available money.” However, in practice, the best price may be *“too perfect to be true.”* Contracts at the lowest price sometimes remain unfulfilled, are executed poorly, or with a significant delay. In such cases, there is an opinion that it may have been worth paying more, so that receiving a fulfilled contract on the terms specified in the tender would be guaranteed or more likely. It is precisely because of such problems in procurement that the concept of an abnormally low price (hereinafter referred to as ALP) has emerged.

In theory, ALP allows the procuring entity to discard dishonest participants who cannot fulfill the contract properly, or those who sincerely but mistakenly believe that they will succeed. In other words, the system is designed to recognize and reject “non-viable” tender bids of participants.

The second and perhaps equally important goal of this system is to promote fair competition. After all, if the procuring entity rejects all participants who chose an unfair strategy for winning the tender, only honest business will remain in procurement.

The goal is clear, but is it possible to achieve it in practice? The ALP functionality was launched in Prozorro in early June 2020, and a month later hundreds of cases of ALP were detected in the system. We analyzed the explanations provided by the tender participants and the relevant decisions of the tender committees (authorized persons) in 855 cases and, based on this, collected information about the state of the ALP system, existing problems, and possible ways to solve them.

By the ALP system in this study, we mean individual components of the Prozorro functionality that interact with each other and check the price offers of participants for ALP.

To do this, in **Section 1**, we explain how and when the ALP system appeared in Ukrainian legislation, how it works, and what participants and procuring entities must do.

In **Section 2**, we look at the international experience of applying ALP. We need it to understand the context and make decisions on further changes to the Ukrainian ALP system.

Section 3 contains statistics with specific indicators: the number of cases when participants did not provide an ALP justification, but were recognized as winners; how often participants with ALP were rejected; in the procurement of what products ALP is most often activated; how participants justify their prices, etc.

In **Section 4**, we describe in detail what problems have been detected in the ALP system.

Section 5 is devoted to the recommendations that we have prepared based on foreign experience and conclusions from the information obtained from Prozorro.

From this research will benefit in the first place:

- Members of the Committee on Economic Development of the Verkhovna Rada of Ukraine, who can form relevant legislative initiatives based on the results of this study;
- Public Procurement Department of the Ministry for the Development of Economy, Trade, and Agriculture of Ukraine (hereinafter MEDT) and SE Prozorro, as it will help them make decisions on changes in the system of non-price criteria based on analytical data;
- Members of the Permanent Administrative Board for Consideration of Complaints about Violations of Legislation in the Field of Public Procurement of the Anti-Monopoly Committee of Ukraine (hereinafter referred to as the AMCU Board), who can take into consideration the conclusions of this study in their law enforcement activity both as a competition agency and as an appeal body;
- procurement participants who can form or change their approaches to justifying ALP and defending their rights in the AMCU Board;
- procuring entities that can form or change their approaches to responding to the justification of the participants’ ALP.

SECTION 1

GENERAL INFORMATION ABOUT THE ALP SYSTEM

Definition of ALP

Within international practice, ALP is understood as a price, whose economic justification makes a procuring entity apprehensive and, accordingly, doubtful of the fact that at such a price a participant can fulfill the contract in the proper way ¹.

The law of Ukraine “On Public Procurement” of December 25, 2015, No. 922 as amended on April 19, 2020, (hereinafter referred to as the Law) offers its own definition of ALP, which is somewhat more difficult to comprehend. Despite this, the Ukrainian interpretation of ALP is not fundamentally different from the world practice. ALP is explained as²:

...price/present price of the most cost-effective bid based on the results of the auction, which is less by 40 or more percent of the arithmetic mean value of the price/present price of tender bids of other participants at the initial stage of an auction, and/or is less by 30 or more percent of the next price/present price of the tender bid based on the results of the electronic auction.

That is, according to the Law, the ALP system is based on a formula that evaluates the price offer and finds out how this price offer relates to:

- the arithmetic mean value of the prices of other participants at the initial stage;
- the next price offer after the third round.

1. p. 2: bit.ly/2QuqUrg

2. bit.ly/2Ylh5Uw

Reasons for the introduction of ALP in 2020

The official purpose of introducing the ALP of a tender bid is to *counteract “price dumping”* in the field of public procurement ³. The explanatory note to the draft law states:

...there are multiple examples that ... it is the price of the tender bid that is significantly reduced that wins... The result of such a winning ... is the conclusion of additional agreements that increase the price per unit of goods and, accordingly, reduce the volume of procurement. In other words, the participant in the procurement procedure uses “price dumping” to win and ... through additional agreements, it offsets its own results ⁴.

What follows is how exactly the ALP system will prevent such cases from happening:

This tool allows you to detect ... abnormally low price ... and draws the procuring entity's attention to the existence of a corresponding risk. In this case, the procuring entity must receive a justification from the participant of the procurement procedure regarding the abnormally low price of their tender bid, and in the absence of such justification (or insufficient argumentation), reject the participant's tender bid ⁵.

3. P. 3 of the explanatory note to the draft law of Ukraine "On Amendments to the Law of Ukraine 'On Public Procurement' and Some Other Legislative Acts of Ukraine on Improving Public Procurement" dated August 29, 2019, No. 1076: bit.ly/31wvZPb

4. P. 3 of the explanatory note to the draft law of Ukraine "On Amendments to the Law of Ukraine 'On Public Procurement' and Some Other Legislative Acts of Ukraine on Improving Public Procurement" dated August 29, 2019, No. 1076: bit.ly/31wvZPb

5. P. 3 of the explanatory note to the draft law of Ukraine "On Amendments to the Law of Ukraine 'On Public Procurement' and Some Other Legislative Acts of Ukraine on Improving Public Procurement" dated August 29, 2019, No. 1076: bit.ly/31wvZPb

The authors of the draft law also mention the widespread use of ALP in the European procurement practice.

The legal grounds for applying ALP appeared on April 19, 2020, with the entry into force of the latest version of the Law. However, the development of the ALP functionality was completed a month later — in May. In the productive environment, it was introduced on June 4, 2020, and applied to all competitive procedures announced after April 19, 2020.

For the first time, ALP was activated with the price offer of the NPKM LLC in the procurement of sidewalk repair services by the executive committee of the Mariupol City Council ⁶. The participant justified their price with a discount on equipment rental and became the winner of the procurement ⁷.

Example of calculating ALP

Prozorro automatically calculates ALP if there are at least two participants who have submitted their tender bids for the procurement item or a lot. This is important to keep in mind, as sometimes procuring entities can manually determine the participant's ALP ⁸. However, there is already at least one decision of the AMCU Board which has confirmed that ALP should be calculated by the system ⁹.

The system analyzes the participant with the most cost-effective price offer for ALP at the time of disclosure of tender bids. Price offers of all subsequent participants are analyzed at the time of rejection of the previous most cost-effective bid.

If the algorithm confirms the presence of ALP, the system will inform both the relevant participant and the procuring entity about this ¹⁰. Next, we will explain in detail the calculation algorithm in case you need to do it manually.

6. [UA-2020-05-15-004979-b](#)


7. In total, ALP was activated four times that day. The other three cases being: [UA-2020-05-21-003881-c](#), [UA-2020-05-25-003523-b](#) and [UA-2020-04-30-000311-c](#)

8. See the protocol of rejection of the TDV "Motor-Harant Insurance Company": [UA-2020-04-30-002456-b](#)

9. [UA-2020-05-06-000651-c](#)

10. Article 30, part 5: [bit.ly/3b29WTQ](#)

For calculations, you need to know the price offers of participants at the initial stage (initial bids) and the price offers after the third round (announced results). In our example, we will use the following price offers:

Initial stage <i>Bids, UAH</i>		Announced results <i>Bids, UAH</i>
250,000	Participant 1	210,000
240,000	Participant 2	200,000
200,000	Participant 3	134,750

We calculate whether the price of participant 3 is 40% less or more than the arithmetic mean value of the price of tender bids of other participants at the initial stage.

1. We calculate the arithmetic mean value of the prices of tender bids of other participants at the initial stage:

$$(250,000 + 240,000) / 2 = 245,000$$

2. We calculate the difference between the received arithmetic mean value and the price of participant 3:

$$100\% - (134,750 * 100\% / 245,000) = 100\% - 55\% = 45\%$$

3. Conclusion: the price of participant 3 is ALP, as it is 40% less or more than the arithmetic mean value of the price of tender bids of other participants at the initial stage.

We calculate whether the price of participant 3 is 30% less or more than the next price of the tender bid based on the results of the auction.

1. Price of participant 2 (after the third round) is the next tender price for participant 3:

$$100\% - (134,750 * 100\% / 200,000) = 100\% - 67.375\% = 32.625\%$$

2. Conclusion: the price of participant 3 is ALP, as it is less than 30% or more than the next tender bid price.

In this example, the price offer of participant 3 meets two ALP criteria at once. However, it would be automatically recognized as ALP even if only one of them was activated.

Actions of the participant in case of the ALP activation

According to the Law, a participant with ALP must provide a justification for the price or cost of the relevant goods, works, or services of the bid¹¹ within *one working day* from the date of determining ALP. The system automatically determines the deadline (date and time) for submitting a justification.

It is worth noting that the absence of justification is the basis for mandatory rejection. Therefore, to become a winner of procurement, the participant **must**, not **should** provide their arguments.

At the same time, the Law suggests exactly how the participant can justify ALP:

11. Article 29, part 14 of the Law: bit.ly/2YCaLaH



The justification of an abnormally low tender bid may contain information about:

- 1) achieving savings due to the applied technological process of production of goods, the procedure for providing services, or construction technology;*
- 2) favorable conditions under which the participant can deliver goods, provide services, or perform works, in particular, a special price offer (discount) of the participant;*
- 3) participant's receiving government aid in accordance with the legislation.*



It is worth noting that the justification **may**, and not **must**, contain such argumentation. The Law in no way restricts the participant in how they explain the price to the procuring entity. There are no requirements for the number of arguments, their concretization, providing evidence, and so on.

Another important requirement is that the justification must be uploaded to the system before the deadline set by the system (within one working day from the date of determining ALP). If a participant uploads an impeccable justification to Prozorro one minute later than the set time, such a tender bid must be rejected.

Conditions under which a procuring entity can reject a participant with ALP

The procuring entity is **obliged** (not **may**) reject the participant on the basis of ALP¹² in two cases:

- 1) the participant did not provide justification;
- 2) the participant provided justification, but after the deadline.

12. Article 29, part 14 of the Law: bit.ly/2YCaLaH

In this case, the procuring entity justifies the decision to reject in accordance with Article 31, part 1, clause 1, paragraph 7 of the Law, namely:

[the participant] did not provide justification for the abnormally low price of the tender bid within the period specified in Article 29, part 14 of this Law [within one working day from the date of determining the most cost-efficient tender bid — ed.]¹³.

In addition, the procuring entity **may** (but is not **obliged** to) reject the participant's tender bid with ALP if the latter:

- 3) provided justification, but the procuring entity considers it inappropriate.

The third basis is more controversial, since it involves, unlike the first two obvious cases, the procuring entity's subjective evaluation of the participant's justification. However, the MEDT confirmed:

...in accordance with the requirements of the Law, the procuring entity may reject an abnormally low tender bid if the participant provided a justification for the price or cost specified in it, but the procuring entity considers such justification improper, indicating in the system the grounds for such rejection...¹⁴.

13. Article 31, part 1, clause 1, paragraph 7 of the Law: bit.ly/2EmiGZe

14. bit.ly/3hD62Dm

In practice, there are indeed cases when procuring entities reject tender bids due to “the improper nature of justifications.”¹⁵ For more information, see Section 3. [Ukrainian experience of the ALP.](#)

Secondly, there are no specific requirements not only for the participants' justifications and criteria for evaluating their appropriateness, but also for the procuring entities' evaluation of these justifications. In accordance with the Law, a procuring entity, in case of rejection of a participant, must point out their arguments¹⁶, indicating the provisions of the Law¹⁷. However, sometimes procuring entities can reject a participant's bid on the basis of ALP, only indicating the lack of specifics¹⁸, their doubts¹⁹ about the arguments, or without explanation at all²⁰. That is, judgments can be subjective, and deviations from a logical point of view are logically groundless. For more information, see Section 3. [Ukrainian experience of the ALP.](#)

The procuring entity can reject a participant with ALP only after the deadline for providing justification.

15. See the protocol of rejection of the PE “POZHSENTR”: [UA-2020-05-25-005839-b](https://ua-2020-05-25-005839-b)

16. Article 31, part 1, paragraph 1 of the Law: bit.ly/2EmiGZe

17. Article 31, part 2, paragraph 1 of the Law: bit.ly/2EmiGZe

18. See the rejection protocol of the LLC “Construction Company ‘Denko’”: [UA-2020-06-25-004425-a](https://ua-2020-06-25-004425-a)

19. See the rejection protocol of the LLC “Investment and Energy Company ‘M2’”: [UA-2020-06-24-005607-a](https://ua-2020-06-24-005607-a)

20. See the protocol of rejection of SP Lavreshkin Andrii Valentynovych: [UA-2020-06-15-000741-b](https://ua-2020-06-15-000741-b)



SECTION 2

INTERNATIONAL EXPERIENCE

ALP is not a Ukrainian invention. Although this system began to operate in Ukraine only in June 2020, it appeared in the practice of EU member states at least in the early 70s of the last century.

For Ukrainian public procurement, it is useful to evaluate the international experience of using ALP, since the results developed by other countries can be used in Prozorro. That is why we explain not only how the ALP system functions in the EU, with which Ukraine harmonizes its own procurement legislation²¹, but also what approaches exist to this issue in other states and international organizations.

In foreign sources, ALP is translated as abnormally low bid/proposed²², abnormally low-priced offer²³, impossibly low offer²⁴, abnormal offer²⁵, or unrealistically low bid²⁶. However, the most commonly used term is abnormally low tender.

21. Article 148 of the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community, and their member states, on the other hand: bit.ly/2D1yQpZ

22. bit.ly/34BmIHd

23. bit.ly/2QvYyGp

24. bit.ly/3lnhWDB

25. bit.ly/2FSqITp

26. bit.ly/32tx61v

EU EXPERIENCE

Formation of ALP

ALP in the EU legal system (EEC²⁷) was mentioned as early as 1971 in Council Directive No. 71/305/EEC²⁸. At the time, Section 2, clause 5, only briefly stated that if the participant's price offer was clearly abnormally low, the procuring entity should examine the circumstances and take them into consideration, as well as request the justification from the participant and explain what exactly the former considers unacceptable in this price offer.

The current EU framework document regulating public procurement as of September 2020 is the Directive 2014/24/EC²⁹. Although Article 69 of this document describes the ALP matter in more detail, EU member states still independently decide the details of how this system should function. The mentioned directive plays the role of a document with general requirements, and each state provides specific mechanisms in national legislation.

27. As of 1971, the European Economic Community was one of three so-called "European communities" that later evolved into the European Union

28. Full name: Council Directive No. 71/305/EEC of July 26, 1971, concerning the co-ordination of procedures for the award of public works contracts (Council Directive 71/305/EEC of July 26, 1971 concerning the co-ordination of procedures for the award of public works contracts): bit.ly/2YELpiH

29. Full Name: Directive 2014/24/EU of the European Parliament and the Council of 26 February 2014 on public procurement and repealing of Directive 2004/18/EU (Directive 2014/24/EC of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance): bit.ly/3qAivGB

How ALP is regulated

Article 69 of Directive 2014/24/EC envisages that (short version):

- 1) the procuring entity must request the justification of the price offer from the participant with ALP;
- 2) the justification may concern:
 - a) the special procedure of the production process, services provided, or construction method;
 - b) the chosen technical solution or exceptional favorable conditions;
 - c) originality of works, goods, or services;
 - d) compliance with environmental, social, and labor law obligations³⁰;
 - e) compliance with obligations concerning the conclusion of contracts with sub-contractors;
 - f) participant's ability to receive assistance from the state;
- 3) the procuring entity evaluates the information provided and is obliged to reject the price offer if the evidence provided does not adequately explain the price offered;
- 4) member states should provide each other with information concerning the participants' justifications.

To find out the appropriateness of the justification, the European Commission advises procuring entities³¹:

- 1) to ask participants with ALP:
 - How did the participant calculate the expenses?

- How did the participant of the bidding come to a specific price for a specific product?
- Does the price allow one to meet all the requirements stipulated in the contract?
- Does this price allow one to comply with the existing labor and environmental standards?
- Is there sufficient funding for the procurement?³² Do the calculations make sense?

2) to feel free to ask for any information they think is necessary to evaluate this price offer;

3) to ask for specific evidence.

Comparison of the Ukrainian and the European ALP systems

Unlike the Ukrainian ALP system, the EU legal system:

- does not limit the coverage of ALP to procurement procedures only (ALP can also be applied to pre-threshold procurement)³³;
- defines that the procuring entity should request an explanation from the participant, and not that the participant should automatically provide it. At the same time, the procuring entity has no limitations concerning the information they may request³⁴.

32. Some sources dedicated to ALP claim that sometimes a procurement transaction with a market value of, for example, UAH 1 mln can be financed only with UAH 500,000, either due to lack of funding or due to errors in estimating future expenses. In such cases, a participant who sees this discrepancy may try to save on certain components of the product, works, or services, which may lead to non-fulfillment of the contract in the future. Therefore, the European Commission encourages procuring entities to check this cause of ALP as well

33. p. 9: bit.ly/20ugUrq

34. p. 10: bit.ly/3gEWqgA

30. For a detailed list, see ANNEX X. List of international social and environmental conventions referred to in article 18(2)

31. p. 11: bit.ly/3gEWqgA

Member states themselves determine:

- the interpretation of the term ALP;
- the period during which the justification must be provided (in Italy, no less than 15 days, and in France—four days)³⁵;
- specific methods for calculating ALP and/or criteria for evaluating the justifications provided.

What is common in the Ukrainian and European systems:

- the legislation offers only possible, not comprehensive, examples of justifications³⁶;
- a participant with ALP cannot be awarded if they have not previously provided a justification³⁷;
- the procuring entity may reject the bid if they consider the justification improper.

Approaches to evaluating the price offer with ALP

It is advisable to divide the criteria for evaluating ALP offers that can be used by procuring entities (including in the EU countries) into two large groups:

- those based on formulas;
- those based on procuring entities' judgments.

35. p. 7: bit.ly/2QuqUrg

36. According to EU precedent law, procuring entities cannot limit the range of factors that participants with ALP provided as justification. For more information, see Page 7: bit.ly/2QuqUrg

37. In accordance with EU precedent law, in some cases, a participant's bid with ALP may be rejected automatically. In addition, such a norm is envisaged by the legislation of the Italian Republic. For more information, see pages 9-10: bit.ly/2QuqUrg

Formulas can take into account variables such as the price offer, the delivery time required to complete the contract, the amount of work, and so on³⁸. To detect ALP, one can also use the Bid Tender Forecasting Model (BTFM)³⁹, the Economic Scoring Formula (ESF)⁴⁰, the ALP criteria (Abnormally Low Bids Criterion, ALBC)⁴¹, and so on. At the same time, according to the precedent law of the EU Court of Justice, the use of arithmetic methods in any case cannot lead to automatic rejection of procurement participants⁴².

In the case of criteria based on procuring entities' judgments, there is always a risk that their opinion will be subjective, or they will make a mistake⁴³.

When evaluating price offers for ALP, procuring entities can take into account various aspects of the procurement:

- compare the participant's price offer with the procurement item;
- compare the expected procurement price (it may not always be known to participants in advance⁴⁴) with the participant's price offer at the initial stage and evaluate the degree of deviation;
- compare the price offer with the prices offered in all other relevant tenders. The procuring entity evaluates either deviations from the average price, or checks the degree of deviation between different price offers, or applies both methods;
- apply the combination of all or some of the above-mentioned methods⁴⁵.

