

Non-Price Criteria in Prozorro:

What the Government
Is Willing to Pay More For?



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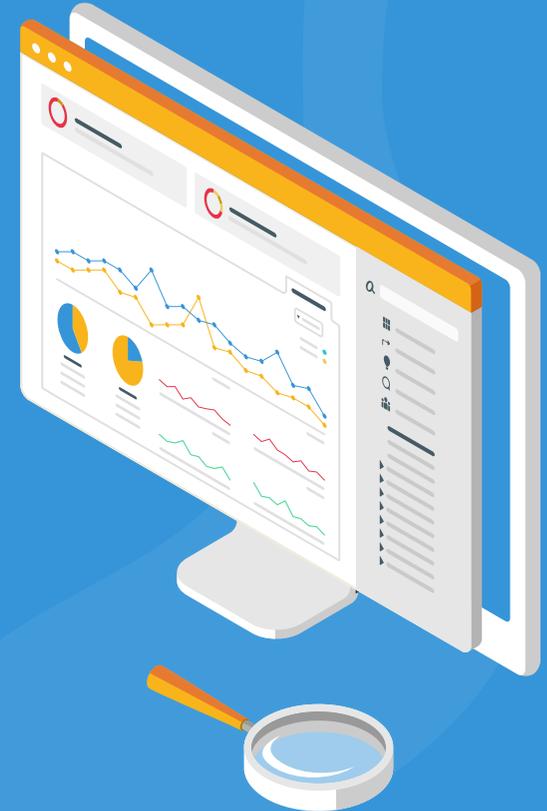
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Our other studies can be found in the section Research → Public Procurement on Transparency International Ukraine's website: bit.ly/DOZORRO-research

CONTENTS

- 04 Terms and abbreviations**
 - 05 INTRODUCTION**
 - 06 SECTION 1.**
General information about non-price criteria
 - 09 SECTION 2.**
Statistics
 - 32 SECTION 3.**
Interviews with procuring entities
 - 36 SECTION 4.**
Problems in the system of non-price criteria
 - 40 CONCLUSIONS**
-



Terms and abbreviations

SAS — the State Audit Service of Ukraine

The Law — The Law of Ukraine “On Public Procurement”
of December 25, 2015, No. 922

AC — adjustment coefficient

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

In public procurement, procuring entities are guided by the principle of getting the best quality for available funds, which is why the lowest price usually determines the winner of a tender. In practice, however, cheaper is not always better. For example, if an entrepreneur offers a slightly higher price, but provides a much longer warranty period, the extra money may be worth it.

To make this possible, the notion of non-price criteria was introduced in the legislation. This includes all indicators that a procuring entity may use to assess the participant's offer apart from the lowest price.¹

The system of non-price criteria has been available in Prozorro since its early days, and the last time it underwent significant changes was in April 2020. Throughout this time, non-price criteria have been helping procuring entities buy more efficiently and better serve the needs of the country and their communities. However, available opportunities are not always commonly used.

That is why we have decided to study a number of issues which we are going to cover in this research:

- How does the system of non-price criteria in Prozorro work in general?
- What specific non-price criteria do procuring entities choose, how often and why?
- What problems do procuring entities face when they use non-price criteria?

In **Chapter 1**, we explain how the system of non-price criteria functions in general.

Chapter 2 covers statistical data on the dynamic of use of non-price criteria since 2017, the frequency of use of specific criteria, participants who have won tenders, the practice of the Permanent Administrative Board for Consideration of Complaints on Violations of Public Procurement Legislation of the Anti-Monopoly Committee of Ukraine (hereinafter AMCU Board) and the State Audit Service of Ukraine (hereinafter SAS), and other information.

Section 3 contains the results of our interviews with leading procuring entities by their use of non-price criteria.

In **Section 4**, we describe the identified problems in the system of non-price criteria.

This study will primarily be useful for:

- members of the Committee of the Verkhovna Rada of Ukraine on Economic Development, as its results may form the basis of relevant legislative initiatives;
- 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 make decisions on changes in the system of non-price criteria based on analytical data.

1. Or the life cycle cost

SECTION 1

General information about non-price criteria

The concept of non-price criteria

The Law of Ukraine “On Public Procurement of December 25, 2015, No. 922 (hereinafter the Law) does not contain the definition of non-price criteria. However, their idea comes down to the fact that the procuring entity is willing to pay a little more for goods, services or works than in a tender based exclusively on the price. In exchange, it receives additional benefits important in this specific case. For example, it could be:

- warranty service — longer warranty period of a product makes the participant's offer more valuable for the procuring entity;
- time frame — a participant who, for instance, can complete repair works in two months as opposed to three as offered by other participants, can get an advantage.²

Introducing non-price criteria

Non-price criteria are not a new phenomenon in Ukrainian procurement, as they are mentioned in previous procurement laws:

- in Article 26 of the Law of Ukraine “On Procurement of Goods, Works and Services for State Funds” of February 22, 2000, No. 1490;³
- in Article 28 of the Law of Ukraine “On Government Procurement” of June 1, 2010, No. 2289;⁴

- in Article 28 of the Law of Ukraine “On Government Procurement” of April 10, 2014, No. 1197;⁵

It is therefore not surprising that the current Law as of February 2021 also includes non-price criteria.