38. See examples of formulas in Annex 1. Arithmetic formula for the identification of abnormally low tenders (ALTs), P. 50: bit.ly/32udyKj

39. The model was developed by Ballesteros-Pérez and the colleagues: bit.ly/2D8cSlq

40. The main point of the economic scoring formula is assigning quantitative estimates to each participant based on the price offer and taking into account how the participant reduced the price during the auction: bit.ly/2D8cSlq, bit.ly/32tx61v

41. The main point of the ALP criteria is setting a threshold for price offers in order to detect ALP: bit.ly/32tx61v

42. p. 4: bit.ly/2QuqUrg

43. p. 2: bit.ly/3lnhWDB

44. p. 32: bit.ly/32udyKj

45. p. 4: bit.ly/2QuqUrg

In other literature, the same methods are divided into two groups — the so-called absolute and relative:

- absolute methods involve comparing the price offer of the participant and its components with the procuring entity's expected cost.

The absolute approach can theoretically be used in any situation, but only if the procuring entity has the correct calculations. In practice, this is not always the case, since the procuring entity's calculations may be based on outdated information, depend on a specific calculation method or construction method, be based on assumptions (for example, about current or future prices for materials), and so on;

- relative methods consist in comparing the price offer of a participant with the average value of the price offers of other participants.

Usually, the lowest price offer is compared with the deviation from the average level of other tender bids. The advantage of this approach is that it takes into account the actual market conditions. However, it can only be used if there are at least five participants, and it is unreliable in situations where there is collusion between the participants⁴⁶. It is relative approaches that are used to calculate ALP in Ukraine as of September 2020.

PRACTICE OF INDIVIDUAL EU MEMBER STATES (as of 2016)^{47, 48}

Some EU member states do not envisage any specific method for determining ALP. Procuring entities in these countries evaluate the price offer of participants on a case-by-case basis, taking into account the circumstances. Arithmetic me-

46. p. 33–34: bit.ly/32udyKj

47. p. 5–7: bit.ly/2QuqUrq

48. p. 16–22: bit.ly/32udyKj

thods are also applied (in eight EU member states out of 28 as of 2015⁴⁹). They were also previously applied in Poland, Portugal, Romania, Slovakia, and Slovenia.

Northern Ireland (United Kingdom of Great Britain and Northern Ireland)

In 2013, the Central Procurement Directorate (CPD) published an advisory note “Procurement of Construction Works: Tenders with an Abnormally Low Price.” It had to do with the procurement of construction works with an expected cost from GBP 30,000. If there are fewer than four participants, procuring entities “*must decide for themselves whether it is appropriate to apply this method.*”

Let's consider the proposed procedure for determining ALP using the example of a tender with six participants.

Participant	Price offer	Is the price less than the adjusted average boundary ⁵⁰ ? (3,676,420)	Is the price less than the proximity boundary ⁵¹ ? (3,663,000)	Reject automatically?
Participant 1	3,662,900	Yes	Yes	Yes
Participant 2	3,663,100	Yes	No	No
Participant 3	3,700,000	No	No	No
Participant 4	5,000,000	No	No	No
Participant 5	5,600,000	No	No	No
Participant 6	5,700,000	No	No	No

49. bit.ly/2EI0yXq

50. Adjusted Average Boundary

51. Proximity Boundary

1. Calculating the adjusted average value: the average value of all offers excluding the highest one (5,700,000):

$$(3,662,900 + 3,663,100 + 3,700,000 + 5,000,000 + 5,600,000) / 5 = 4,325,200$$

2. Calculating the adjusted average limit: 85% of the adjusted average:

$$4,325,200 * 0.85 = 3,676,420$$

3. Determining the lowest qualifying price: the price offer that is higher than the adjusted average:

$$3,700,000 > 3,676,420 = \text{true}$$

So, 3,676,420.

4. Calculating proximity margin⁵²: 1% of the lowest qualifying price (3,700,000). The minimum allowed value is 1,000, and the maximum value is 100,000:

$$3,700,000 * 0.01 = 37,000$$
$$1,000 < 37,000 < 100,000 = \text{true}$$

5. Calculating the proximity boundary: the lowest qualifying price minus the proximity margin:

$$3,700,000 - 37,000 = 3,663,000$$

6. Defining the lowest boundary: the lowest value between the adjusted average boundary and the proximity boundary:

$$3,663,000 < 3,676,420 = \text{true}$$

So, 3,663,000.

7. If both the third and fourth columns contain the value “yes,” the price offer is rejected automatically.

$$\text{Offer of participant 1 } (3,662,900) < 3,676,420 \text{ AND } < 3,663,000.$$

The price offer of participant 1 should be automatically rejected, since it is below the adjusted average boundary and the proximity boundary at the same time. Participant 2 will be awarded, since they offered the lowest price offer and have one acceptable value, “No” (in column No. 4).

Since Northern Ireland was required to comply with the EU procurement directives in 2016, automatic rejection could only be applied to procurement with an expected cost below the EU thresholds. In other cases, the procuring entity was required to request a justification from the participant and evaluate it.



52. Proximity Margin

Italy⁵³

Italian law stipulates that procuring entities must evaluate the justification of those participants whose price offers are below the abnormality threshold. The abnormality threshold can be calculated using five different methods. The procuring entity decides through a lottery which method will be applied. To avoid price manipulation, participants do not know beforehand which of the calculation methods will be applied.

Let's look at one of the methods using the example when 11 participants took part in the tender.

Participants	1	2	3	4	5	6	7	8	9	10	11
How much is the price offer less than the expected cost	8 %	9 %	11 %	13 %	14 %	16 %	17 %	18 %	20 %	21 %	25 %

1. To calculate the average downgrade value, we exclude the two lowest and epy two highest values (8% and 9%; 21% and 25%):

$$(11 \% + 13 \% + 14 \% + 16 \% + 17 \% + 18 \% + 20 \%) / 7 = 15.57 \%$$

2. Calculating the average deviation from 15.57% of those price offers that are higher than 15.57%:

$$\begin{aligned} & ((16 \% - 15.57 \%) + (17 \% - 15.57 \%) + (18 \% - 15.57 \%) + \\ & (20 \% - 15.57 \%)) / 4 = 2.18 \% \end{aligned}$$

3. Calculating the abnormality threshold:

$$15.57 \% + 2.18 \% = 17.75 \%$$

4. The procuring entity should request justification from those participants whose deviation of their price offer from the expected cost is more than 17.75%. That is, the participants 8-11.

53. See also: bit.ly/3hzdtLU

Poland

Procuring entities are required to request justification from those participants whose price offers are lower by more than 30% of the expected cost or the average value of all price offers. There is no requirement for a minimum number of submitted bids.

Portugal

The price offer is considered ALP if it is lower than the expected cost:

- by 40% or more for procurement of works;
- 50% or more for other procurement.

The procuring entity can also set various “threshold abnormality values,” but they must inform potential participants in advance.

Romania

Until 2016, Romania had rules according to which the price offer was considered ALP if, excluding VAT, it amounted to:

- less than 85% of the expected cost (if less than five bids were submitted);
- less than 85% of the arithmetic mean value of all submitted bids, excluding the lowest and highest of them (if at least five bids were submitted).

Since 2016, these norms have changed, and the relevant law no longer envisages calculations for determining ALP.

EXPERIENCE OF OTHER STATES AND INDIVIDUAL ORGANIZATIONS (as of 2016)⁵⁴

The World Bank⁵⁵

The World Bank's practice involves five stages of responding to ALP:

- 1) the procuring entity detects ALP by comparing the price offer with market prices or the expected cost;
- 2) the procuring entity suggests that the participant provide justification;
- 3) the participant provides justification;
- 4) the procuring entity analyzes the participant's justification;
- 5) the procuring entity justifies in writing their decision to reject the participant or award them.

Hereafter, we will look at each of these stages in detail.

After determining the most cost-efficient price offer, the procuring entity evaluates those tender bids that meet the requirements of the tender documentation.

If there are fewer than five such tenders, the absolute method is applied. The procuring entity compares the price offer of the participant and the prices of its components with the expected cost of the procurement item and the procuring entity's calculation of the prices of its components. If the participant's price offer is 20% or more less than the expected price, they must justify it. And the procuring entity will evaluate whether this offer is ALP.

54. p. 16–22: bit.ly/32udyKj

55. bit.ly/348m1HD

If there are five or more bids, the relative method is applied. In this case, ALP is defined as a price that is more than one standard deviation lower than the arithmetic mean value of all price offers. Such a method can be applied if market prices are competitive and independent and there are no collusions (anticompetitive concerted actions).

An example.

Participants	1	2	3	4	5
Price offers, mln	72	92	82	101	53

1. Calculating the arithmetic mean value of all price offers:

$$(72 + 92 + 82 + 101 + 53) / 5 = 80$$

2. Subtracting the average value from each sample element:

$$\begin{aligned}72 - 80 &= -8 \\92 - 80 &= 12 \\82 - 80 &= 2 \\101 - 80 &= 21 \\53 - 80 &= -27\end{aligned}$$

3. Squaring all the resulting differences:

$$\begin{aligned}-8^2 &= 16 \\12^2 &= 144 \\2^2 &= 4 \\21^2 &= 441 \\-27^2 &= 729\end{aligned}$$

4. Getting the sum of squares:

$$16 + 144 + 4 + 441 + 729 = 1,382$$

5. Dividing the resulting amount by the number of elements in the sample:

$$1,382 / 5 = 276.4$$

6. Calculating the square root from the resulting number:

$$\sqrt{276.4} = 16.62$$

The rounded standard deviation value is 17.

7. We subtract the standard deviation from the arithmetic mean value of all price offers:

$$80 - 17 = 63$$

8. The ALP threshold is 63. All price offers that are less than this value are defined as a potential ALP.

$$53 < 63 = \text{true}$$

Thus, the price offer of 53 mln is a potential ALP.

If the procuring entity recommends concluding a contract with the participant with ALP, they must ask them for a price justification. Regardless of what methodology is applied, the World Bank does not reject offers with ALP without evaluating the participants' justifications.

After receiving the justification, the procuring entity must conduct a thorough analysis and answer a number of questions:

1. Didn't the participant take into account any part of the works or materials during the evaluation? Was this done intentionally or by mistake? Was some part of the works evaluated differently by the procuring entity and the participant, and why? Did the participant rate a certain part of the contract too low compared to the market, and why?
2. Does the participant plan to apply different volumes, consistency, timing, and combinations of resources (such as construction equipment, personnel,

and materials) compared to other participants? Can the participant change the procedure for using resources without changing the cost of the contract, if the existing procedure, in the opinion of the procuring entity, does not allow the participant to properly fulfill the contract?

3. Using the table, the procuring entity compares prices for individual components of the contract between the participant with ALP and other participants, if the procedure for fulfilling the contract is comparable in all cases. If the price offer of a participant with ALP in all cases differs from the price offers of other participants by approximately the same relative amount, the procuring entity focuses on analyzing the expenses of the participant with ALP and clarifying how and why the rate of profit was determined and whether they took into account the occurrence of force majeure. If the difference regards only a certain spending pattern, the procuring entity must analyze it in detail.

Taking into account the results of the previous steps, the procuring entity requests a detailed analysis of the calculations from the participant. To do this, they can provide a template that needs to be filled in ⁵⁶. The participant will have at least 5-10 business days to respond.

Calculation analysis usually has the following components:

Price offer analysis = cost of goods / works (equipment, materials, and labor) + overheads + force majeure expenses + revenue

4. The procuring entity asks the participant for explanations that would justify their calculations. If necessary, they can request additional detailed analysis of the calculations.
5. If the participant's tender offer envisages the engagement of subcontractors, they, as responsible for the services provided by them and the work performed, must provide the procuring entity with all the necessary information to justify ALP.

⁵⁶. For an example of such a template, see page 23: bit.ly/34BmlHD

If the participant has not submitted the documents within the specified period, their bid is rejected. If they have provided a justification, it may also contain a reference to:

- special economic characteristics of the production process, services provided, or the construction method;
- the selected technical solutions or any exceptionally favorable conditions provided to the participant for the supply of goods, works, or non-consulting services;
- the originality of works, supplies, or services offered by the participant;
- the compliance with current standards and obligations, etc.

After that, the client must analyze all the information provided and take into account all the evidence presented. If the procuring entity needs to receive new calculations or documents during the verification process of the submitted justifications, they can request them from the participant. As a result, the procuring entity must evaluate whether this participant will be able to fulfill the contract properly. If in doubt, the bid of such a participant is rejected.

Based on the results of their work, the procuring entity prepares a detailed report in which they indicate:

- what specific calculations of the participant did the procuring entity recognize as ALP;
- the procuring entity's calculations, which, in their opinion, should be in order for the contract to be fulfilled properly;
- shortcomings identified in the participant's tender bid;
- recommended decision to reject a participant or award them based on the "Detailed evaluation of the participant's price analysis";

- copies of all documents that the procuring entity and participant exchanged during the study of the latter's price offer.

A similar approach to defining and studying ALP is offered by the **Asian Development Bank** ⁵⁷.

The feature of this approach is that it requires that procuring entities have deep professional knowledge. It also requires time and specialists who can make a thorough analysis.

The USA

The Federal Acquisition Regulation (FAR)⁵⁸ regulates all types of federal procurement. At the same time, each state has specific rules that do not contradict the FAR ⁵⁹.

The law stipulates that procuring entities (contracting officers, COs) must purchase goods and services "*at fair and reasonable prices.*" This concept is close in meaning to ALP, but the term abnormally low price is not used.

The FAR does not define "*fair and reasonable prices,*" but they are understood as prices that ⁶⁰:

- reflect the fair market value or total allowable cost of the work of a virtuous and responsible contractor taking into account a reasonable profit;
- envisage the ability of the contractor to fulfill the terms of the contract properly;
- a reasonable buyer will pay based on market conditions, alternative requirements, and non-price factors.

57. bit.ly/3ht7mZr

58. bit.ly/3lme0G

59. bit.ly/34yHTKx

60. bit.ly/3hKf5SQ

In addition, the FAR (31.201-3) defines that *“reasonable prices in nature and amount do not exceed those that would be offered by a virtuous person when conducting a competitive business* ⁶¹.”

The procuring entity must make sure that the offered price is fair and reasonable before determining the winner in accordance with article 13.106-3.

The law specifies the methods and approaches that the procuring entity can use to determine the fairness and reasonableness of the price⁶²:

- market research;
- comparison of the offered price with the prices recognized as fair and reasonable in previous procurement;
- current price lists, catalogs, or advertisements (however, including the price in the price list, catalog, or advertisement does not establish the fairness and reasonableness of the price);
- comparison with similar procurement items in a related industry;
- procuring entity's expert knowledge of the procurement item;
- price comparison with an independent government assessment;
- any other reasonable way ⁶³.

Procuring entities must indicate in writing whether the prices offered are fair and reasonable, using a special document on determining the reasonableness of prices ^{64, 65}.

61. [bit.ly/31oYRk](https://www.far.gov/31oYRk)

62. Article 13.106-3 Award and documentation, p. 376: [bit.ly/31me0G](https://www.far.gov/31me0G)

63. For more information about specific pricing methods, see the U.S. Department of Defense's guide: [bit.ly/3aYVBa](https://www.far.gov/3aYVBa)

64. p. 2: [bit.ly/2EDFyDe](https://www.far.gov/2EDFyDe)

65. Article 13.106-3 Award and documentation, p. 376: [bit.ly/31me0G](https://www.far.gov/31me0G)

Russian Federation ⁶⁶

The price offer is recognized as ALP if it is 25% or more less than the expected cost.

If the expected procurement cost is more than RUB 15 mln, the contract can only be concluded if its implementation is secured. The amount of security must be 1.5 times higher than the amount of security specified in the tender documentation and not less than the amount of advance payments.

If the expected procurement cost is RUB 15 mln or less, the participant must either provide security for the fulfillment of the contract (1.5 times more than specified in the tender documentation), or properly justify its price and provide the security for fulfillment that is defined in the tender documentation.

To justify their integrity, the participant can use information from the Register of Concluded Contracts. It must confirm that they have fulfilled three contracts without fines, penalties, etc. within three years prior to the date of submission of the tender bid. At the same time, the cost of one of these contracts must be at least 20% of the expected cost of the contract in which ALP was activated.

Tajikistan

The specialized law stipulates that the tender commission must reject the participant's price offer if the participant offers a price less than 10% or more of the expected cost for construction work (without receiving and evaluating justification).

Turks and Caicos, a British Overseas Territory in the Caribbean

If a participant offers a price, necessary to perform the work, that the tender committee consider ALP, its price offer is rejected.

66. [bit.ly/3gyvW6](https://www.far.gov/3gyvW6)

POSSIBLE CAUSES OF ALP ^{67, 68, 69, 70, 71}

Literature quite often pays attention to the causes of ALP occurrence. Many sources agree that an ALP-like price offer may actually be due to a number of other reasons than the participant's malicious intent. Therefore, procuring entities are advised to take this into account when evaluating justifications. Some of the causes such as the ALP explanation have already occurred in the Ukrainian practice of providing justifications.

Possible causes include:

- the participant may have an urgent need to conclude a contract even if this may lead to financial losses;
- the participant may lack experience;
- there may have been an error in calculating expenses and profits;
- ALP could be used as a way to push a competitor out of the market;
- a participant is trying to enter a new market (it is indicated that such a situation is more typical for procurement of goods and consulting services);
- a participant can thus avoid situations where the means of production stand idle;
- ALP may have appeared due to the procurement entity's error in the tender documentation (inaccuracies, blurred wording, etc.) /a participant misunderstood the requirements of the tender documentation through their own fault;
- a participant misjudged the risks;

- a participant does not comply with the requirements of the legislation (in the field of social, labor, or ecological relations);
- a participant received assistance from the state;
- part of the expenses may be lower due to the fact that the participant has similar valid contracts in the same region/city;
- a participant can save on scale (for example, when it comes to the production of goods);
- a participant can apply a more innovative method of production/providing services/performance of works, or use cheaper raw materials for production (secondary, confiscated, etc.);
- a participant tries to enter a market where there is collusion between a small number of participants. In such cases, “market” prices may be artificially inflated, and therefore the expected cost by the procuring entity is actually also abnormally inflated.

Despite the variety of the ALP causes, the main goal of the procuring entity should be to focus on the question *“Does the participant really have the opportunity to properly fulfill the contract at the stated price?”* In most cases, this can only be done by examining in detail the specific case of ALP together with the potential contractor of the contract⁷².

At the same time, as the European Fisheries Control Agency notes, *“a procuring entity will never be able to find out 100% about all the reasons why the participant offered ALP.”*⁷³

67. bit.ly/3lnhWDB

68. p. 4: bit.ly/2D6JDPU

69. p. 48: bit.ly/3qBqgTY

70. p. 2–3: bit.ly/2QuqUrg

71. p. 32–33: bit.ly/32udyKj

72. p. 33: bit.ly/32udyKj

73. p. 4: bit.ly/2D6JDPU



SECTION 3

UKRAINIAN EXPERIENCE OF ALP

Object of research: cases of ALP activation, justifications provided by participants, and relevant decisions of tender committees.

Analyzing the content of the above-mentioned documents, we limited ourselves to 855 first cases of ALP activation (from June 10 to July 20, 2020).

Data relevance: the data are relevant as of January 2021.