From December 2015 to April 2020, the application of non-price criteria was limited to procurement of the so-called *complex or specialized nature*. The Law did not explain how this nature was to be determined in a tender; therefore, procuring entities had⁶ to do it on their own, coming up with the substantiation in every specific case.

Such discretion and the absence of criteria of complex or specialized nature sometimes led to successful disputing⁷ of non-price criteria by participants with the AMCU Board.

However, on April 19, 2020, a new version of the Law came into force, which allowed the use of non-price criteria in all procurement, not just tenders that are complex or specialized. The current version of the Law as of February 2021 (dated December 20, 2020) allows the application of non-price criteria in the evaluation of bids regardless of their complexity and nature.

Application of non-price criteria

The procuring entity independently chooses what non-price criteria it wants to use in the tender and how many of them. Information on this, the weight of each criterion and methods of evaluation of bids are published in the tender announcement / tender documentation.

2. An example of using non-price criteria can be seen in the tender [UA-2017-01-23-000048-c](#)

3. [bit.ly/2N9SyEI](#)

4. [bit.ly/2M1in9u](#)

5. [bit.ly/2KrLJJM](#)

6. [bit.ly/2M1tlvF](#)

7. E.g. see complaint UA-2019-01-18-000010-a.a3 in tender [UA-2019-01-18-000010-a](#) or complaint UA-2019-06-27-000373-c.b1 in tender [UA-2019-06-27-000373-c](#)

Article 29 of the Law offers the following list of non-price criteria:

... price / life-cycle cost together with other evaluation criteria, in particular such as: terms of payment, delivery period, warranty service, technology transfer and training of management, research and production staff, application of environmental and / or social protection measures related to the subject of procurement.

The phrase “in particular” indicates that the list is not exhaustive but provides examples instead. The same position was shared by the MEDT, at least with regard to the wording of the Law until April 19, 2020.⁸ In addition, the Law does not include most non-price criteria that procuring entities have already applied in practice.

At the same time, note that in at least five of its decisions in 2020, the AMCU Board effectively claimed that the list of non-price criteria contained in the Law was exhaustive.⁹

The law does not regulate this, but the system technically allows the procuring entity to offer one or several options for each non-price criterion. For example, a procuring entity created the criterion “Distance (in km) from the participant's gas station to the procuring entity's transport section”.¹⁰ In this particular case, the procuring entity provided four options and decided to give them the following weight:

Non-price criterion option weight	Non-price criterion option
0 %	more than 6 km
5 %	4 to 6 km
10 %	2 to 4 km
15 %	up to 2 km

8. bit.ly/2M1tlvE

9. E.g. see complaint UA-2020-10-22-009861-a.c1 in tender [UA-2020-10-22-009861-a](#)

10. [UA-2017-01-04-000730-b](#)

This way, the greatest weight of the non-price criterion (15%) will be given to the participant whose gas stations are located at a distance of less than 2 km from the procuring entity.

Determining the winner in procurement with non-price criteria

To award the tender, Prozorro compares not simply the prices proposed by the participants, but instead they are adjusted using a special formula. Such prices are called adjusted prices. By comparing the adjusted prices, the system will rate participants from lowest to highest *adjusted price*.

The participant's price offer during the auction must account for at least 70%¹¹ of the adjusted price. The other 30%¹² or less of the price weight can be determined by non-price criteria.

The procuring entity will sign the contract with the winner at the price offer, not at the adjusted price. The adjusted price is used only to compare the participants' offers.

Calculating the adjusted price

The adjusted price is determined by Prozorro automatically, and the procuring entities and the participants do not need to do this manually. Both prices, i.e. the price offer and the adjusted price, will be displayed on the page before the start of the auction and stored before its end.

To help the reader understand the logic of the adjusted price, here is how we can explain this process.

Let us imagine that the procuring entity has created two non-price criteria, “Warranty period” and “Number of specialists,” with the following options:

11. Except for cases when the competitive dialogue procedure is applied

12. Interestingly, under the Law of Ukraine “On the Procurement of Goods, Works and Services for State Funds,” the price criterion also had to account for at least 70%. In the next two laws governing public procurement, this figure was reduced to 50%. However, in the current Law, the figure is back at 70%.

Warranty period for the product — 20 %

1. *Option 1*: over 5 years — 20 %
2. *Option 2*: 3 to 5 years — 10 %
3. *Option 3*: less than 3 years — 0 %

Number of specialists available with the participant — 10 %

1. *Option 1*: more than 10 specialists available — 10 %
2. *Option 3*: 5 to 10 specialists available — 5 %
3. *Option 3*: fewer than 5 specialists available — 0 %

The total maximum weight of both non-price criteria constitutes 30%; therefore, the procuring entity complies with the Law requirements.

Suppose that three bidders offered the following prices and chose the following options:

- *price of participant 1*: UAH 100,000;
criteria: “less than 3 years” (0%) and “fewer than 5 specialists” (0%).
Total: 0%;
- *price of participant 2*: UAH 120,000;
criteria: “3 to 5 years” (10%) and “5 to 10 specialists” (5%). Total: 15%;
- *price of participant 3*: UAH 140,000;
criteria: “more than 5 years” (20%) and “more than 10 specialists” (10%).
Total: 30%;

To compare the offers, we need to calculate the adjusted prices. The adjusted price is calculated using the following formula:

Adjusted price = Price offer / Adjustment coefficient (hereinafter AC)

The adjustment coefficient is calculated using the following formula:

$$AC = 1 + (F1 + Fn) / \text{Weight of the "Price" criterion}$$

F1 + Fn is the value of each non-price criterion option selected by the participant.

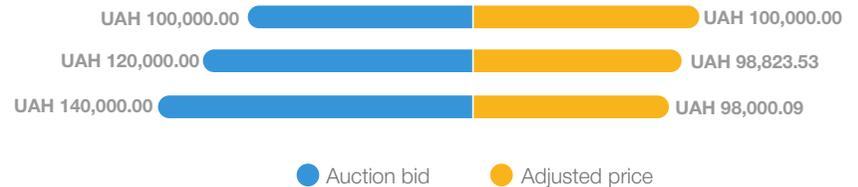
The weight of the “Price” criterion can be calculated by subtracting the total maximum weight of non-price criteria from 100.

For participant 3, the calculation of the AC is as follows:

$$AC = 1 + (0.1 + 0.2) / 0.7 = 1.42857$$

The adjusted price of participant 3, therefore, will be 98,000.09 (=140,000 / 1.42857).

Calculating the adjusted prices of all participants, we get:



Thus, based on the auction results, the best offer is the one of participant 3, despite the fact that the price offer is the highest.





SECTION 2

Statistics

Research object: 12,996 lots (10,893 tenders) with non-price criteria, announced from January 1, 2017, to November 30, 2020.

By "successful" lots in this section we mean those lots where the tender resulted in the signing of a contract.

Data time frame: the data are up-to-date as of January 2021.

Methodology: we used the data available in the Prozorro system. We processed them using the professional¹³ and public¹⁴ BI Prozorro modules and Microsoft Excel.

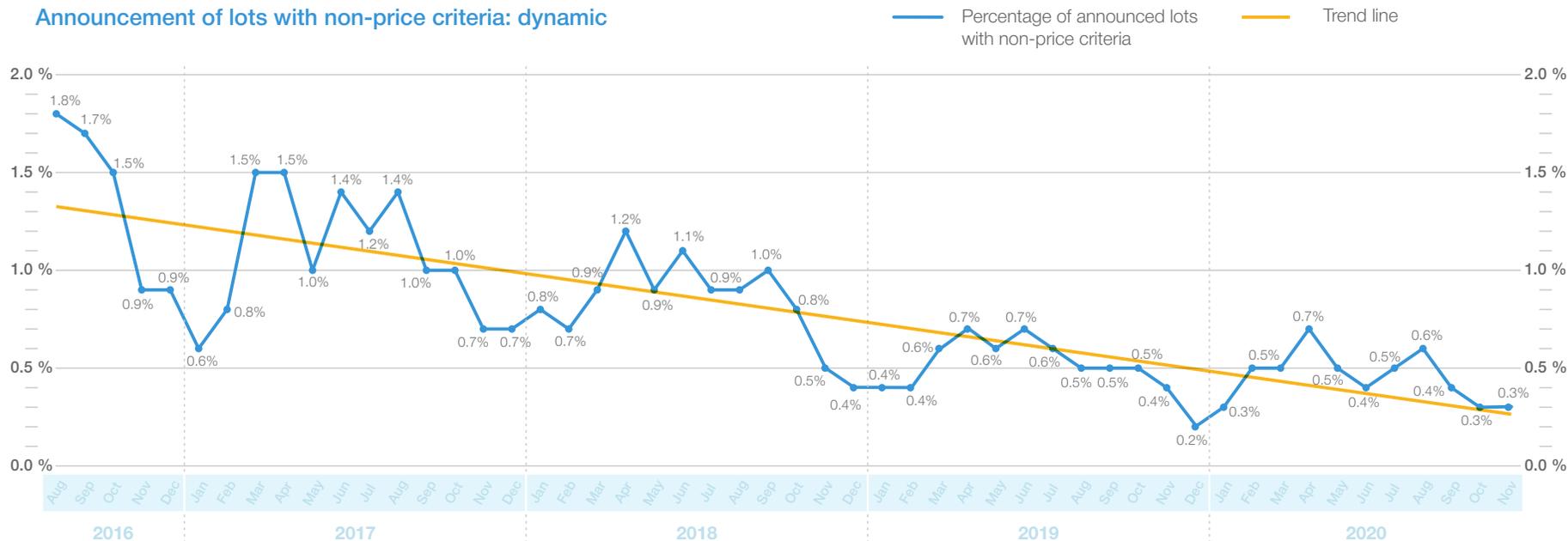
Research limitations: due to technical limitations, the BI Prozorro module cannot obtain information on such types of procurement as competitive dialogue and framework agreements (specifically on the stage of selection of participants). Therefore, this stage of procurement is not taken into account in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