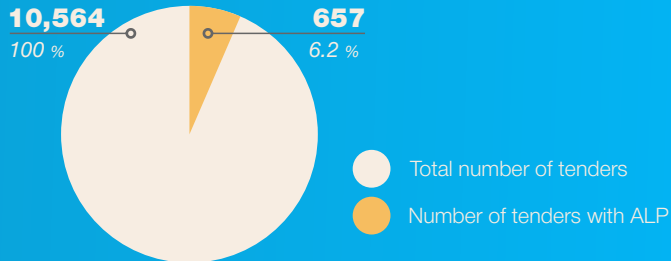
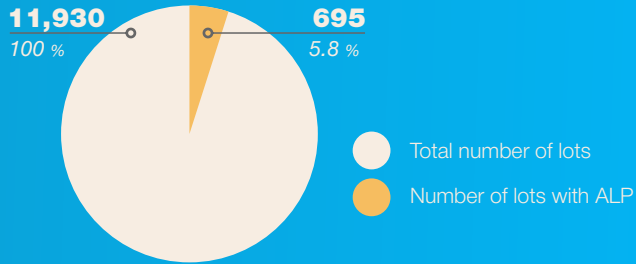
Methodology: we used the data available in the Prozorro system. We processed them using the professional and public BI Prozorro modules and Microsoft Excel.

Research limitations: due to technical limitations, the BI Prozorro module cannot obtain information on such types of procurement as competitive dialogue and framework agreements (specifically on the stage of concluding a framework agreement). Therefore, such procurement is not taken into account in our data.

The data obtained apply only to open bidding and open bidding with publication in English.

NB: Due to rounding the percentage to tenths, the amount calculated may not match (up to tenths) the amount specified.

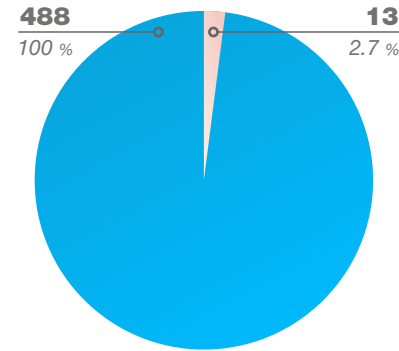
ALP activation frequency



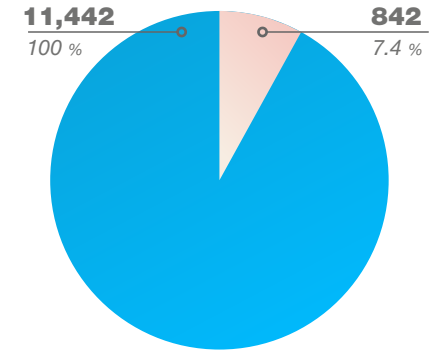
During the period from June 10 to July 20, 2020, auctions were completed in 11,930 lots, or in 10,564 tenders. During the same period, Prozorro determined ALP 855 times in 695 lots, or 657 tenders.

Thus, ALP was activated in 6% of all lots/tenders.

Open bidding with publication in English



Open bidding



● All auctions during this period ● ALP auctions

In open bidding with publication in English, ALP was activated only 13 times, or in 2.7% of lots. In the “national” open bidding—842 times, or in 7.4% of lots.

Thus, it can be assumed that ALP is more typical for open bidding. This may be due to the fact that:

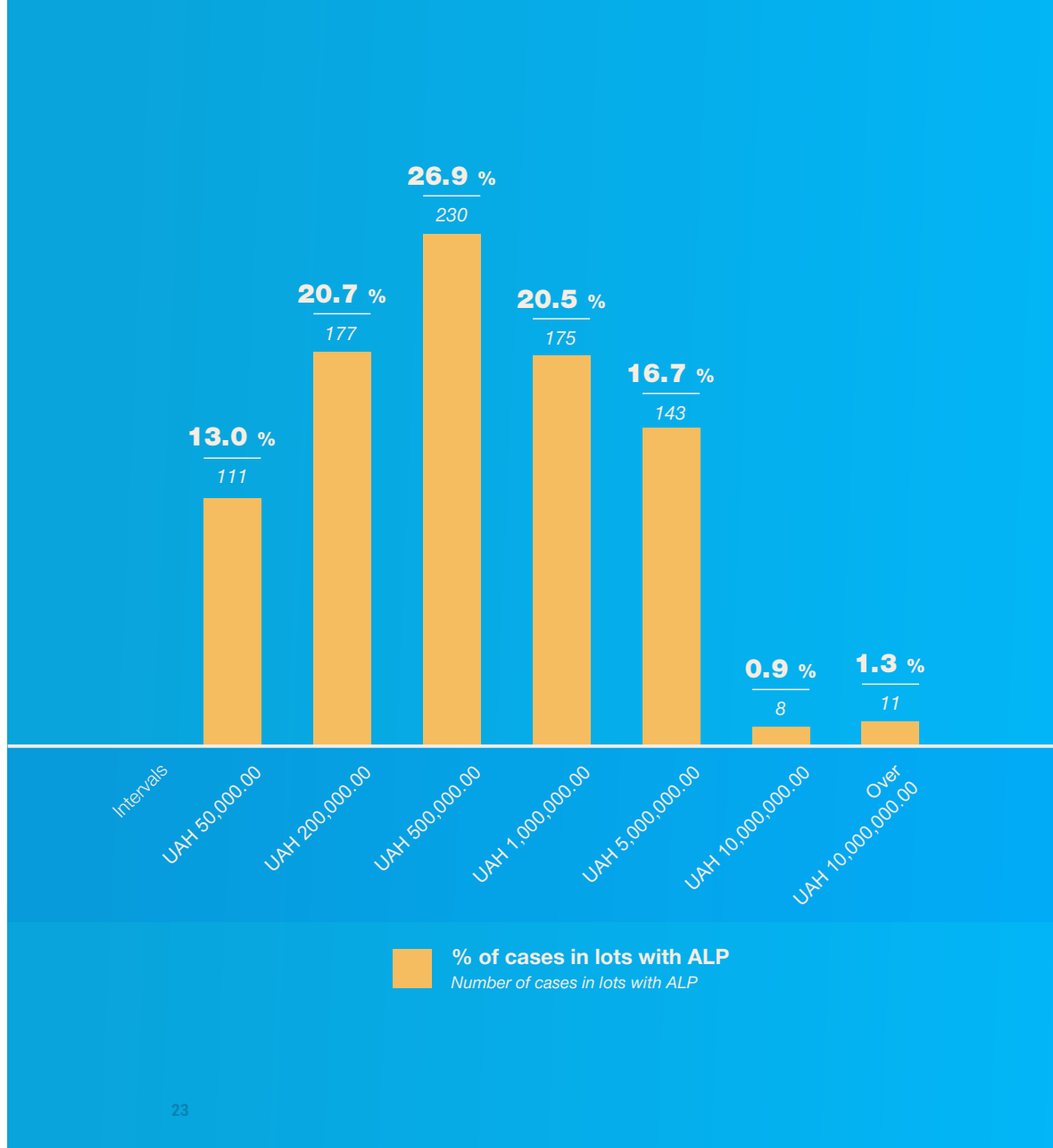
- some of the participants who are less promising from the point of view of proper fulfillment of the contract in the “European bidding” drop out at the pre-qualification stage which causes such low indicators compared to the “Ukrainian bidding”;
- some procuring entities can allow only two or three participants to participate in the auction who have colluded with each other, do not compete, and do not reduce prices during the reduction process;

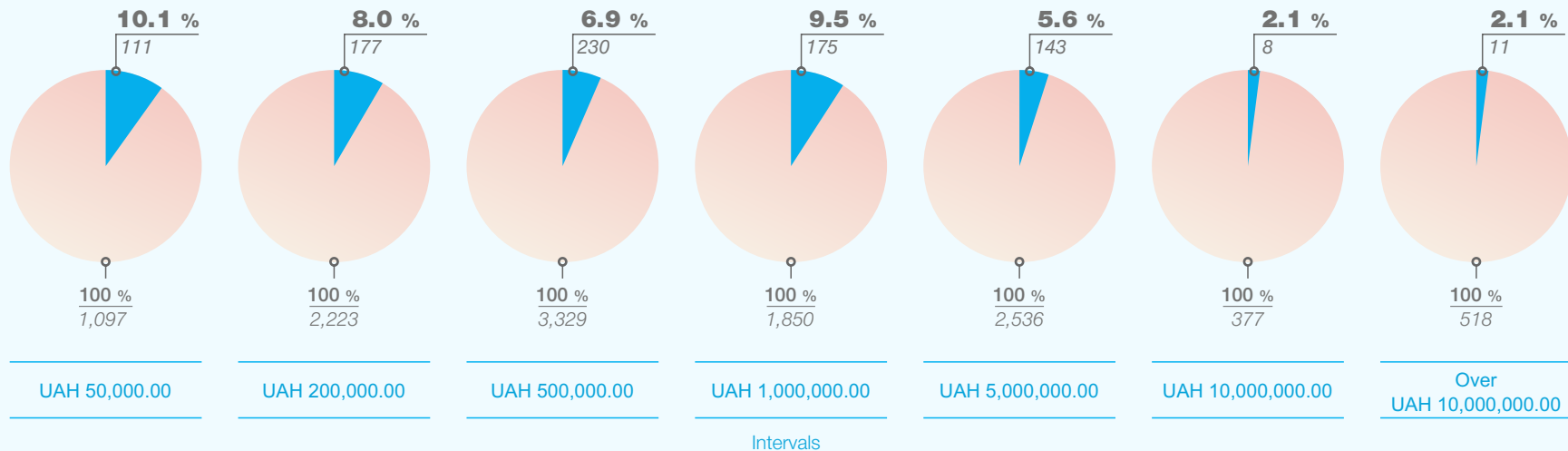
Expected ALP procurement cost

It cannot be stated that ALP is activated mainly in any particular range of the expected cost, although the largest number of cases (26.9%) occurred in the range of UAH 200,001-500,000.

The example of intervals:

- UAH 50,000 should be read as “from 0 to 50,000 inclusive”;
- UAH 200,000 should be read as “from 50,000 (exclusive) up to 200,000 inclusive.”





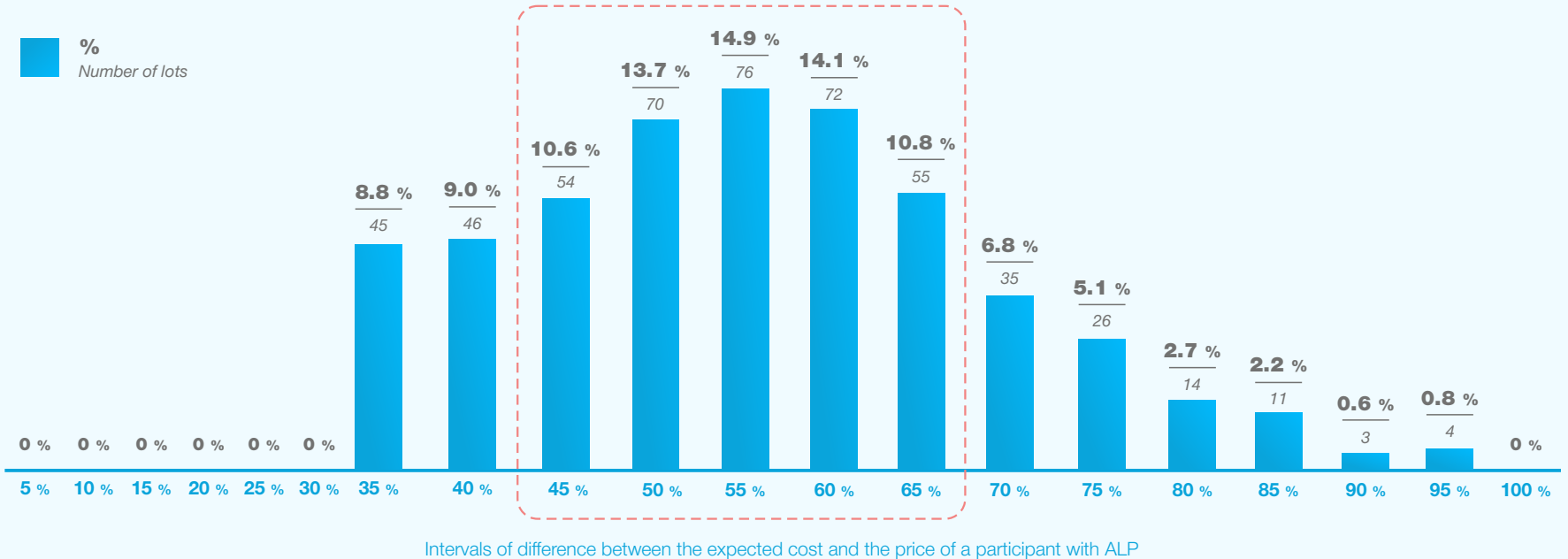
● Number of lots during this period
 ● % of lots with ALP out of all lots during this period

If we compare lots with ALP with all lots during this period, then most often ALP was activated in lots with an expected cost from UAH 1 to 50,000 (every tenth such lot had ALP).

And vice versa, in lots with a high expected cost (from UAH 5,000,001 and more), ALP occurred much less frequently.

We should note that quite often ALP occurred in the intervals of UAH 500,001-1,000,000. This is not only slightly more than 20% of all cases with ALP in terms of quantity, but also every tenth lot with such an expected cost among all lots.

Correct determination of the expected cost



We calculated how much less than the expected cost was the participant's offer with ALP in cases where the participant provided justification and:

- either became the winner;
- or was rejected not because of ALP.

In other words, this happened when the procuring entity either agreed with the ALP argumentation or did not reject it, thus recognizing that there were no problems with the price.

511 cases fall under this description. In 63.1% of them, the price of a participant with ALP was 41-65% less than the expected cost. In almost a fifth of all cases

(18.2%) — by 66-95%. One of the possible explanations for this may be the incorrect determination by the procuring entity of the expected cost or a deliberate overpricing of it.

At the same time, there are no cases when the participant's offer with ALP is less than the expected procurement cost by less than 35%.

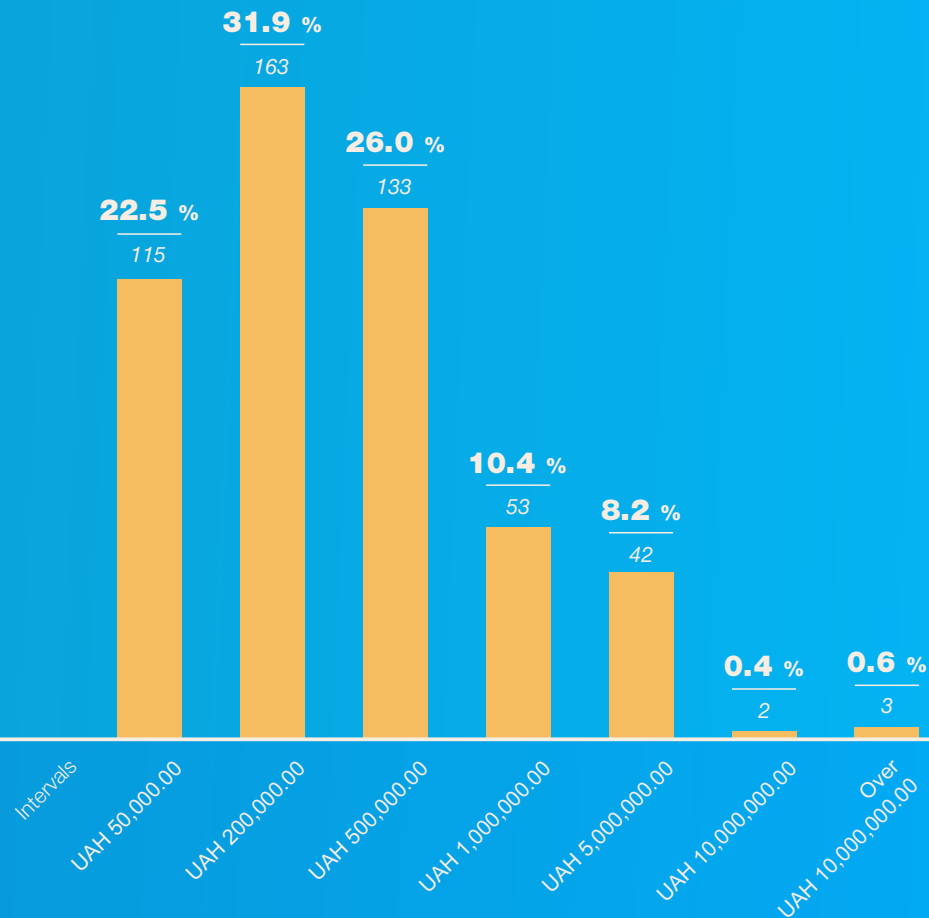
The example of intervals:

- 5% should be read as "from 0 to 5%";
- 10% should be read as "from 5 (not inclusive) to 10% inclusive."

In monetary terms, this difference was most often up to UAH 500,000.

The example of intervals:

- UAH 50,000 should be read as “from 0 to 50,000 inclusive”;
- UAH 200,000 should be read as “from 50,000 (exclusive) up to 200,000 inclusive.”



 %
Number of lots with ALP

Procuring entities with ALP

855 of the first cases of ALP activation account for 484 procuring entities. Moreover, 17.2% of them had from 3 to 15 cases of ALP.

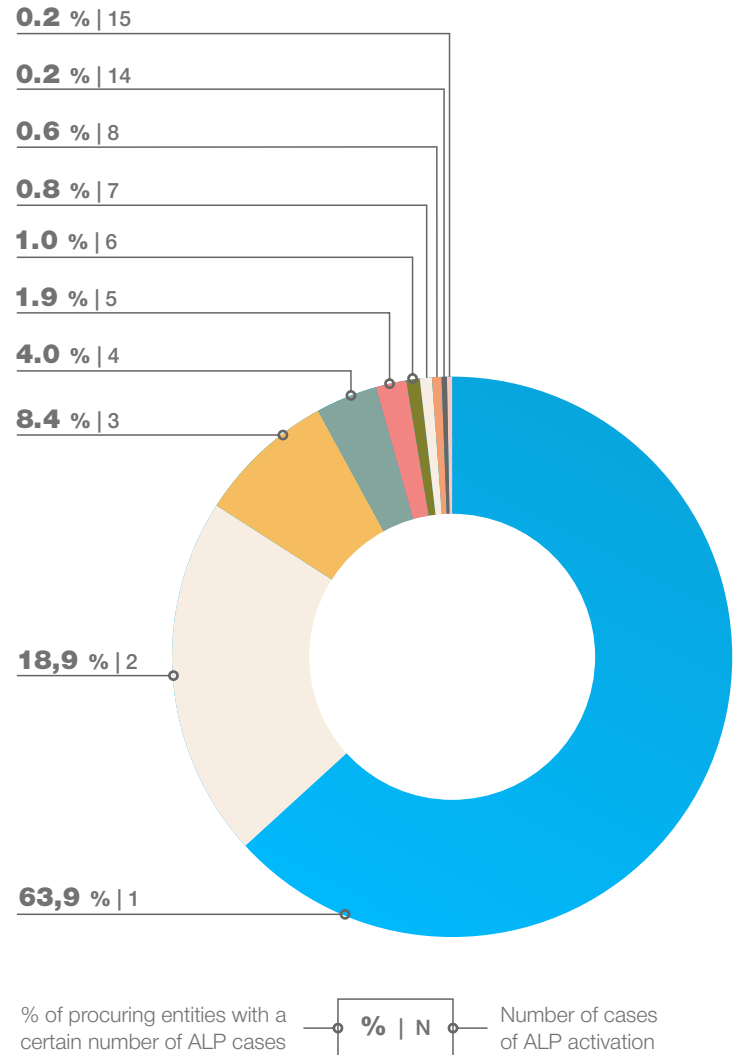
During the period we studied, auctions were completed with 3,752 procuring entities. Thus, ALP was activated in 12.9% of all procuring entities. It is not yet known why exactly ALP was activated with them, but there may be at least the following options:

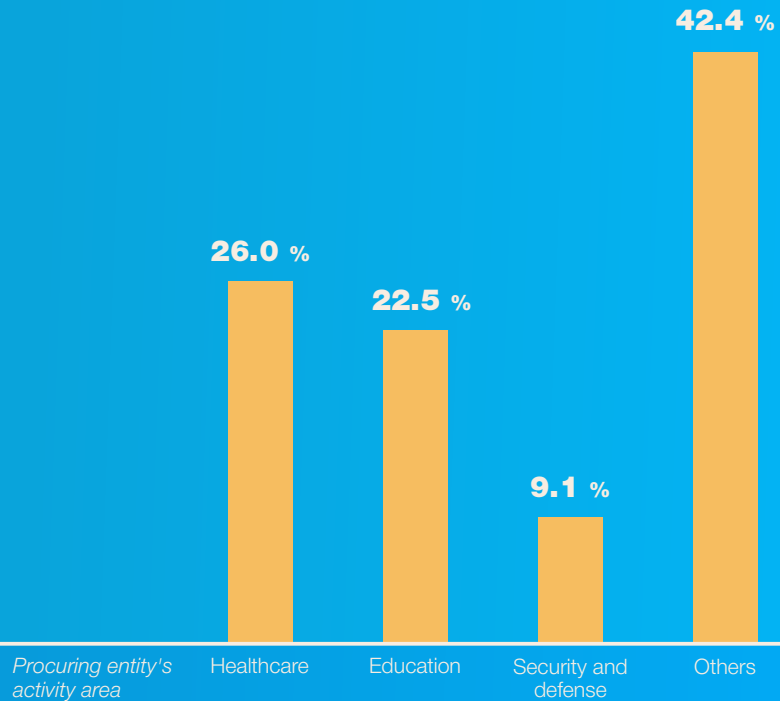
- these procuring entities incorrectly determined the expected cost/deliberately overestimated it;
- these procuring entities purchased goods, works, or services in which ALP is activated more often;
- the procurement transactions of these procuring entities were conducted by those participants who use dumping as a strategy to win auctions.