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

13. bit.ly/3psMztb

14. bit.ly/2LQ08JA

Announcement of lots with non-price criteria: dynamic



During the research period, non-price criteria were used in five types of procurement:

- pre-threshold procurement;
- simplified procurement;
- open bidding;
- open bidding with publication in English;
- negotiation procedure (for defense purposes).

Further, when referring to the “five types of procurement,” we mean the types listed above.

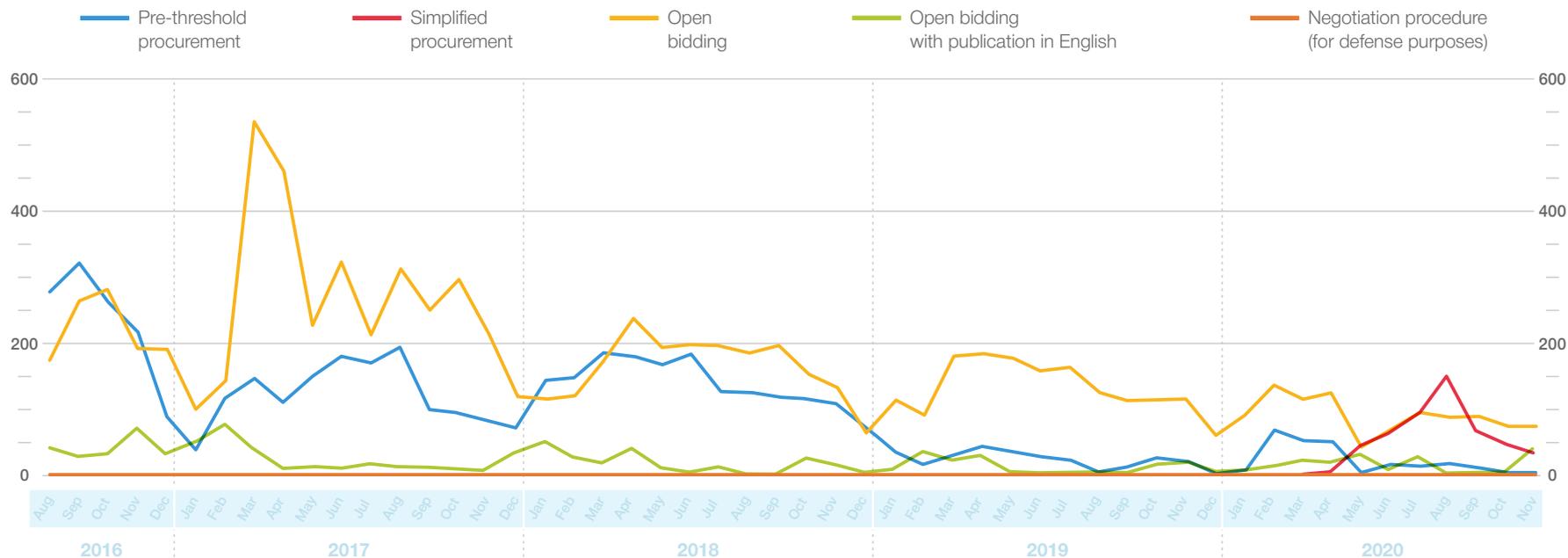
The trend line on the chart indicates that, since 2016, the share of announced lots with non-price criteria has been constantly decreasing in relation to the total

number of lots of these five types of procurement. The decrease occurred in cycles: the smallest number of lots with non-price criteria was traditionally announced at the end of the year and at the beginning of the following year.

At the same time, the total number of lots of five types of procurement remained at approximately the same level — ≈ 38 thousand lots per month.¹⁵ That is, the decline occurred in both absolute and relative terms.

Interestingly, almost every peak period of procurement announcements with non-price criteria had one or two leading procuring entities, who largely accounted for the peak. These procuring entities announced from 13% to 38% of all tenders launched during these periods with non-price criteria.

15. Though by the end of 2020, their number increased significantly to 58 thousand lots



Open bidding¹⁶ with non-price criteria accounted for 34% to 90% of all lots with non-price criteria depending on the period. On average, it was 60%. At the same time, for all procurement in general (both with non-price criteria and without), the share of open bidding averaged 40%. That is, open bidding with non-price criteria was announced disproportionately frequently compared to other procurement.