Most of the cases of ALP among procuring entities occurred in the branch “Healthcare Center” of PJSC “Ukrzaliznytsia” (15 cases) and the Military Medical Department of the Security Service of Ukraine (14 cases).

The branch “Healthcare Center” of PJSC “Ukrzaliznytsia” purchased access services to the Medical Information System Service and provider services, medicines, and medical supplies, as well as services for cleaning sewer networks and wells.

The Military Medical Department of the Security Service of Ukraine purchased pharmaceutical products or medical supplies in 13 cases out of 14. In the 14th case — grain crops and potatoes.





 % of all procuring entities with ALP

We also analyzed all procuring entities with ALP and divided them according to their main areas of activity. As a result, it turned out that 26% of procuring entities belong to the healthcare sector, 22.5% — to education, and 9.1% — to security and defense.

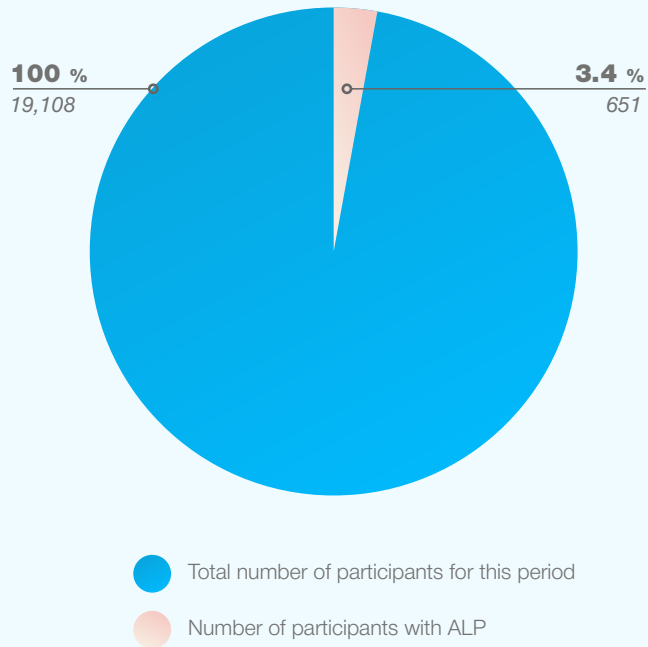
Participants with ALP

We assumed that a significant number of cases of ALP would account for certain companies that most often use price dumping during the auction. Accordingly, this way, it will be easy to identify participants who often use the mentioned strategy to win auctions. However, the majority of them (82%) had only one case of ALP from which it is impossible to conclude that such actions are systematic.

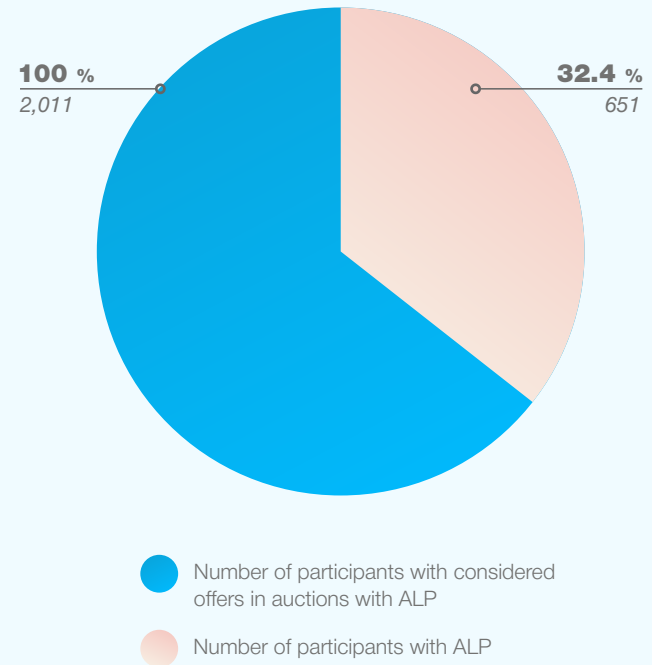
Another 40 participants had from 3 to 34 cases of ALP activation. Their bidding strategy may be the subject of further in-depth research (in particular, the fulfillment of contracts). However, given the justifications provided by them, we cannot automatically consider such cases to be unfair dumping.

A total of 651 participants accounted for 855 cases of ALP activation.

Number of ALP cases per participant	Number of participants	100 %
34	1	0.2 %
5	3	0.5 %
4	13	2.0 %
3	23	3.6 %
2	74	11.4 %
1	537	82.5 %



A total of 19,108 participants took part in the auctions that were completed during the study period (regardless of the ALP occurrence in them). Thus, ALP was activated in 3.4% of them.



During the study period, there were 2,011 participants who took part in auctions with at least one ALP and whose bids were considered⁷⁴. Accordingly, ALP was activated in every third of them.

74. Participants who were rejected or recognized as winners. These statistics also include those whose tender bids are awaiting consideration (since ALP could also be activated with their prices, although it was possible not to get to the point of the actual consideration of the tender bid of this participant)

Participant with ALP

LLC
BADM-B

LLC
Promelectronics

LLC Furniture Factory
“Dynasty”

LLC Production Association
“Art in Metal”

Number of activation
cases for this participant



Most of the cases of ALP happened with LLC BADM-B. In its justifications, the company mainly noted that:

- certain medical products are exempt from VAT and import duties for the quarantine period;
- prices for goods are set in accordance with the requirements of the legislation;
- the margin surcharge for goods does not exceed 10%;
- the company offers a cheaper domestic equivalent.

LLC Promelectronics supplies electrical equipment. In three cases, a participant did not provide justification and was rejected only in two of them. In the third case, a procuring entity awarded them⁷⁵. In two more cases, a participant provided

procurement prices, a copy of the delivery contract, an expenditure invoice, and other arguments.

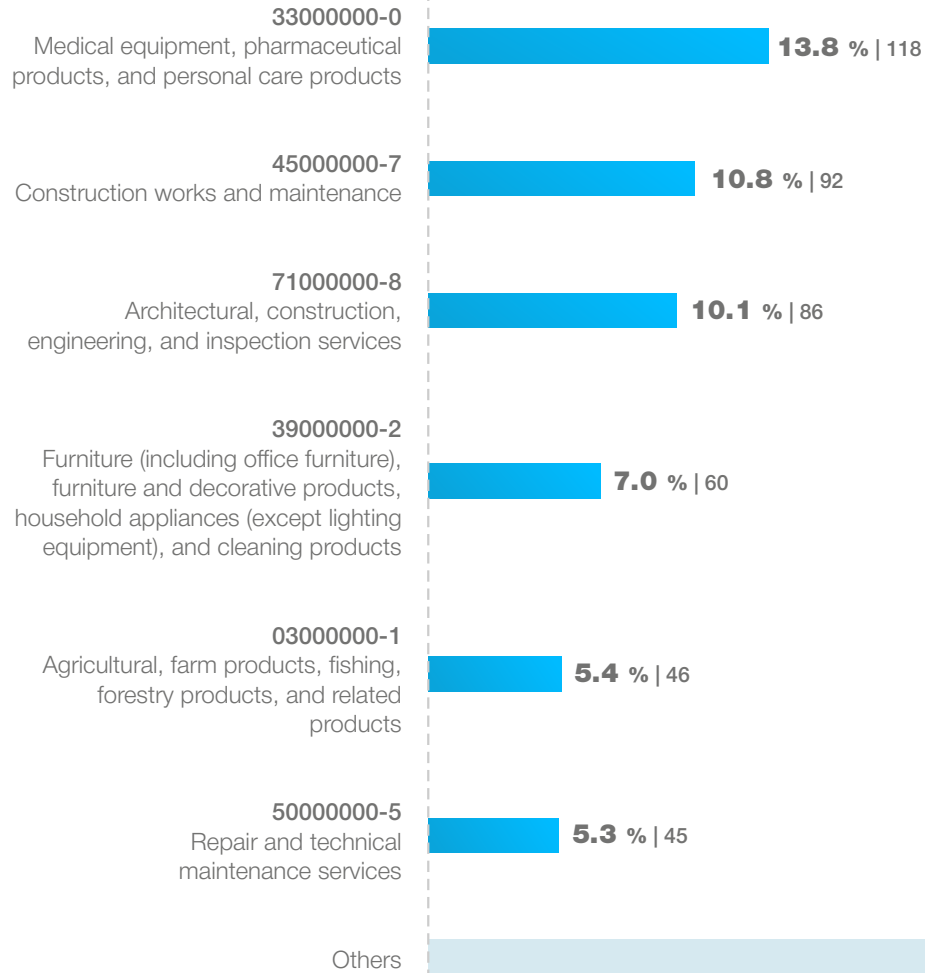
LLC Furniture Factory “Dynasty” produces a wide range of furniture. The participant provided justification all five times, but was awarded in two of them (in the other three cases, the participant was rejected for reasons unrelated to ALP). The argument for their price was the fact that they owned production facilities and had a technological process.

LLC Production Association “Art in Metal” produces and sells metal products. In all five cases, the participant provided justification, but was awarded only in one of them. The reduction of general production costs due to the large number of products in other lots and improvement of the technology of the production process were indicated as an argument.

75. [UA-2020-06-30-000736-a](#)

CPV code

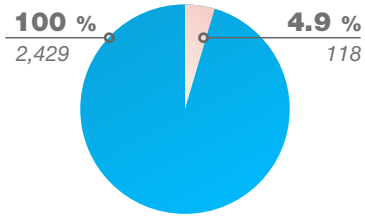
 % among all lots with ALP



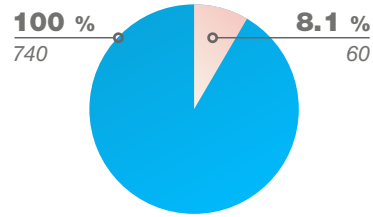
CPV

ALP was activated in 40 CPV codes out of a total 46 according to the second sign.

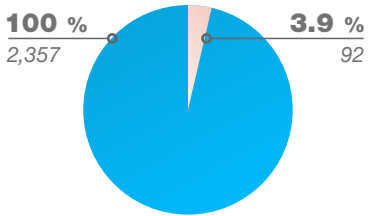
52.3% of cases of ALP activation account for six CPVs. We are talking about medicines, construction and repair, furniture, and food.



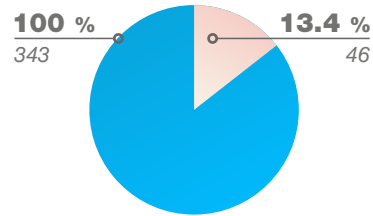
33000000-0 Medical equipment, pharmaceutical products, and personal care products



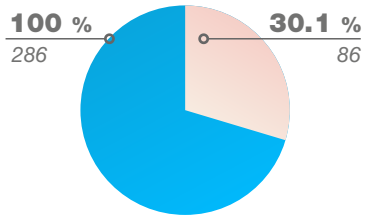
39000000-2 Furniture (including office furniture), furniture and decorative products, household appliances (except lighting equipment), and cleaning products



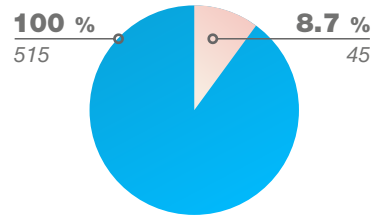
45000000-7 Construction works and maintenance



03000000-1 Agricultural, farm products, fishing, forestry products, and related products



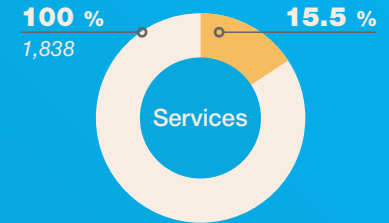
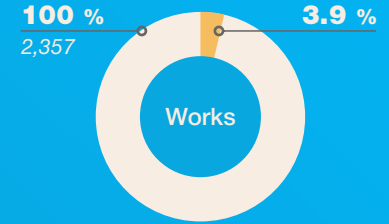
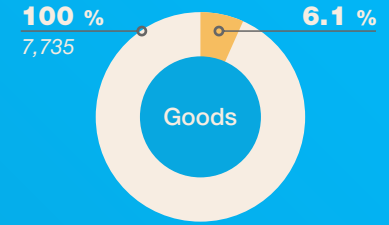
71000000-8 Architectural, construction, engineering, and inspection services



50000000-5 Repair and technical maintenance services

● Number of lots according to these CPVs ● % of lots according to these CPV with ALP

If to compare how often ALP was activated in procurement according to certain CPVs, the leaders are architectural, construction, engineering, and inspection services. During the period we studied, almost every third procurement of these services had ALP.



● Total number of lots ● Lots with ALP

This opinion is confirmed by analyzing how often ALP was activated in procurement of goods, works, and services compared to all the procurement of goods, works, and services during this period. The table shows that every sixth lot for services procurement had at least one ALP (2.5 times more often when compared with goods procurement).

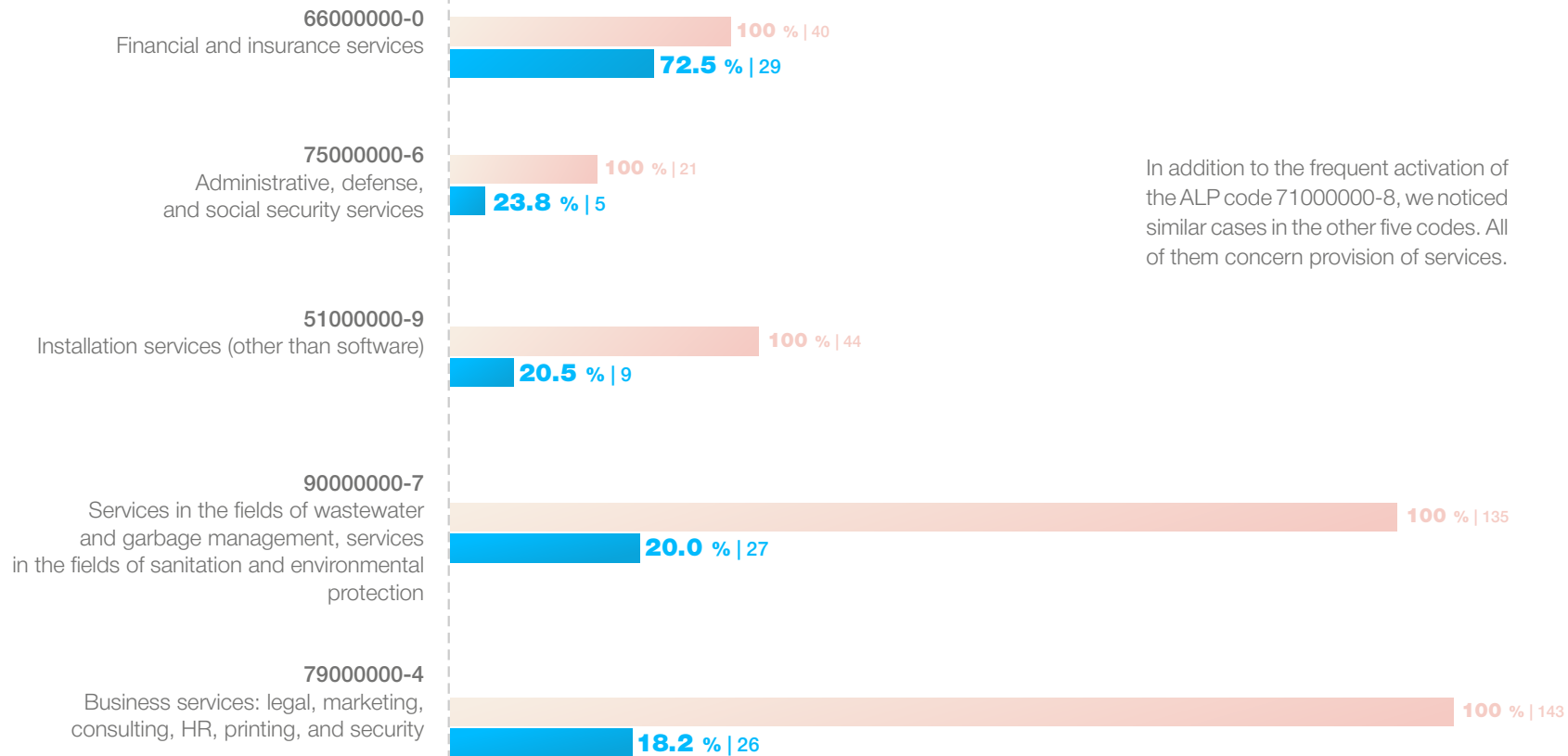
CPV code



Number of lots according to these CPVs



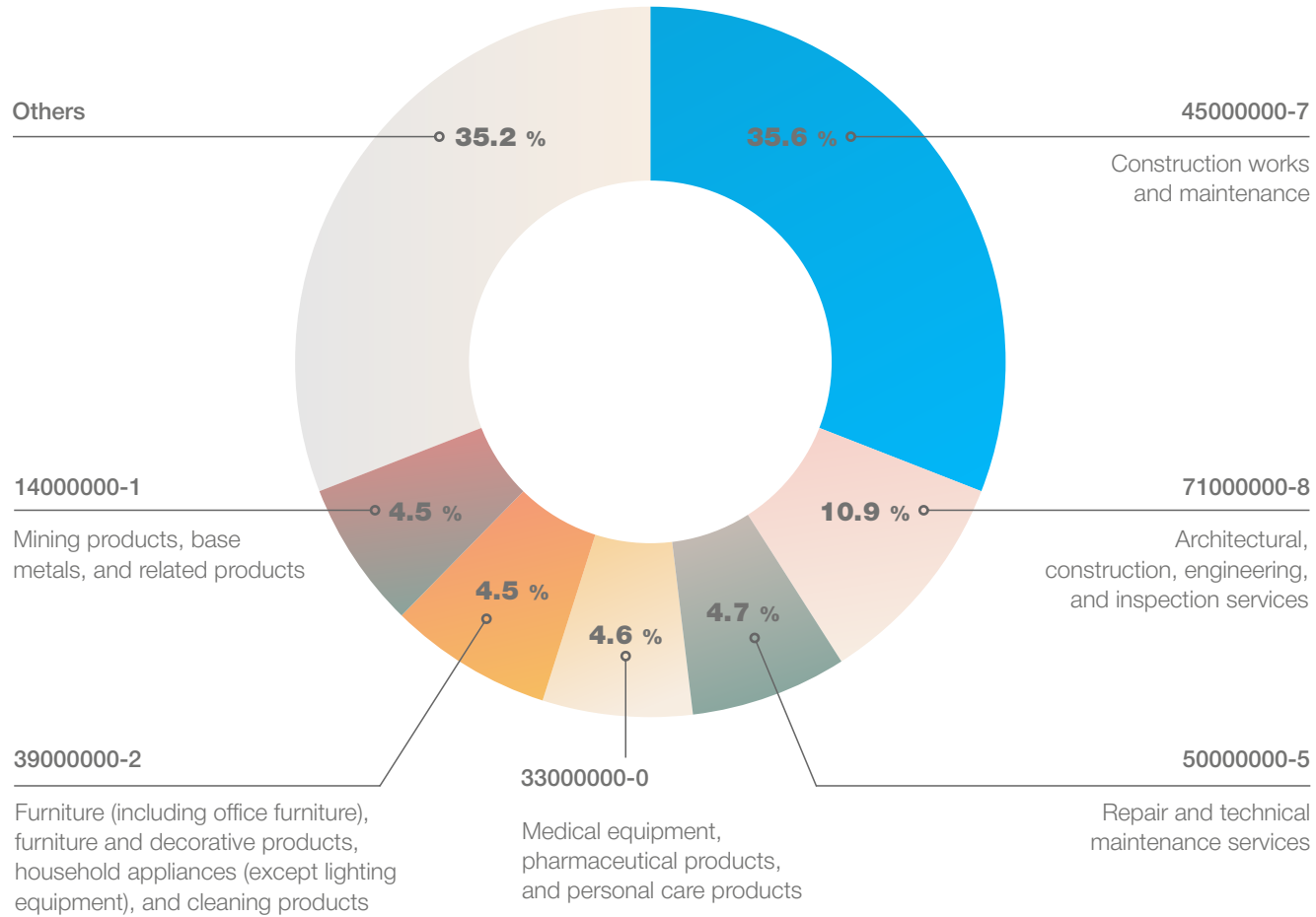
% of lots according to these CPV with ALP



In addition to the frequent activation of the ALP code 71000000-8, we noticed similar cases in the other five codes. All of them concern provision of services.

% — % of the expected cost

The expected cost rating includes almost all the same CPV codes as the quantity rating. Almost half of the total expected cost (46.5%) accounts for construction and repairs.



CONTENT OF PARTICIPANTS' JUSTIFICATIONS

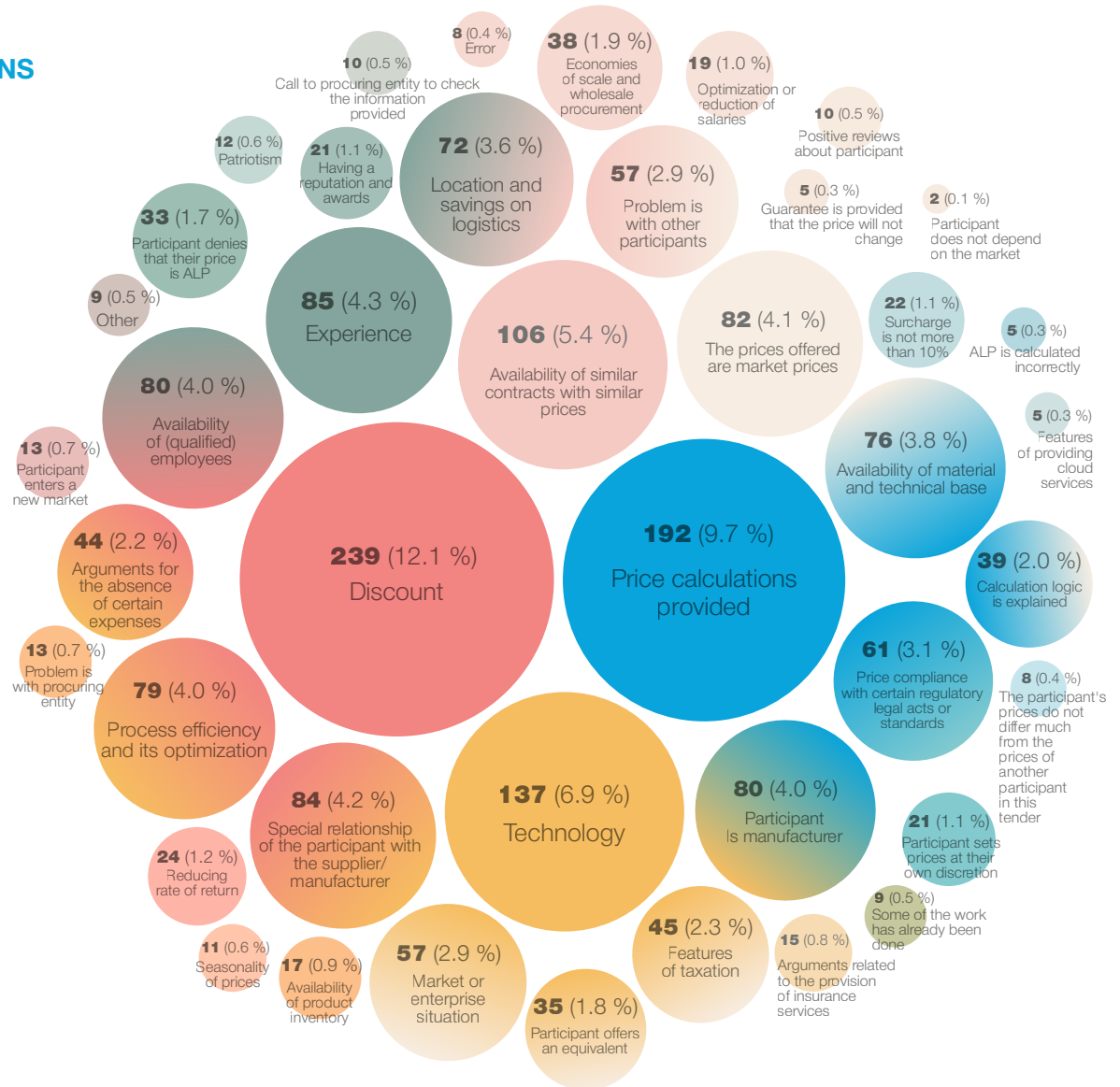
Among the 855 first cases of ALP activation we analyzed, participants provided justification 572 times (67% of cases). We manually studied them and selected 1,974 keywords (most of them had several points as arguments, respectively, and several keywords). Depending on the content, we have grouped the keywords into 42 groups which we will discuss in more detail hereafter.

This part takes into account all explanations of participants, regardless of whether they were provided within the time limit set in Prozorro, or after it (if the deadline for providing justification is missed, the procuring entity must not take it into account).

Most often, participants indicated a discount from the manufacturer, supplier, importer, etc., or their discount to the procuring entity. This argument is mentioned in 12% of all justifications.

Four groups of the most common arguments out of a total of 42 make up a third of all the arguments provided (34.1%), namely:

- discount;
- price calculations provided;
- technology;
- availability of similar contracts with similar prices.



Sometimes one participant's argument could be attributed to different groups at the same time. In this case, we chose the group according to which of the two arguments, in our opinion, the participant emphasizes first, and which is secondary⁷⁶.

1. Discount

The point comes down to the fact that the participant received a discount from the manufacturer/importer/supplier or provides a discount to the procuring entity themselves.

Examples of arguments: we reduced the price for cooperation with the procuring entity; we were given a discount on the rental of equipment; an agreement was reached with our supplier and carrier of material to reduce the price of construction materials and transportation; an offer for this type of product from the manufacturer; we can provide you with a discount; an internal order of the company, on the basis of which the director is given the right to offer products for participation in public procurement at a price lower than 35% of the average market; we were ready to offer an even lower price; a discount of 35% to the procuring entity; we provide a discount to free up the warehouses; calculations are provided where it can be seen that the participant reduced the price for an hour of work and the like.

2. Price calculations provided

We have interpreted very broadly what arguments can be considered as price offer calculations. Sometimes such calculations took two lines of text where the participant explained two or three components of their price. Sometimes they were reduced to links to prices for this product on the Internet. In some cases, participants provided procuring entities with very detailed estimates.

Examples of arguments: a letter from the manufacturer indicating the unit price is provided; an estimate is provided; the cost price and mark-up amount are

76. For example, "...we provide the procuring entity with a discount" is assigned to the "Discount" group. While "...we were able to provide a discount due to the fact that we saved on high-quality logistics" is assigned to the "Location and savings on logistics" group

provided; the procurement price and sale price are provided; estimates for other items are provided; our estimate documentation passed an expert examination; a salary estimate is provided; a screenshot of correspondence with the manufacturer by e-mail is provided; market prices for translation services are provided; a link to average market prices in pharmacies is provided; commercial offers from suppliers are provided; a link to the participant's profile on Clarity Project; a screenshot of prices on the Internet is provided; an expense invoice with sales prices of goods to another procuring entity is provided; a contract with the supplier is provided; calculations of price components are provided, etc.

3. Technology

Participants rarely explained exactly what technology they were using and how it saved money. For the most part, they only pointed out its use.

Examples of justification: a full and continuous production cycle allows to adjust the price; our producers have reduced the cost price by means of technologies; reuse of waste from production activity; advanced technologies; highly mechanized and automated technological processes, etc.

A detailed description of the technology used can be found, for example, in procurement transactions [UA-2020-06-24-006462-a](#), [UA-2020-06-25-001761-b](#) and [UA-2020-06-26-004938-a](#) (lot No. 2).

4. Availability of similar contracts with similar prices

In this group, we have included those arguments that concerned either the fulfillment of similar contracts, or the offer of similar prices, or both arguments simultaneously. To a certain extent, this argument may indicate that the procuring entity consciously or unconsciously overestimated the initial expected procurement price, despite the market situation.

Examples of arguments: a link to another tender participant with similar prices is provided; experience in performing such works in this region; a copy of a similar

contract is provided; I can provide contracts with the same prices with other procuring entities; existing similar contracts with this procuring entity; certificates of delivery and acceptance of works are provided; I am the only one who has experience of similar contracts; a list of previous similar works is provided; currently, I am performing a similar contract, which reduces costs and so on.

5. Experience

This group includes those cases when participants only indicated that they had experience (mostly without providing evidence).

Examples of arguments: links to successful contracts with the same procuring entity are provided; a description of experience is provided; extensive experience in the market/in Prozorro; experienced employees and director; we provide services to enterprises throughout Ukraine, etc.

6. Special relationship of the participant with the supplier/ manufacturer

Examples of arguments: we achieve savings through cooperation with the farm; a letter from the farm with which we cooperate is provided; an agreement is reached with the supplier and carrier to reduce the price due to the fact that the price fell at the auction; we are an exclusive partner of the manufacturer; a dealer agreement and an authorization letter from the manufacturer are provided, etc.

7. The prices offered are market prices

If a participant provided calculations to confirm that prices are market prices, we classified them as “Price calculations provided.” The category “Proposed prices are market prices” included only statements about market prices or other arguments besides calculations.

Examples of arguments: the price is not artificially low; the average cost for these works over the past year is not much higher than the price offered by us; a certificate is provided that the prices correspond to the level of market prices in

the Donetsk oblast; a link to another tender with other participants and the same prices is provided; a link to websites with prices for these goods is provided; an overview of market prices with links is provided; the website on which the procuring entity can check the price is indicated; we have studied the average market value; a guarantee letter about market prices and the like is provided.

8. Availability of (qualified) employees

Examples of arguments: extensive experience of employees; certificates of qualification of personnel are provided; employees are ready to work for less due to a decrease in the number of orders; some employees work at home and on a freelance basis; professional team; the number of technical staff is reduced; small staff, etc.

9. Participant is manufacturer

Examples of arguments: I myself am a manufacturer; I am the largest manufacturer of goods in Ukraine; some of the goods are goods of my production; we perform the work ourselves; for several years I have been a leading supplier of these goods, and so on.

10. Process efficiency and its optimization

This is a fairly broad category which includes all the arguments that, in our opinion, do not necessarily indicate a special production technology.

Examples of arguments: a special audit methodology; reduced administrative/general production costs; savings due to the applied procedure for providing services; the use of strategic, tactical, and operational planning; reduction of administrative costs will be covered at the expense of other procuring entities; savings due to the replacement of certain state standards (DSTU)⁷⁷ for certain organization standards (SOU)⁷⁸; cost reduction due to the use of solar panels; a

77. State standard of Ukraine (DSTU)

78. Organization Standard of Ukraine (SOU)

quality management system and environmental management system of the DSTU ISO⁷⁹ and the like are introduced.

11. Availability of material and technical base

Examples of arguments: availability of my own car; my own equipment; I have my own landfill and therefore sell at cost price; a list of equipment for order fulfillment is provided; I have my own production capacities; partially my own equipment, and so on.

12. Location and savings on logistics

Examples of arguments: savings on field work and business trips of employees due to geographical proximity; the procuring entity is in the same city with the participant; the manufacturer partially provides transport services; we supply to other procuring entities, and therefore logistics costs are minimized; savings due to transportation by sea; my own logistics; high-quality logistics; savings on logistics and the like.

13. Price compliance with certain regulatory legal acts or standards

Examples of arguments: the participant submitted a tender bid with prices for goods according to the Register of the Ministry of Healthcare; the price is calculated in accordance with the DSTU; the price meets the requirements of the legislation; insurance payments are determined in accordance with the law of Ukraine and the order of the State Commission for Regulation of Financial Services Markets; the certificate of conformity with ISO; the price is calculated in accordance with current standards, etc.

14. Market or enterprise situation

Examples of arguments: suppliers supported me during the deterioration of economic conditions; the goal is not to make a profit, but to establish partnerships

with you; more favorable terms of cooperation because of the pandemic; because of the pandemic, the demand has decreased, and we have revised the prices; the price is offered to maintain the market position; fluctuations in the euro exchange rate; we sell goods at cost price due to the fall of the economic activity during the quarantine; we sell goods purchased from enterprises that are in liquidation due to the economic crisis; the tenant reduced rent by 50%; because of the crisis during quarantine, we were forced to offer a low price with almost zero profit to win; some assets are already amortized; low workload of the enterprise; a lot of procurement and a high percentage of wins, etc.

15. Problem is with other participants

In these cases, the participant in their justification indicated the problems in the behavior or tender bids of other participants.

Examples of arguments: little experience of participation in procurement from a competitor; other participants with higher prices simply did not take an active part in the auction; the tender bid of another participant is inconsistent with the legislation; among the participants only we are manufacturers, and others are not; another participant has an abnormally high price; the prices of goods offered by another participant are inflated by the manufacturer; another participant offered the same cost of man-hours as we did; the competitor overestimated the norm of man-hours; other participants did not understand, perhaps, the technical requirements, and therefore put such high prices; a comparison of calculations of my prices and the prices of the next participant is provided; bids of other participants do not meet the procuring entities' requirements and have additional stock items, etc.

16. Features of taxation

For the most part, such arguments were provided by participants who are private entrepreneurs and pharmaceutical companies.

Examples of arguments: VAT and import duty on goods are not charged during quarantine; if VAT is taken into account, the price will be the same as with others; is not a VAT payer; procurement from suppliers without VAT; zero tax rate, etc.

79. Standards of the International Organization for Standardization (ISO)

17. Arguments for the absence of certain expenses

One of the most controversial groups of arguments. Participants explain their low bid by the absence of certain expenses. At the same time, from a logical point of view, such an argument may be appropriate if there is confidence and evidence that these expenses are present with other competing participants.

Examples of arguments: absence of economic losses due to quarantine; no need to buy anything new; not tied to foreign currency; no other expenses except for those related to production; no intermediaries; no contractors; procurement, storage, and transportation costs are not included; we do not attract credit funds; no travel expenses; no expenses for intermediary services; no rental of premises and equipment, etc.

18. The calculation logic is explained

This group of arguments is close to “calculations provided,” but it mainly includes logical explanations without calculations.

Examples of arguments: a coefficient was applied that took into account the volume of work; our price offer is based on commercial offers from manufacturers; the price corresponds to the company's policy and market conditions; we bought at a lower price than we sell, and therefore can supply; we decided that we could fulfill the contract at a lower price than originally planned; after analyzing the market, we decided to reduce prices; the price at the beginning of the auction was adequate, and then reduced; the price was reduced, which is a sign of healthy competition; this is intellectual work and does not include fixed costs, except for the intellectual component, and so on.

19. Economies of scale and wholesale procurement

Examples of arguments: reduction of the cost of materials due to wholesale procurement; large volumes of goods grown; this number of products ordered is

considered a wholesale order; we import these goods in large batches; savings due to economies of scale; we are a wholesale company and have a minimum mark-up, etc.

20. Participant offers an equivalent

Examples of arguments: the product model was discontinued and the price for it dropped; domestic analog; we were offered a product — an analog of another company; we offer cheaper equivalents due to the availability of a wide range; I supply an analog product from Belarus; more cost-effective equivalents, etc.

21. Participant denies that their price is ALP

Examples of arguments: if you calculate the price of a medicine with VAT, as if there is no quarantine, then the price would not be ALP; the price is not ALP because it is similar to another participant's; our price has no signs of abnormal; our price is not ALP; we do not believe that our price is ALP, etc.

22. Reducing rate of return

Examples of arguments: without taking into account the seller's margin due to quarantine; reduction of the amount of profit to 2%; reduction of the marginality because during the pandemic we have fewer projects; reduction of the profit rate; a 5% surcharge, and we are satisfied with it, and so on.

23. The increase is not more than 10%

This is a specific argument only for some medications.

Examples of arguments: the marginal supply chain surcharge does not exceed 10 percent.

24. Participant sets prices at their own discretion

All the arguments in this group come down to the fact that the government does not set prices for most goods in Ukraine, and participants can determine them freely.

Examples of arguments: the regulation of prices for these works has been abolished; this price is acceptable for us; the prices correspond to the pricing policy of the enterprise; the participant sets the tariffs themselves, unless otherwise stipulated by law; we can freely determine the cost of services; the price is economically justified and acceptable for the management; the participant can independently set any prices, etc.

25. Having a reputation and awards

Examples of arguments: the guarantee of contract fulfillment is my impeccable reputation; we have a good reputation; the image of a participant; a powerful insurance company with the largest agency and representative network; we always successfully fulfill contracts; awards; a place in a rating, etc.

26. Optimization or reduction of salaries

Examples of arguments: employees' salaries are paid without bonuses; we will pay their salaries at the expense of other revenues; reduction of salary costs; we pay our salaries at the minimum wage level, and so on.

27. Availability of product inventory

Examples of arguments: an increase in inventory; a larger quantity of goods was produced in advance; material was purchased before the start of the pandemic; goods were purchased last year at lower prices; the presence of material residues in warehouses; large inventory, etc.