The peak in March–April 2017, which is most prominent on the graph, was formed by open bidding announced by the Department of Housing and Utility Services of the Donetsk Oblast State Administration. The fact that a single procuring entity

can impact the overall curve of the number of lots in such a significant way demonstrates uncommon the use of non-price criteria actually is.

Conclusion: the frequency of the use of non-price criteria is in steady decline in both absolute and relative terms. A significant contribution to the number of announced lots with non-price criteria is made by individual active procuring entities.

16. Without taking into account open bidding with publication in English

Regions with the highest number of lots with non-price criteria

Quite often, certain phenomena in public procurement (certain types of procurement, disputes, monitoring, etc.) are most concentrated in oblasts with big cities, such as Kyiv oblast,¹⁷ Dnipropetrovsk oblast or Lviv oblast. Despite this, procurement with non-price criteria was disproportionately often announced in the Donetsk region.

During 11 months of 2020, procuring entities in Donetsk oblast announced 16% of all lots with non-price criteria, ranking second after Kyiv (21%). At the same time, only 6% of all bidding organizers in Ukraine are based in Donetsk oblast, and 9% in Kyiv.

Moreover, in 2019, Donetsk oblast ranked first, having announced almost a third (31%) of all procurement with non-price criteria.

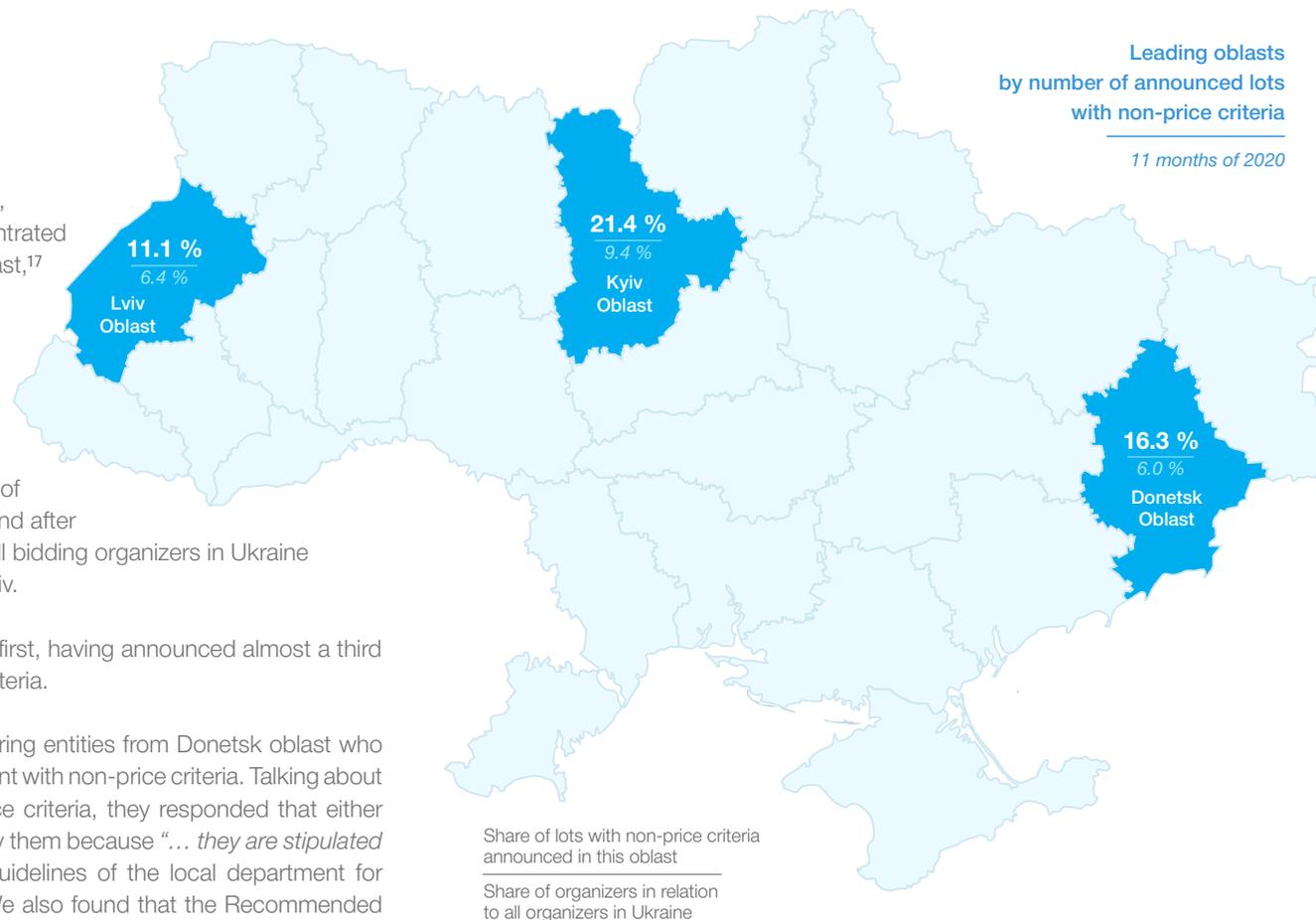
We were able to talk with only three procuring entities from Donetsk oblast who account for a significant share of procurement with non-price criteria. Talking about the reasons of their active use of non-price criteria, they responded that either the tender committee itself decided to apply them because “... *they are stipulated by the law,*” or they were following the guidelines of the local department for economic issues in public procurement. We also found that the Recommended Procedure for Pre-Threshold Procurement, developed on behalf of the Head of the Donetsk Oblast State Administration, proposes to determine non-price criteria in pre-threshold procurement.¹⁸