28. Arguments related to the provision of insurance services

Examples of arguments: a diversified insurance portfolio; risks are reinsured; the subject of insurance is evaluated as low-risk; a low level of insurance payments allows to provide a discount, and so on.

29. Problem is with procuring entity

Examples of arguments: the procuring entity did not specify the unit of measurement in the draft contract; the item is in satisfactory condition, and therefore there is less work; the procuring entity changed the number of goods and did not review the expected cost; the expected cost is inflated at least twice; the procuring entity incorrectly determined the expected procurement price, etc.

30. Participant enters a new market

Examples of arguments: expansion of the customer base of the enterprise; a description of the "market penetration strategy" from the textbook is provided; the goal is to enter the market of these services; reduction of the rate of profit by entering a new market; is trying to enter a new regional market and a link to the textbook "Enterprise marketing" is provided, etc.

31. Patriotism

Examples of arguments: our price gives savings of public funds by 35%; savings of people's funds and development of education; we do not deal in earnings and gains on the pandemic; it is inappropriate to set high prices if we are talking about funds from the budget; the company decided to minimize the mark-up to increase the country's defense capability; we do not aim to achieve high profits at the expense of state budget funds, unlike others, and so on.

32. Seasonality of prices

Examples of arguments: seasonal price fluctuations for a seasonal product; it is possible to buy goods during the low-price season and sell them later; the product has seasonal price fluctuations, and the price will decrease even more; favorable conditions in the summer season, and so on.

33. Positive reviews about participant

Examples of arguments: positive reviews about the participant on DOZORRO; in the act of acceptance of goods under another contract, it is written that they have no comments to us; a reference is provided by the procuring entity; we have positive reviews (reviews are not provided), etc.

34. Call to procuring entity to check the information provided

Examples of arguments: a proposal to compare prices via the internet; whom you can contact for references; you can contact the manufacturer for confirmation of information; a call to ask about average market prices in the Statistics Department of the Mykolaiv region; a call to analyze tenders in Prozorro; a call to check prices on the Ukrainian energy exchange, etc.

35. Some of the work has already been done

Examples of arguments: the work has already been partially completed; absence of costs for creating electronic layout originals; a large number of materials already developed; part of the work has already been completed because work has already been done in this region, and so on.

36. The participant's prices do not differ much from the prices of another participant in this tender

Examples of arguments: my price cannot be ALP because it is fifth in the list of all prices in this tender; the competitor provided approximately the same price; the price offer of the next participant is not much different, and so on.

37. Error

Participants noted that they mistakenly offered such a price.

38. ALP is calculated incorrectly

Participants noted that the system incorrectly calculated ALP.

39. Features of providing cloud services

All these cases relate to only one phrase: "The system is cloud-based, and services for providing access to and using such a system do not incur additional costs."

40. Guarantee is provided that the price will not change

Examples of arguments: the participant guarantees compliance with the terms of the tender and compliance with the price; a letter of guarantee as part of the tender offer is provided about adhering to the principles of fair competition; the draft agreement already envisages the impossibility of raising the price in the future; our bank guarantee indicates the authenticity of intentions.

41. Participant does not depend on the market

Examples of arguments: 90% of the materials that I supply are in stock. And therefore, I am independent of market conditions; independence of market conditions.

42. Other

Here we have added arguments that are not included in other groups.

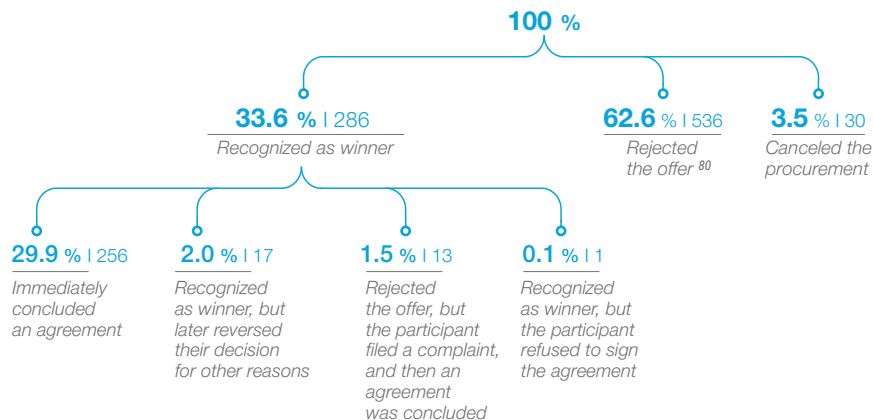
Examples of arguments: the participant calculated the price for one stacked cubic meter; there are many manufacturers of overalls, so, we will buy cheaper; many of these products in Ukraine are produced under our order; [participant's name] can provide services or perform works; it is difficult to estimate the cost of work because there are many offers on the market, and so on.

DECISIONS AND ARGUMENTS OF PROCURING ENTITIES

Status of participants with ALP

The table shows what decisions were made in relation to participants whose ALP was activated, regardless of whether they provided justification or not.

In almost 2/3 of cases, participants were rejected. They were recognized as suppliers only in 31.4% of cases.



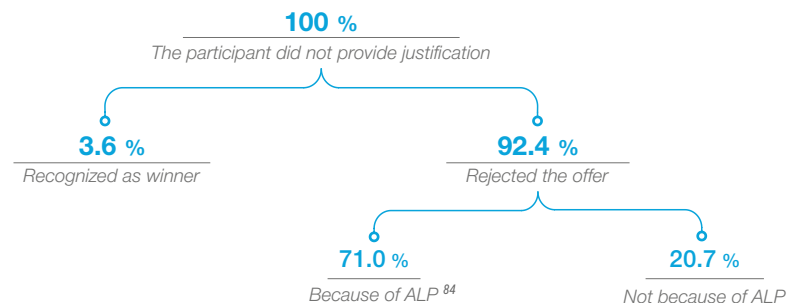
In addition, in three more cases (0.4%), the procuring entity did not have time to consider the tender bid because the previous participant contested their rejection.

80. The procuring entity rejected the participant's tender offer for any reason, and the latter did not contest this decision

Participants did not provide the ALP justification

In most cases, when participants did not provide an ALP justification, procuring entities rejected their bids (92% out of 276).

Despite the absence of justification, participants were awarded in 10 cases from our sample ⁸¹. Moreover, once, the procuring entity explained their decision by saying that the participant provided justification in writing ⁸². In another case, the participant provided their estimate within the established time limit, which can be considered a proper justification for the price, but in no way indicated that this document was related to the justification of ALP ⁸³. For more information about this case, see the part "What should be considered a justification."



In one case, the reason for the rejection is unknown because the file is corrupted ⁸⁵. Another one does not contain a rejection protocol ⁸⁶.

81. [UA-2020-05-20-001502-c](#), [UA-2020-05-25-003523-b](#), [UA-2020-05-28-001451-a](#), [UA-2020-05-29-005776-b](#), [UA-2020-06-03-000936-a](#), [UA-2020-06-10-003950-b](#) (two lots), [UA-2020-06-11-004405-c](#), [UA-2020-06-24-001302-c](#) and [UA-2020-06-30-000736-a](#)

82. [UA-2020-06-03-000936-a](#)

83. [UA-2020-06-11-004405-c](#)

84. Cases where ALP was the sole reason for rejection, and cases where it was one of several

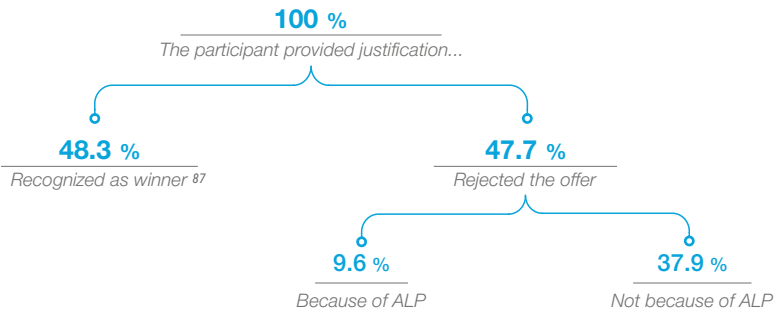
85. [UA-2020-05-28-006057-b](#)

86. [UA-2020-06-02-002005-b](#)

Participants provided the ALP justification

When participants provided the ALP justification, procuring entities awarded them 48% of the time. Rejection of bids under such circumstances also occurred in 48% of cases. Moreover, mostly the rejection was not related to ALP (the procuring entity did not mention ALP in the protocol as the basis for rejection).

In other words, the risk of providing a justification and being rejected on the basis of improper justification is quite low (approximately 10%). In addition, such a rejection can be contested. See the part "[Practice of the AMCU Board.](#)"

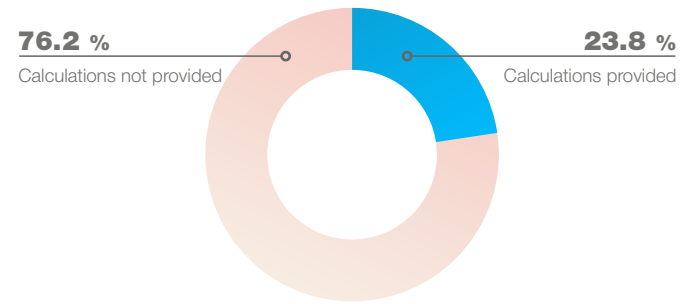


In the remaining 4% of cases, either the procurement was canceled (3.5%) ⁸⁸, or they did not have time to consider the participant's bid because the previous participant contested their rejection.

87. In some cases, the procuring entity awarded the participant, although they provided justification later than the deadline. For example: [UA-2020-06-05-002632-c](#)

88. Meaning that the procuring entity canceled the procurement and did not provide any response to the participant

Calculations as justification of ALP



The Law does not specify that participants are required to justify their prices by providing calculations. However, they can provide them to make the price offer look more convincing in the eyes of the procuring entity.

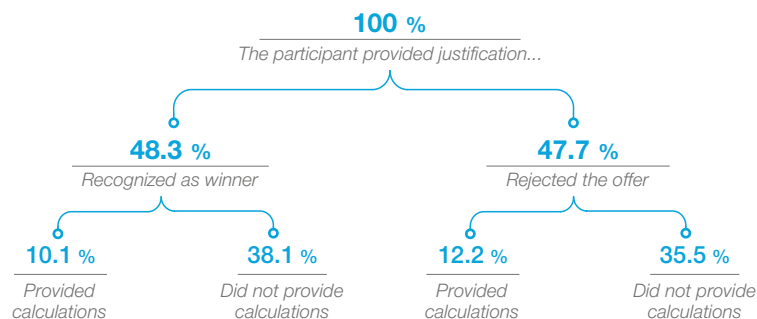
By calculations, we understood any calculations that the participant tried to use to justify the proposed price. They could be very detailed ⁸⁹ or superficial ⁹⁰, relate only to a part of the cost of the procurement item, or cover all expenses.

We paid special attention to calculations, since they are the basis of the price of any goods, services, or works. In addition, calculations are a clearer argument in contrast to the wording "*special technological process*" and "*qualified employees.*"

Participants provided calculations to support their price offer in only 24% of the justifications.

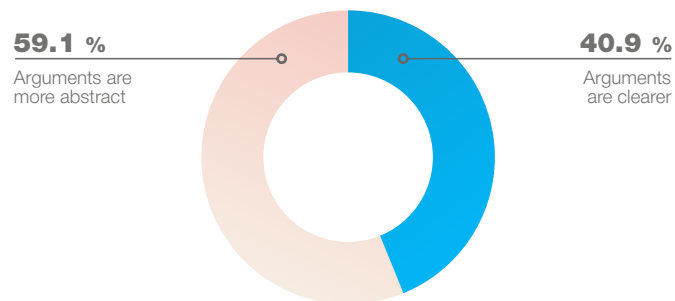
89. For example, see: [UA-2020-05-25-002679-b](#)

90. For example, see: [UA-2020-06-09-000614-a](#)



Based on statistics alone, we cannot say that the availability of calculations as a price justification affects the chances of a participant becoming a supplier. Probably, most procuring entities take into account not only the availability of calculations when evaluating justifications.

Quality of arguments



Analyzing the arguments, we tried to give our own subjective evaluation of the quality of the participants' arguments. We used two possible evaluations: "Arguments are clearer" and "Arguments are more abstract."

We gave the "Arguments are clearer" evaluation when at least one of the participant's arguments in its justification is supported by evidence, or it contains an argument that does not require further proof. For the most part, the arguments were clearer in cases where participants provided estimates, but not only that.

For example, it could be calculations of price components in two versions — before and after the auction⁹¹, an agreement with the supplier⁹², a certificate from the Chamber of Commerce and Industry⁹³, a comparison of prices with the prices of other participants and prices in other tenders⁹⁴, and so on.

When in doubt about which category the participant's justification belongs to, we assigned it to the "Arguments are clearer" group.

As a result, according to our subjective evaluation, the arguments were clearer in 237 cases of ALP activation, or 41 % of all⁹⁵.

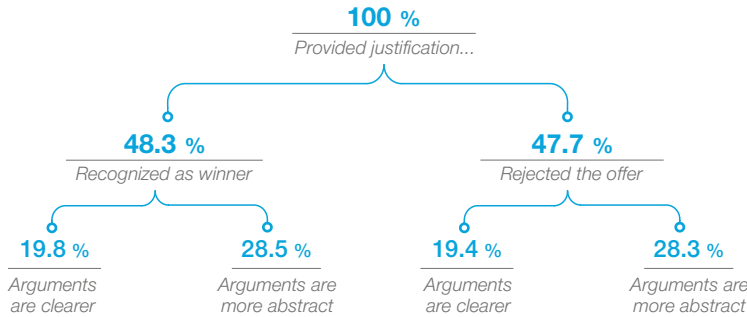
91. [UA-2020-06-26-001991-a](#)

92. [UA-2020-05-04-000755-c](#)

93. [UA-2020-05-20-001675-b](#)

94. [UA-2020-05-28-001532-a](#)

95. We defined the argument as more abstract in 338 justifications, or 59% of cases



We cannot state that clearer (in our subjective opinion) justifications more often led to the signing of the agreement by the party.

Subjective arguments of procuring entities when rejecting a participant with ALP

When studying cases of ALP, we analyzed whether a particular rejection of a participant, in our opinion, is controversial or not. This indicator is subjective.

We found 49 out of 855 such cases (6%)⁹⁶. These are the cases when the participant provided a justification of ALP, but the procuring entity rejected it without proper justification, in our opinion. To understand how the AMCU Board interprets the appropriateness of a participant's rejection because of ALP, see the next part, "AMCU Board Practice."

Subjective (in our opinion) arguments of procuring entities about the rejection of participants can be divided into eight categories (a total of 52 arguments from 49 rejection protocols). At the same time, we evaluated the arguments of procuring entities only in terms of ALP:

96. Or 9% of all cases where participants provided justification of ALP

- 1) procuring entities note that the justification is improper, and provide certain arguments. For example: "lack of specifics,"⁹⁷ "the formula provided does not justify an abnormally low price,"⁹⁸ "discount from the participant... does not explain the reason for an abnormally low price,"⁹⁹ etc. — **17 cases**;
- 2) procuring entities simply point out the lack of proper justification without arguments and explanations — **7 cases**¹⁰⁰;
- 3) "...there are contradictions and inconsistencies in the bid of the participant and the justification of ALP."¹⁰¹

This is one of the few grounds on which you can legally reject a participant. At the same time, as the practice of the AMCU Board shows, the procuring entity needs to present quality arguments for such inconsistencies — **6 cases**¹⁰².

For more information, see the part "Practice of the AMCU Board";

- 4) "...the participant provided justification, but did not document it" — **6 cases**.

It should be noted that the Law does not establish any requirements for documentary confirmation of the justification of ALP;

- 5) "...the participant did not give arguments in their justification that would relate to the examples proposed in the Law, namely: 1) achieving savings... 2) favorable conditions... 3) receiving state aid..." — **5 cases**¹⁰³.

97. [UA-2020-05-27-001922-a](#)

98. [UA-2020-06-23-007983-a](#)

99. [UA-2020-06-23-007983-a](#)

100. [UA-2020-05-26-005366-b](#) or [UA-2020-06-15-000741-b](#)

101. [UA-2020-05-20-001756-b](#) or [UA-2020-05-21-004815-c](#)

102. [UA-2020-05-22-000206-c](#) or [UA-2020-05-22-000384-c](#)

103. [UA-2020-05-20-002172-c](#) or [UA-2020-05-25-001128-c](#)

Note that the price justifications specified in the Law are not a comprehensive list of possible arguments. This was also confirmed by the AMCU Board in its decision on the complaint [UA-2020-05-20-002172-c.a3](#)¹⁰⁴;

6) “...the participant did not provide the relevant calculations and thus did not justify their price” — **5 cases**¹⁰⁵.

It should be noted that the Law does not establish any requirements for providing price calculations to justify ALP;

7) “...the participant provided justification after the indicated deadline,” but, according to the information in the Prozorro system, the participant provided the necessary documents on time — **3 cases**¹⁰⁶;

8) “...the participant did not provide justification,” but, according to the information in the Prozorro system, the participant provided the necessary documents on time — **3 cases**¹⁰⁷;

PRACTICE OF THE AMCU BOARD

From June 10 to August 14, 2020, ALP was activated in 1,396 tenders. In 149 of them, participants filed 306 complaints with the AMCU Board. Out of the 306 complaints, ALP was mentioned only in 19 (1.4%). Out of these 19 cases:

- in 11 cases, the procuring entity rejected the participant due to the fact that the justification provided by them was not proper/convincing. In eight cases, the AMCU Board sided with the participant and only in three cases with the procuring entity. However, in all 11 cases, the AMCU Board acquitted the participants in the part that concerned the justification of ALP, and did not consider it improper¹⁰⁸;

104. [UA-2020-05-20-002172-c](#)

105. [UA-2020-05-18-004282-c](#) or [UA-2020-05-18-004555-c](#)

106. [UA-2020-05-21-003379-b](#) or [UA-2020-06-03-007700-b](#)

107. [UA-2020-06-22-004127-c](#) or [UA-2020-06-11-000529-c](#)

108. [UA-2020-06-23-007983-a](#) (two complaints), [UA-2020-06-15-000741-b](#), [UA-2020-06-03-007871-b](#), [UA-2020-06-03-003730-c](#), [UA-2020-05-27-001922-a](#) (three complaints), [UA-2020-05-20-002172-c](#), [UA-2020-05-19-002661-a](#) and [UA-2020-05-19-002477-a](#)

- in four cases, other participants filed a complaint against the winner, arguing that the latter also provided an improper/unconvincing justification. All four lost^{109, 110};

- in one case,¹¹¹ not the system, but the procuring entity determined ALP by making the corresponding calculations manually. The AMCU Board ruled that since Prozorro did not have information about ALP, the procuring entity unreasonably rejected the participant;

- in one case,¹¹² the complainant noted that “...the procuring entity did not create a technical opportunity to add a new document,” and therefore did not upload the justification. Having considered the complaint, the AMCU Board confirmed the legality of the participant's rejection;

- another case only superficially concerns ALP¹¹³. After the auction for gas supply, the procuring entity rejected the participant's bid because they “...offer a low price for the supply of natural gas, which caused doubts in the tender committee of the lyceum. The participant did not provide a letter of guarantee that the price would not change during the term of the agreement.”

The participant responded in their complaint to the AMCU Board that the electronic procurement system “...does not define their price as abnormally low, and therefore there is no reason to reject the bid.” The Board ordered that the procuring entity cancel their decision to reject the participant;

- in the latter case, the participant filed a complaint against the procurement entity's decision to reject their bid due to the justification of ALP, but subsequently withdrew it¹¹⁴.