17. The city of Kyiv has a separate administrative status; however, the BI module calculates it as part of Kyiv oblast

18. bit.ly/3szUeQu

Leading oblasts by number of announced lots with non-price criteria

11 months of 2020



Conclusion: a disproportionately large number of tenders with non-price criteria were announced by procuring entities in Donetsk oblast. Some procuring entities explained this by the initiative of the tender committee and the recommendations of the designated public procurement department.

The connection between amounts of spending of a procuring entity and the use of non-price criteria

We calculated the share of procuring entities with non-price criteria among all procuring entities per 1,000 people for the period from January 1 to November 30, 2020.

For the calculation, we used the expected value amounts only in those five types of procurement where non-price criteria were used at least once.

As a result, it turned out that the more funds a procuring entity has available (i.e. higher amounts of contracts), the more likely it is that they will use non-price criteria.

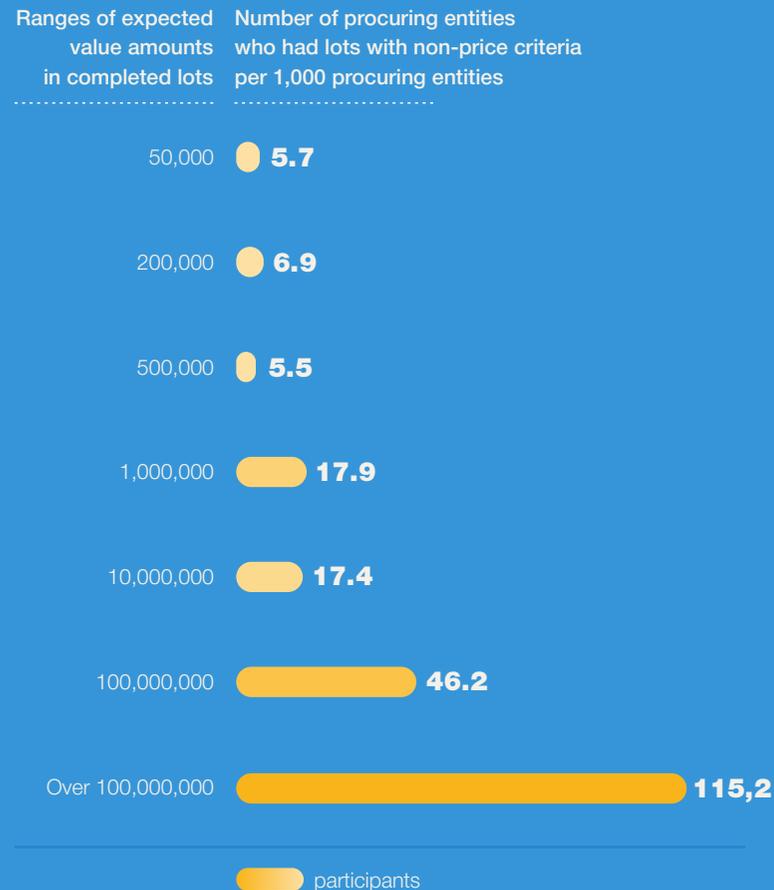
In the range of up to UAH 500,000, on average, only one in six procuring entities per one thousand used non-price criteria (0.2%). However, for procuring entities with contracts for amounts over UAH 100 million, this figure already constituted 115 procuring entities per one thousand (or 12% of everyone in this range).

Here are the examples of ranges:

- 50,000 should be read as "up to 50,000 inclusive";
- 200,000 should be read as "from 50,000 (exclusive) up to 200,000 inclusive".

We have two hypotheses that can explain these connections:

- 1) procuring entities that spend higher amounts in procurement can engage more staff in the organization of procurement and, thus, have more opportunities to work with non-price criteria (identify which criteria to apply in the procurement and verify the participant's compliance with the stated criteria);
- 2) the use of non-price criteria is perceived by procuring entities as appropriate for procurement for larger amounts, as there are also greater risks. In particular, this explanation was provided to us by certain procuring entities during the interviews.



Conclusion: the higher the total amount in announced tenders of the procuring entity, the more likely they are to use non-price criteria at least once.

Expected cost of lots with non-price criteria

Similarly, we have seen that non-price criteria are more often used in lots with higher expected value.

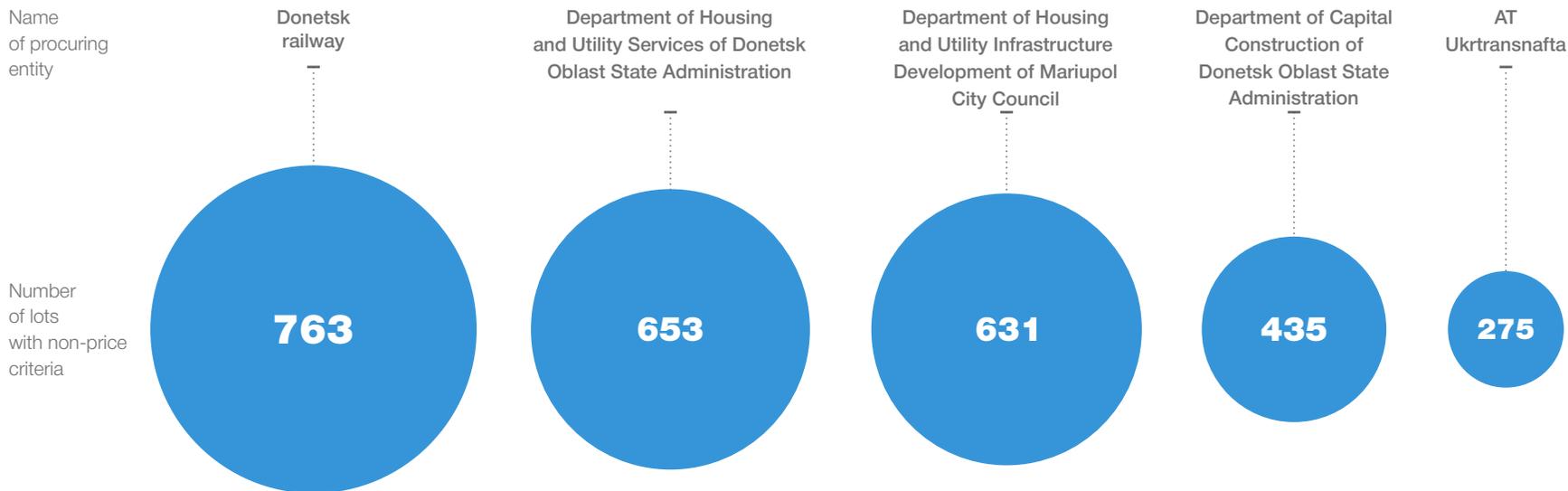
Here are the examples of ranges:

- 20,000 should be read as "up to 20,000 inclusive";
- 50,000 should be read as "from 20,000 (exclusive) up to 50,000 inclusive."

Conclusion: non-price criteria are more common not only with procuring entities that spend significant amounts on purchases, but also in their purchases with the expected value of UAH 1 to 5 million. More than a third of all lots with non-price criteria were used in lots with an expected value of UAH 1 to 5 million.



Procuring entities with the highest number of lots with non-price criteria



During the research period, 28,951 procuring entities announced at least one of the five types of procurement.¹⁹ At the same time, only 1,546 of them, or 5.3%, used non-price criteria at least once.²⁰

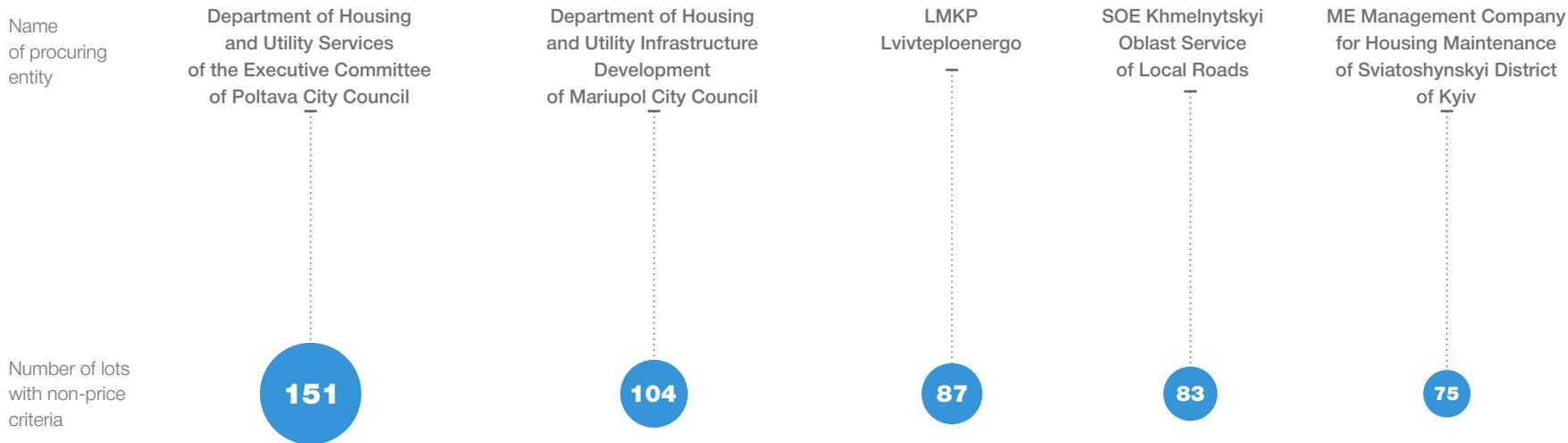
Of these, 1,214 (79%) procuring entities used non-price criteria in 2017-2020 in only 1–5 lots.²¹ Only 103 procuring entities have more than 20 lots with non-price criteria.