109. [UA-2020-06-12-007019-c](#), [UA-2020-06-12-007019-c](#), [UA-2020-06-02-010090-b](#) and [UA-2020-06-02-009681-b](#)

110. There were cases when participants submitted a request to the procuring entity to cancel their decision on determining the winner, arguing that the justification was improper. For example, the requirement of the participant TOV Scientific and Technical Laboratory Center “TRIM ECO” in the [UA-2020-06-26-001991-a](#) procurement. However, we did not analyze these cases.

111. [UA-2020-05-06-000651-c](#)

112. [UA-2020-06-25-002154-c](#)

113. Complaint No. UA-2020-06-24-005607-a.a3 in the procurement: [UA-2020-06-24-005607-a](#)

114. Complaint No. UA-2020-05-18-004555-c.c3 in the procurement: [UA-2020-05-18-004555-c](#)

A common feature of all 19 cases is that in none of them did the AMCU Board deny that the appropriateness of the ALP justifications. Most often, on this occasion, the Board noted:

*The documentation does not contain individual requirements for the procedure for forming the bid price of a participant and the procedure for forming a justification of an abnormally low price. Taking into account the above, the complainant's offer was unlawfully rejected by the Procuring entity on the above-mentioned ground.*¹¹⁵

In two of the 19 cases, the procuring entity indicated that the participant provided false information in the ALP justification. However, after considering the complaint, the AMCU Board ruled:

*...the procuring entity did not prove or document that the complainant provided false information as part of the bid in this part. Taking into account the above, the complainant's offer was unlawfully rejected by the procuring entity on the above-mentioned ground.*¹¹⁶

The following are the examples of procuring entity's arguments about the inappropriateness of the ALP justifications in cases where the AMCU Board decided to cancel the decision on rejection:

- ...the participant provided only a letter in an arbitrary form... There are no logical, systemic, economic, technical explanations and justifications, any specifics and references to prices in the region... The absence of comparative calculations with reference to norms and traditions in the*

115. See, for example, [UA-2020-06-23-007983-a](#), [UA-2020-06-23-007983-a](#) or [UA-2020-06-15-000741-b](#)

116. [UA-2020-06-03-007871-b](#) and [UA-2020-06-03-003730-c](#)

- ...understanding of the relevant business activity does not allow the tender committee to make a proper evaluation of the abnormally low price... The lack of proper justification calls into question the compliance with deadlines and quality of realization... The lack of proper justification is a fact of late submission;*¹¹⁷
- ...the participant did not justify their prices in any way because according to the Law, the justification may contain references to 1) achieving savings... 2) favorable conditions... 3) receiving state aid...The certificate of the Lviv Chamber of Commerce and Industry does not confirm the fact that the price is not abnormal;*¹¹⁸
- ...the participant did not provide a proper justification for the abnormally low price of the bid, in particular, did not indicate which innovative and effective methods would be used in the provision of services and how their application affected price formation;*¹¹⁹
- ...the participant did not provide proper justification;*¹²⁰
- ...[the participant] offers a low price for natural gas supplies, which raised doubts with the lyceum's tender committee.*¹²¹

PRACTICE OF THE SASU

Among the 51 auditor's reports published from June 10 to August 14, 2020, regarding tenders with ALP, ALP is mentioned only once in the [UA-2020-05-19-001791-b](#) procurement.

In this report, the auditors noted that the subject of the analysis was also the participant's justification of ALP. According to the results of the analysis, no violations were found.

117. [UA-2020-05-19-002477-a](#)

118. [UA-2020-05-20-002172-c](#)

119. [UA-2020-05-27-001922-a](#)

120. [UA-2020-06-15-000741-b](#)

121. [UA-2020-06-24-005607-a](#)

SECTION 4

PROBLEMS AND CONCLUSIONS

What should be considered a justification

We identified one case where the procuring entity formally fulfilled the requirement to justify the price, but the submitted documents did not actually contain any arguments. However, such situations may be frequent or occur repeatedly.

The system determined that during the procurement of maintenance services,¹²² the participant PE Budspetsinvest offered ALP. The price justification had to be provided before 00:00 on July 2, 2020. In the first half of the day on July 1, the participant uploaded 15 documents to Prozorro. Among them there was a copy of a similar contract, a certificate of no criminal record, consent to the processing of personal data, etc., but not a single document that would resemble the justification of ALP in name or content.

The specific nature of this situation is that one of the 15 documents uploaded on July 1 is an estimate for the maintenance of premises (in our opinion, the only one that can be interpreted as a justification for ALP). However, like with the other 14 files, there is no mention of the ALP argument. In the end, the procuring entity recognized awarded this participant.

The question arises, from the point of view of the Law, can the participant be considered to have justified ALP?

On the one hand, the procuring entity already required an estimate in the tender documentation, and the participant did not indicate in any way that this particular document should be interpreted as a justification for ALP.

On the other hand, the Law does not establish any requirements for the format of justification. In fact, there was a justification in the bid, and procuring entities quite often awarded participants with less clear and convincing arguments than the estimate.

Studying the technical side of this question also did not give an answer. Each document uploaded during the ALP justification period must receive the “documentType: evidence” element (it indicates that the submitted document is an ALP justification)^{123,124}. On July 1, 2020, all 15 documents that the participant uploaded received such an element¹²⁵. However, since the other 14 documents with the “documentType: evidence” element cannot be considered an ALP justification, it is not certain that the estimate provided is such.

The need to provide the ALP justification several times

If the procuring entity for some reason canceled their previous decision several times and re-evaluates the participant with ALP, the system each time signals the need to justify ALP, despite the fact that such justification was provided the first time.

In one case, the participant provided a timely justification for ALP, and the procuring entity awarded them. However, the participant was later rejected, and their status in the system changed (the requirement to provide the ALP justification was activated for the second time). When the participant filed a complaint with the AMCU Board, and the latter decided to cancel the decision on rejection, the status changed for the third time, and for the third time a request was received to provide justification. The participant provided the same justification all three times. From a logical point of view, this does not make sense, since the price that needs to be justified has not changed and cannot change since the first ALP activation and its first justification¹²⁶.

123. See: bit.ly/32wZjVb

124. There were cases when the ALP justification was uploaded to the system as “qualificationDocuments”: [UA-2020-06-12-006416-c](https://ua-2020-06-12-006416-c)

125. bit.ly/2Qs0iyy

126. [UA-2020-06-05-000545-b](https://ua-2020-06-05-000545-b)

122. [UA-2020-06-11-004405-c](https://ua-2020-06-11-004405-c)

In addition, the question arises, is the procuring entity obliged to reject the participant in accordance with the Law if the latter did not provide justification for the second and third times, but only for the first?

Participant	Decision	Additionally
TOV Antares-3000	Decision canceled	ALP justification until June 24, 2020, 00:00
TOV Antares-3000	Decision canceled	ALP justification until July 3, 2020, 00:00
TOV Antares-3000	Awarded	ALP justification until July 30, 2020, 00:00

This is a minor issue, but it requires clarification and possibly changes to the system¹²⁷.

The need to compare the price with ALP with the prices of other participants at the initial stage

There are cases when participants offer different prices at the initial stage of the auction, but reach almost the same prices after the third round. However, ALP may still be activated, as their prices were very different in the beginning. In this case, the question arises about the feasibility of comparing the final bids with the primary ones.

In addition to the problem already mentioned in this example, ALP was recognized as the second most expensive price offer of all two, which is illogical¹²⁸:

Participant	Initial offer	Final offer	ALP?
TOV FC Treaty House	1,500,000.00	650,000.00	—
AT commercial bank PrivatBank	670,000.00	670,000.00	ALP 40 %

Similar examples can be found in the procurement [UA-2020-06-03-006643-b](#), [UA-2020-06-09-000614-a](#) and [UA-2020-06-03-006571-b](#).

A variation of this problem can be situations when all three participants equally significantly reduced their prices and ALP¹²⁹ was activated for all three.

Participant	Initial offer	Final offer	ALP?
PAT Ukrtelekom (Donetsk branch)	150,000.00	37,000.00	ALP 40 %
TOV Antares	152,000.00	38,000.00	ALP 40 %
SP Maslo Lidiya Borysivna	170,000.00	50,000.00	ALP 40 %

ALP due to inflated expected cost

In some cases, ALP may be activated not because the participant has reduced their price offer below the level of profitability, but because the procuring entity incorrectly calculated the expected cost (overpricing). For more information, see the part “[Correctness of determining the expected cost](#)” of Section 3.

127. Also see: [UA-2020-06-15-001911-a](#)

128. [UA-2020-06-16-000673-a](#)

129. [UA-2020-06-16-004905-c](#)

128. [UA-2020-06-16-000673-a](#)

For example, a problem with determining the expected cost may have occurred in the procurement [UA-2020-05-06-000651-c](#), where five participants out of six offered an average of UAH 224,399.6 each, while the expected procurement price was UAH 1,200,000 (an overpricing of more than 5 times).

Expected procurement price	1,200,000.00
Participant 1	199,999.00
Participant 2	200,000.00
Participant 3	239,999.00
Participant 4	240,000.00
Participant 5	242,000.00
Participant 6	1,094,000.00

In the [UA-2020-06-26-001674-b](#) procurement, six out of eight participants offered an average of UAH 217,079.7 at the expected cost of UAH 750,000 (a difference of 3.5 times)¹³⁰.

The problem of determining the expected cost not only directly affects the savings of taxpayers' funds, but also the functioning of the ALP system. If four out of six participants offered approximately equally low prices, the question arises whether it is logical to determine their ALP just because the other two offered significantly higher prices¹³¹.

130. Also see the procurement [UA-2020-06-22-000540-a](#), where the prices of participants are 3-13 times less than the expected cost
131. [UA-2020-05-27-007679-b](#)

Participant	Final offer	ALP?
Participant 1 (winner)	112,970.00	ALP 40 %
Participant 2	112,999.99	—
Participant 3	113,300.00	—
Participant 4	143,000.00	—
Participant 5	212,780.00	—
Participant 6	220,000.00	—

The same questions can be asked with the procurement transactions [UA-2020-05-28-001594-a](#), [UA-2020-06-01-005235-b](#) and [UA-2020-06-04-002158-a](#).

In addition, in at least four cases, participants directly indicated in the justification that the procuring entities calculated the expected cost incorrectly¹³².

“Abnormally high price”

ALP may be activated because one of the participants offered a significantly higher price than all the others. For example, in the procurement [UA-2020-06-18-002075-a](#), four participants indicated similar prices (from 1,240,000 to 1,440,000). However, the fifth and last one never reduced their price offers, and their final price remained UAH 2,859,745.20. As a result, the fourth participant's ALP was activated, but that of the third one, whose price was not much different, was not. This is an example of the correct operation of the algorithm, which is logically incorrect.

132. [UA-2020-06-02-009800-b](#), [UA-2020-06-05-002328-c](#), [UA-2020-06-15-001593-c](#) and [UA-2020-06-16-007066-c](#)

Participant	Final offer	ALP?
TOV KB TEKHNOFILTR	1,240,000.00	ALP 40 %
TOV TVF TEKHNOHRAD	1,240,500.00	ALP 40 %
TOV BAZOVYY ELEMENT PLIUS	1,240,600.00	—
TOV FOLTER — UKRAYINA	1,440,000.00	ALP 30 %
TOV DERIS-GROUP	2,859,745.20	—

A similar situation occurred in the procurement [UA-2020-06-18-002502-b](#)¹³³:

Participant	Final offer	ALP?
SP Kozhushko Mykola Andriyovych	170,000.00	—
PP Olbud	189,500.00	—
TOV KUZ	189,900.00	ALP 30 %
PP PRIORBUD	289,500.00	—

In one of these cases the participant explicitly stated in their justification:

...I insist that the price of my price offer is calculated taking into account the market prices of the region and cannot be abnormally low, being the 5th out of seven participants according to the auction results.¹³⁴

A variation of this problem is a situation where some of the most profitable offers do not have ALP, but ALP is activated with the next participants. For example, in the procurement [UA-2020-06-12-001959-a](#)¹³⁵:

133. Also see the procurement: [UA-2020-06-26-001674-b](#)

134. SP Kabak Andrii Petrovych: [UA-2020-06-05-002552-b](#)

135. Also see [UA-2020-06-11-002270-c](#) and [UA-2020-06-10-001050-c](#)

Participant	Final offer	ALP?
SP Haidamachuk Iryna Oleksandrivna	589,800.00	—
SP Malitskyi Mykola Mykolayovych	589,900.00	—
PP NVK UCHPRYLAD	590,000.00	—
SP Mokriak Kostiantyn Petrovych	660,594.00	ALP 30 %
SP Plakhta Oleksandr Pavlovych	985,380.00	—
PP UKRDYDAKTYK	1,224,300.00	—

Such a situation creates additional risks for the procurement sector. Some participants may act in collusion and offer prices at auction that will allow one of them to avoid ALP, despite the really abnormally low price.

In some cases, participants in their justifications claimed that they did not have ALP, but other participants set an abnormally high price¹³⁶ or suspected them of collusion¹³⁷.

Incorrect activation of ALP

In some cases, the ALP may have not been activated due to a coincidence.

For example, in the procurement [UA-2020-05-06-000651-c](#). The procuring entity rejected the participant's bid on June 1 on the grounds that the latter did not provide a justification for ALP. At the same time, the participant claimed that the system did not determine their price as ALP, which was also confirmed by the AMCU Board in its decision of June 24¹³⁸. However, the algorithm for determining ALP was activated later, and the system required the participant to provide justification by July 16 (the price offer of the participant, of course, did not change all this time).

136. [UA-2020-06-12-006416-c](#) [UA-2020-06-15-001593-c](#) [UA-2020-06-15-004141-b](#) [UA-2020-06-17-001120-b](#) etc

137. [UA-2020-06-05-003608-c](#)

138. Complaint UA-2020-05-06-000651-c.a2: [UA-2020-05-06-000651-c](#)

Such a situation is explained by the fact that the ALP system is under development, and the identified errors are still being fixed¹³⁹.

Position of the AMCU Board: risks are possible

When considering complaints involving ALP, the AMCU Board often stated:

...the [procuring entity's] documentation does not contain separate requirements for the procedure for forming the bid price of the participant and the procedure for forming the justification of an abnormally low price. Given the above, the complainant's bid was unlawfully rejected by the procuring entity.¹⁴⁰

The conclusion can be interpreted as follows: if procuring entities had specified in advance in the tender documentation the requirements for the ALP justifications, they could have demanded compliance with these requirements and rejected vague justifications. At the same time, this will be contrary to the Law because it does not give procuring entities the right to set mandatory criteria for evaluating the justifications of ALP by participants.

Participants with unclear justifications can still become suppliers

If the goal of the Ukrainian ALP system, as well as the ALP system in the EU, is to determine whether a participant can properly perform a contract at the proposed price, then this goal may often not be achieved (both in Ukraine and probably in the EU). Some of the participants provide very detailed and thorough explanations. However, others can only make do with short arguments that do not allow them to make sure that the contract will be fulfilled.

139. The procuring entity learned that the system is still not fully adapted to the new legislation from the response of the state enterprise "ProZorro." See the complaint UA-2020-05-06-000651-c.a2: [UA-2020-05-06-000651-c](#)

140. See, for example: [UA-2020-06-23-007983-a](#) [UA-2020-06-23-007983-a](#) or [UA-2020-06-15-000741-b](#)

For example, in one procurement of medicines, the participant provided only the following justification¹⁴¹:

This price is the result of the applied technological process of medicine production.

The participant seems to have justified ALP as required by Law. However, this explanation does not convince that the contract will be fulfilled properly, which in such cases turns the ALP system into a formality.

A few more examples:

- ...the occurrence of an abnormally low price is associated with favorable conditions under which our company can provide services, in particular a special price offer (discount);¹⁴²*
- ...[the participant] is a manufacturer of medicines and has conditions under which they can deliver the goods.¹⁴³*

In all three cases, contracts were signed with the participants.

The question of what exactly the justification should be was also raised with the AMCU Board. The procuring entity believed¹⁴⁴ that the participant provided only "general phrases... which in no way justify the abnormally low price..." As for what the justification should have been, the former noted:

141. [UA-2020-05-15-003118-c](#)

142. [UA-2020-05-29-002731-b](#)

143. [UA-2020-06-19-007157-c](#)

144. Complaint UA-2020-06-15-000741-b.a1: [UA-2020-06-15-000741-b](#)

« ...the law does not define the concept of 'proper justification of the bid price.' According to the academic Explanatory Dictionary of the Ukrainian language (Dictionary of the Ukrainian language: in 11 volumes. Volume 5, 1974. 480): justification — a set of evidence, facts, arguments to convince of something, to confirm something... »

Taking into account the above, the legislator gives the Procuring Entity the right to reject an abnormally low tender offer if the participant has not provided proper justification for the price or cost indicated in it. »

After considering the complaint, the AMCU Board ordered that the procuring entity cancel the decision to reject the participant.

The problem of unclear justifications also has another side. In some cases, participants claimed that they were unable to provide specific documents or calculations because they were trade secrets¹⁴⁵. This raises the question of what the participants' justifications should be in order to convince them of their ability to fulfill the contract and preserve trade secrets.

Fundamental problem of the Ukrainian ALP system

The fundamental problem of the entire ALP system is hidden in this opinion:

« A dishonest participant will not be able to provide an ALP justification or will not be able to properly justify ALP. »

According to this, there are only three points where the system can work.

145. [UA-2020-06-11-001317-c](#), [UA-2020-06-15-001593-c](#), [UA-2020-06-18-002126-b](#), [UA-2020-06-19-002473-b](#) etc

1. **Point 1.** A dishonest participant will not provide justification because there are no arguments in favor of a position that provides for illegal actions.

Procuring entity's actions. The procuring entity will reject the tender bid of such a participant, since they did not provide justification.

Counterargument. In 32% of cases, participants did not provide procuring entities with a justification. They may not have noticed the requirement to provide such an explanation, may have provided it late, or not have provided it at all, since their price has no legitimate justification. Thus, it is possible that the system still stopped some dishonest participant at this stage.

At the same time, all participants (including dishonest ones) can write anything as a justification. According to our calculations, abstract justifications occurred in more than half of the cases.

Probably, over time, fewer and fewer dishonest participants will stop at this stage, when they will see with what abstract justifications procuring entities can recognize participants with ALP as winners and what the practice of the AMCU Board in this regard is.

2. **Point 2.** A dishonest participant cannot justify their price in the proper way.

Procuring entity's actions. The procuring entity will reject the bid of such a participant, as their justification is improper.

Counterargument. The Law does not establish mandatory requirements for the content of participants' justifications. In addition, the Law also does not establish any requirements for procuring entities to evaluate the justifications of participants. Thus, the participant may provide any justification other than obviously false or contrary to the previously provided tender documentation (in this case, the procuring entity may reject it based on providing false information).

It happened that procuring entities checked the information provided by the participant with ALP and found out that it was untrue. For example, in one of the cases,¹⁴⁶ the procuring entity found out from the manufacturer of the product that they did not provide an additional discount to the participant, although the latter indicated this. Since the participant provided false information in their justification, the procuring entity rejected them. The participant did not appeal to the AMCU Board.

However, as of July 2020, such cases are isolated. In addition, the practice of the AMCU Board shows that the procuring entity should make efforts to make such a deviation recognized as legal and also spend extra time verifying the information provided.

- 3. Point 3.** A participant with ALP will file a complaint, but the AMCU Board will reject it due to improper justification.

Procuring entity's actions. The procuring entity's decision to reject the participant will not change.

Counterargument. In none of the 19 complaints to the AMCU Board as of the end of August 2020 the Board has not yet recognized the justification of participants with ALP as improper.

In addition, participants can provide a justification that will be almost impossible for the procuring entity to refute.

With this in mind, the winning strategy of the participant is to provide one of two justifications:

- which, if rejected by the procuring entity, they will be able to support with evidence during consideration by the AMCU Board.

For example, provide a copy of the internal order on holding the promotion,

- the authenticity of which or the impact of which on reducing the participant's price will be almost impossible for the procuring entity to refute.

Such justifications include a number of existing examples in Prozorro: selling old stock, discounts to the procuring entity, promotions, entering a new market, reducing the rate of profit during the economic crisis, availability of qualified personnel, and so on.

A separate group consists of arguments about the absence of certain expenses. For example: we do *not* use subcontractors, we do not use funds for marketing and advertising, we do *not* rent equipment, and so on. It is almost impossible for the procuring entity to prove the untrue nature of such false statements. Prozorro already has cases when procuring entities rejected participants based on providing false information in the ALP justification¹⁴⁷. It is unknown in how many other cases participants provided false explanations of their prices.

Sometimes participants do not deny that they provided ALP, but their answer is formally a justification: *"we agree that [the price] is low, but in the current market situation we are ready to work for the stated price to expand the customer base of our company."*¹⁴⁸ We believe that the procuring entity can hardly convince the AMCU Board that such a justification is improper.

The problem, in our opinion, is also that within the existing system, the procuring entity should evaluate the validity of the participant's justification, and not their ability to fulfill the contract in the proper way. In other words, if the participant explains their price with a discount and provides a corresponding internal confirmation document, even if the document and the discount are authentic, they do not indicate the participant's ability to fulfill the contract. At the same time, according to the Law, such justification will be considered proper, and the participant's price offer cannot be rejected on the basis of ALP.

146. [UA-2020-05-25-002323-b](#)

147. [UA-2020-06-09-001891-a](#) or [UA-2020-06-01-006856-b](#)

148. [UA-2020-06-02-005107-b](#)

In this situation, the procuring entity is de facto more unprotected than the participant. Their actions are reduced to the following options:

- reject the participant if they do not provide justification within the specified time limit;
- study the justification of ALP for false information or contradictions with the tender bid and, if any, reject the participant.

At the same time, difficulties may arise, since, in this case, the procuring entity must have experience in a certain topic or contact an expert, spend time and other resources on verification;

- reject a participant with ALP on other grounds envisaged by the Law.

In 20% of cases where participants did not provide an ALP justification, procuring entities rejected their bids not based on ALP.

Summing up, we can say that the ALP system in the form in which it functions today is prone to:

- creating additional work and an additional risk of rejection for an honest participant;
- creating a safety net against signing a contract with an inexperienced dishonest participant (who, for example, will not dare to provide false information in the justification or will not have time to submit the justification);
- not creating obstacles to signing a contract with an experienced dishonest participant.

In addition, the current ALP format allows those honest participants who mistakenly offered ALP at an auction (made a mistake or “got carried away by bargaining”) to withdraw from the procedure without losing the tender security.



SECTION 5

RECOMMENDATIONS

Since Ukraine has committed to harmonize its legislation with the legislation of the EU,¹⁴⁹ and also enshrined in the Constitution the desire to acquire full membership in the EU,¹⁵⁰ we did not consider the option of removing the norms on ALP from the Law. However, it is advisable to try to change the system in such a way that it promotes efficient use of public funds and fair competition. That is why we focused on the question of how the ALP system can be modified to correct the identified shortcomings. The options for action in this section are grouped into two categories:

- those that can be used as a preventive measure (even before ALP is activated);
- those that can be applied after ALP is activated.

Some of the proposed solutions are only potential options, since they cannot be used as of September 2020 due to the features of Ukrainian legislation.

Options for actions that can be applied before ALP activation

1. Spell out the criteria for evaluating ALP justifications

The procuring entity can spell out detailed indicative criteria in the documentation in advance, in case of compliance with them, the justification will be recognized as proper¹⁵¹. The Ministry of Economy, in accordance with Article 9, part 1, subparagraphs 5 and 12 of the Law, can prepare official recommendations on such justification criteria. In the future, when making changes to the Law, it is possible to envisage the approval by the Ministry of Economy of a separate Generic list of the ALP justifications.

149. Article 148 of the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their member states, on the other hand: bit.ly/2D1yQpZ

150. Articles 85, 102, and 116 of the Constitution of Ukraine: bit.ly/3gyoJXp

151. bit.ly/2Evg9er

Advantages: if clear and reasonable criteria are created, the procuring entity will have a better chance of objectively evaluating whether the ALP justification is proper.

Disadvantages: such procuring entity's requirements as of September 2020 can only be recommendatory. If the Law provides for the right of the procuring entity to set such criteria as mandatory, there will be a risk that participants with other, although also correct justifications, will be rejected. In addition, there are discriminatory risks associated with this approach.

2. Use non-price criteria (most economically advantageous tender, MEAT, or EMAT)^{152, 153} and sometimes the life cycle criterion (as well as limited participation trades).

Applying MEAT procedures instead of the usual reductions allows to choose a winner not only based on the most favorable price, but also on the overall quality and attractiveness of the tender bid. The evaluation may relate to such aspects as the organization and experience of the project team and the contractor's manager, the proposed planning and management procedures, innovation, maintainability, environmental aspects, and so on.

Advantages: the most favorable tender bid is no longer determined only on the basis of the most favorable price; therefore, the risk of ALP is reduced.

Disadvantages: the use of non-price criteria can only reduce the risk of ALP, but this is not a panacea, especially in cases where the price still gets more points when evaluating bids (as in open bidding, where the weight of the price criterion cannot be less than 70%). In addition, such procedures can be difficult for procuring entities with little experience and lack of resources (human, time, etc.).

152. bit.ly/3lnhWDE

153. Best value (BV) in the USA

In addition, in this case, proof of the ability to fulfill the contract at the stated price is replaced by proof of the existence of non-price criteria, which also need to be properly justified.

3. Accuracy of determining the expected cost

If the expected cost is overestimated, there is a risk that several participants will offer very low but market prices. However, their offers will be recognized as ALP because of one or two other participants who offered prices as close as possible to the expected value, and never reduced them during the auction.

In this context, the European Commission advises procuring entities to thoroughly study the market whose goods, services, or works are being purchased, analyze previous procurement transactions and similar transactions of other procuring entities, and consult with specialists in the relevant field¹⁵⁴.

A certain shift in this issue is the approval by the Ministry of Economy of an approximate methodology for determining the expected cost of the procurement item in compliance with the Law (Order No. 275 of February 18, 2020)¹⁵⁵.

Advantages: the reduction of the probability of ALP activation and savings. In addition, with a good understanding of the market, the procuring entity will be able to evaluate the participant's price offer more professionally.

Disadvantages: individual procuring entities may not have enough people, time, money, and so on to implement some of these steps. To gain the necessary experience, certain officials of the procuring entity must stay in their position for a long time, and the staff turnover itself should be small.

154. p. 9: bit.ly/3gEWqgA

155. bit.ly/31CqkqT

4. Quality of tender documentation

Tender documentation should not contain ambiguities, contradictions, or other shortcomings. Otherwise, participants may misinterpret the requirements (accidentally or intentionally). If a potential participant sees ambiguity in the tender documentation, they can take advantage of this to offer ALP, knowing in advance about the possibility of exploiting such inaccuracies at the stage of contract fulfillment¹⁵⁶.

Advantages: clarity and unambiguity are already one of the requirements when drawing up tender documentation. However, the probability of ALP decreases due to a misinterpretation of the requirements.

Disadvantages: the procuring entity may not be professional enough to prepare tender documentation for sophisticated works.

5. Providing answers to participants' clarifying questions

There are cases when procuring entities do not properly answer the participants' questions. As a result, participants may draw incorrect conclusions, which will affect the adequacy of the price¹⁵⁷.

Advantages: it is already the procuring entity's responsibility to provide explanations regarding the procurement. The risks that ALP will be activated due to a misinterpretation of the documentation requirements are reduced.

Disadvantages: it happened that procuring entities gave explanations to participants, but did not make appropriate changes to the tender documentation. In such cases, the AMCU Board stated that the requirements of the tender documentation are of priority, despite the information provided in the procuring entity's response.

156. p. 26-31: bit.ly/32udyKj

157. p. 26-31: bit.ly/32udyKj

6. Framework agreements

The conclusion of framework agreements does not help to avoid ALP, but it allows to quickly and “painlessly” for the procuring entity to conclude a new supply contract on a conditional basis within a week, while the previous procuring entity blackmails and demands an unjustified price increase.

Advantages: the procuring entity can quickly conclude a new contract with another participant.

Disadvantages: the practice of framework agreements as of September 2020 is not very common, and procuring entities may not fully understand how to apply them.

7. Ensuring contract fulfillment

Based on the interviews conducted, it can be assumed that securing the performance of a contract (for example, in the form of a bank guarantee) is one of the most effective tools. The participant understands in advance that they will lose a significant amount of funds if they fulfill the contract improperly.

Advantages: the requirement to provide a bank guarantee increases the price of dishonest behavior for the participant and thus motivates them either not to participate in the tender or to fulfill the contract in the proper way.

Disadvantages: the procuring entity must first correctly spell out the text of the bank guarantee so that it can be used in the future. In some cases, procuring entities do not require bank guarantees, as this can “scare away” an already small number of potential participants if we are talking about procurement in a market with low competition. There is an opinion that procuring entities do not often withdraw funds under a bank guarantee, even in cases where they have the right to do so. This behavior does not motivate dishonest participants to properly fulfill contracts, and this minimizes all the benefits of ensuring the fulfillment of the contract.

8. Risk reduction through supplier diversification

If procuring entities know that they are vulnerable to blackmail by a dishonest supplier of a certain strategically important product, they can conclude several contracts for the supply of these goods. If the participant forces the procuring entity to raise the price unreasonably, the latter will be able to refuse, losing only a part of the deliveries, and not all 100 %.

Advantages: the procuring entity will be more flexible and less dependent on blackmail from a certain dishonest supplier.

Disadvantages: procuring entities that lack human and time resources may not be able to hold multiple tenders for each of the strategically important products instead of just one. Such contracts should be concluded for above-threshold amounts because there is a risk that they will be regarded as avoiding open bidding. Another risk is that in all tenders for the supply of a strategically important product, one supplier can win.

8. Formula calculation as a basis for price change

If the relevant market allows, the procuring entity can offer a formula by which the parties to the contract will determine whether there are grounds for changing the price (increasing or decreasing). This formula answers the question of whether there has actually been a price fluctuation in the market, which may be a reasonable basis for changing the contract value.

Advantages: the subjectivity factor is eliminated. The price will change due to price fluctuations in the market, which is one of the legal grounds for revising the contract value. The inclusion of a formula calculation in the draft contract gives the parties the same idea of the grounds for changing the price in advance.

Disadvantages: it does not prevent a dishonest participant from blackmailing the procuring entity for the sake of price and does not protect against the risk of non-fulfillment. Such formulas are not applicable to all products.

10. Condition that the price is constant for a certain period of time¹⁵⁸

Sometimes procuring entities indicate in the draft contract that the price set based on the auction results cannot be reviewed for a certain period (for example, 30, 60, or 90 days).

At the same time, cases of price revision are limited and envisaged in Article 41, part 5 of the Law. Prices can be changed more often than once every 90 days from the date of signing the contract only for gasoline, diesel oil, gas, and electricity.

Advantages: the subjectivity factor is eliminated for a certain period of time.

Disadvantages: it does not prevent a dishonest participant from blackmailing the procuring entity in order to increase the price. During this period, price fluctuations may indeed occur in the market, which is a legitimate reason for revising the contract value. At the same time, if the procuring entity refuses to review the contract price, this may lead to non-fulfillment of the contract by the participant for objective reasons.

11. Improve the ALP deduction algorithms

In some cases, algorithms determine ALP in accordance with the Law, but incorrectly from an economic point of view. Given this, it is necessary to correct the algorithms and, possibly, suggest new ones that will work according to a different logic.

Advantages: reduction of the number/avoidance of cases where ALP is activated incorrectly or illogically.

Disadvantages: it takes time to analyze, discuss, test, and implement.

Options for actions that can be applied after ALP activation

Further on, we offer several concepts on how to solve the identified problems. If it is decided to apply one of them, you must first adopt relevant amendments to the Law.

1. Procuring entity does not evaluate the appropriateness of the justification

Once the system establishes price offers with ALP, the relevant participants must provide security for the fulfillment of the contract (for example, a bank guarantee) within a certain period of time without having to justify their prices. Tender bid is rejected if the participant does not provide a bank guarantee. The text of the bank guarantee should be standardized.

Advantages: the subjectivity factor is eliminated. The procuring entity can no longer recognize as winner the participant with an abstract justification and reject the participant with a detailed and appropriate justification. If the participant seeks to force the procuring entity to review the value of the contract after signing it, the price that they will have to pay for this behavior increases. Accordingly, dishonest participants receive additional motivation to either properly fulfill the contract or refuse to participate.

Disadvantages: this approach does not allow to identify cases when an honest participant will eventually not be able to fulfill the contract properly because they made a mistake in calculations or have little experience and overestimated their capabilities. As a result, the contract will be signed, although with a bank guarantee, but not fulfilled properly for the price determined at the auction. Due to the introduction of such a requirement, some participants may refuse to participate in procurement. In addition, mandatory enforcement of the contract may lead to an increase in the prices of participants.

¹⁵⁸ bit.ly/2Evg9er

2. Leave the system as it is as of September 2020

Advantages: perhaps, over time, procuring entities may learn to reject participants with improper justification in a way that does not contradict the practice of the AMCU Board.

Disadvantages: a number of problems presented in Section 4 “Problems and conclusions” are not solved.

3. Determine what is the appropriate justification

The ALP system will remain unchanged, but the legislation will contain a detailed interpretation of what justification is appropriate. This can be a list of sample arguments along with a list of ways to confirm them. Such a list can be compiled on the basis of existing justifications, which we analyzed in the first 855 cases of ALP activation.

Advantages: procuring entities' subjectivism in evaluating the arguments provided by participants is somewhat reduced. Participants know in advance how to provide justification and by what criteria they will be evaluated.

Disadvantages: no matter how extensive and detailed this list is, it will not be able to cover all possible ALP justifications. That is, there will be cases when ALP is de facto justified, but this “scarce” justification cannot be accepted, since it is not envisaged by law. In addition, this approach still focuses on evaluating the justification itself, rather than the ability to fulfill the contract properly at the stated price. The participant can provide a truthful justification, supported by documents, but it will not affect the offered price in any way. In addition, there are a number of reasons for the occurrence of ALP, which the procuring entity cannot verify in any way and which can only be justified by internal documents of the participant (entering a new market, deciding to reduce the profit rate, a special discount, etc.).

4. Envisage in the Law the obligation for procuring entities to study in detail the justification of participants

The procuring entity is obliged to study in detail the justification of the participant or participants with ALP, compare/analyze/consult with experts, request additional documents if necessary, and make a decision based on the information received. In other words, this option involves implementing the World Bank's approach. Procuring entities in the context of ALP get broader rights. This approach can work if procuring entities are more professional.

Advantages: theoretically, this method is the best one, since only it brings the procuring entity as close as possible to the goal: to find out whether the participant is able to fulfill the contract properly. Each case is unique, and no algorithms can take into account individual characteristics. Thus, one of the participants successfully noted in their justification:

« ...calculation of the economically reasonable price of a service is provided only by taking into account real and objective costs, which are different for each individual business entity (participant), which ensures their different economic potential and competitiveness, as well as different price ratios of the final offers of participants.¹⁵⁹

» **Disadvantages:** this method is best suited for cases where there are few procuring entities, they have appropriate professional training and are able to professionally evaluate the justification of participants and their calculations. If they are unable to do so, they should have the appropriate resources to order an evaluation of bids with external performers. Since a large number of procuring entities in Ukraine may simply not have the time or appropriate professionalism to evaluate the participants' bids in a

159. [UA-2020-06-23-007983-a](#)

comprehensive way, this approach seems unsustainable today. In addition, this creates great potential for discretionary decisions. If there are a lot of procuring entities (there are about 39,000¹⁶⁰ of them in Ukraine), it will be more difficult to track and put an end to the wrong decisions. This approach can also increase the number of complaints to the AMCU Board.

160. The [Prozorro public analytics module](#) contains information about 38,963 procuring entities that conducted procuring transactions during 2018-2020 as of September 2, 2020



CONCLUSIONS

State of the ALP system

Clear or abstract arguments, as well as available or absent calculations confirming the participant's position, are unlikely to play a significant role in determining the winner.

For the most part, procuring entities do not refuse the abstract arguments of participants. In other words, the ALP system does not yet fully work in the intended way when the procuring entity has the opportunity to evaluate and reasonably reject “unsustainable” contracts.

At the same time, cases when procuring entities refuse the arguments of participants and reject their bids are highly likely to be contested with the AMCU Board in favor of the participants. It can be assumed that the number of appeals against procuring entities' decisions to reject the ALP justifications will only increase in the future, and judicial practice will be added to the practice of the AMCU Board, which in turn will become a source of making appropriate changes to the Law.

De facto, the procuring entity has a small chance of rejecting the participant on the basis of improper justification of ALP.

Thus, for the most part, the system does not perform its function as a “filter” for those cases when the contract cannot actually be fulfilled properly. There is a risk that justifying ALP will become just a formality, and failure to provide justification, for example due to inattention, is another reason to reject a participant when there were no other grounds.

The ALP system in the form in which it functions today is prone to:

- creating additional work and an additional risk of rejection for an honest participant;
- creating a safety net against signing a contract with an inexperienced dishonest participant;
- not creating obstacles to signing a contract with an experienced dishonest participant.

Reasons for ALP activation

We can't say whether ALP activation mostly depends on the procuring entity, the participant, or the procurement item. There are certain patterns, but there is not enough information to assert cause-effect relations.

As a hypothesis, we can assume that ALP is more likely to appear in procuring entities' procurement in the fields of medicine, education, security, and defense, especially when it comes to purchasing services.

It is advisable to study in more detail the reasons for ALP activation in these procurement transactions. The answer to this question can help reduce the number of ALP cases and, therefore, achieve the main goal — to reduce cases when the contract is not fulfilled or fulfilled improperly.

ALP calculation algorithm

It is advisable for the legislator to review the algorithm for determining ALP. The approach available as of September 2020 makes mistakes even if formally it works correctly.

As a basis for the new algorithm, it is advisable, in particular, to consider the Northern Irish and Italian formulas, as well as the World Bank formula.

Future development of the ALP system

Although our sample is quite limited (the first 855 cases of ALP activation), we can conclude that the ALP system in the form in which it exists in Ukrainian legislation as of September 2020 is unlikely to contribute to the obvious and sufficiently justified identification of “unsustainable” tender bids. However, it is possible that, after some time, the situation will change, and repeated analysis will show completely different results. Accordingly, we recommend repeating it in early 2021.

In addition, special attention should be paid to the issue of preventing ALP, and not just responding to it. Such a step can potentially reduce cases of non-fulfillment of the contract/improper fulfillment of the contract.

We also recommend that you investigate the implementation of contracts starting from 2016, in which, according to the formula envisaged by the Law, ALP should have been activated. The results of the analysis will allow you to:

- find out whether to introduce such a formula;
- determine how large-scale the problem of improper execution of contracts is;
- predict solutions to the problem of improper fulfillment of contracts.

As of September 2020, for a number of objective reasons, Ukraine is unlikely to remove ALP from its legal space, which means that this system needs to be improved.

In any case, we hope that a comprehensive analysis and recommendations of this study will be useful for improving the ALP system.