Four out of five leading procuring entities using non-price criteria are from Donetsk oblast.

19. Open bidding, open bidding with publication in English, negotiation procedure (for defense purposes), simplified and pre-threshold procurement

20. Or 3.4% of all procuring entities which announced any kind of procurement during this period

21. By December 2020, not inclusive



Some of the leading procuring entities no longer use non-price criteria, which is why the 2020 statistics is different. During this period, the procuring entity with the highest number of lots with non-price criteria was the Department of Housing and Utility Services of the Executive Committee of Poltava City Council.

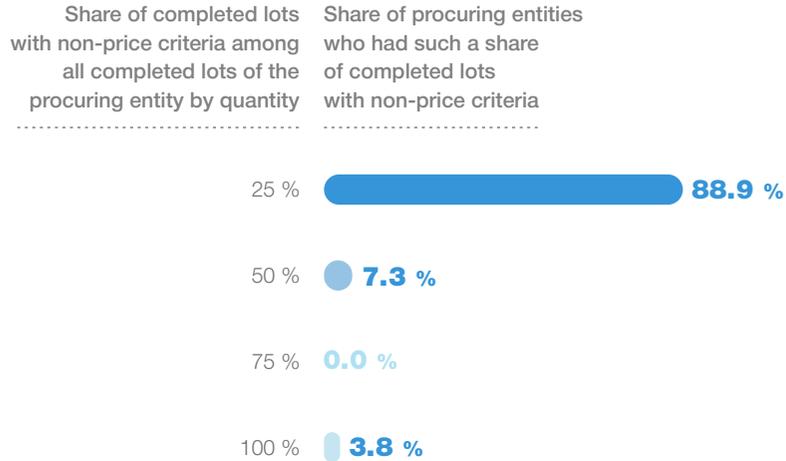
At the same time, for these procuring entities, lots with non-price criteria accounted for only 9-30% of all their announced procurement.²²

²² 6% to 28% in relation to complete procurement

Conclusion: over time, leading procuring entities started using non-price criteria much less frequently or stopped doing it at all.

For procuring entities which announced tenders with non-price criteria most often in 2020, such lots accounted for no more than a third of all their tenders overall.

Frequency of use of non-price criteria



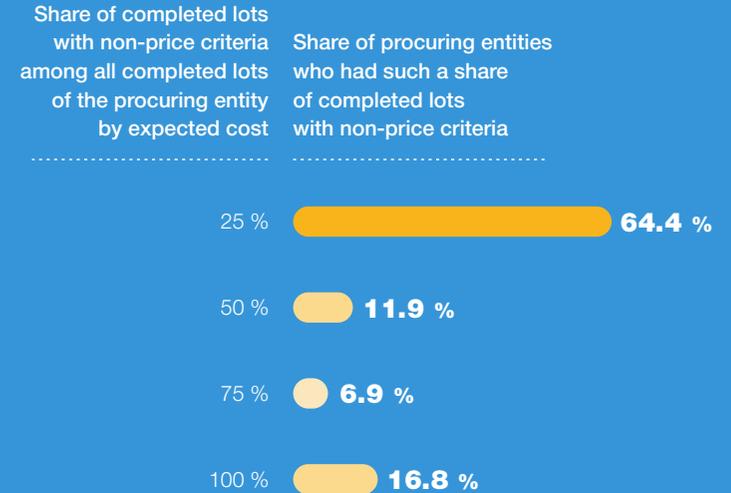
We decided to find out not only how many procuring entities used non-price criteria in their tenders, but also how often they did so.

For most bidding organizers, lots with non-price criteria accounted for a quarter or less of all their completed procurement (89% of procuring entities).

The situation is somewhat different in terms of expected values. Tenders with non-price criteria accounted for 25% or less of the expected value of all procurement of these procuring entities in as many as 64% of cases.

Here are the examples of ranges:

- 25% should be read as "up to 25% inclusive";
- 50% should be read as "from 25% (not inclusive) up to 50% inclusive."



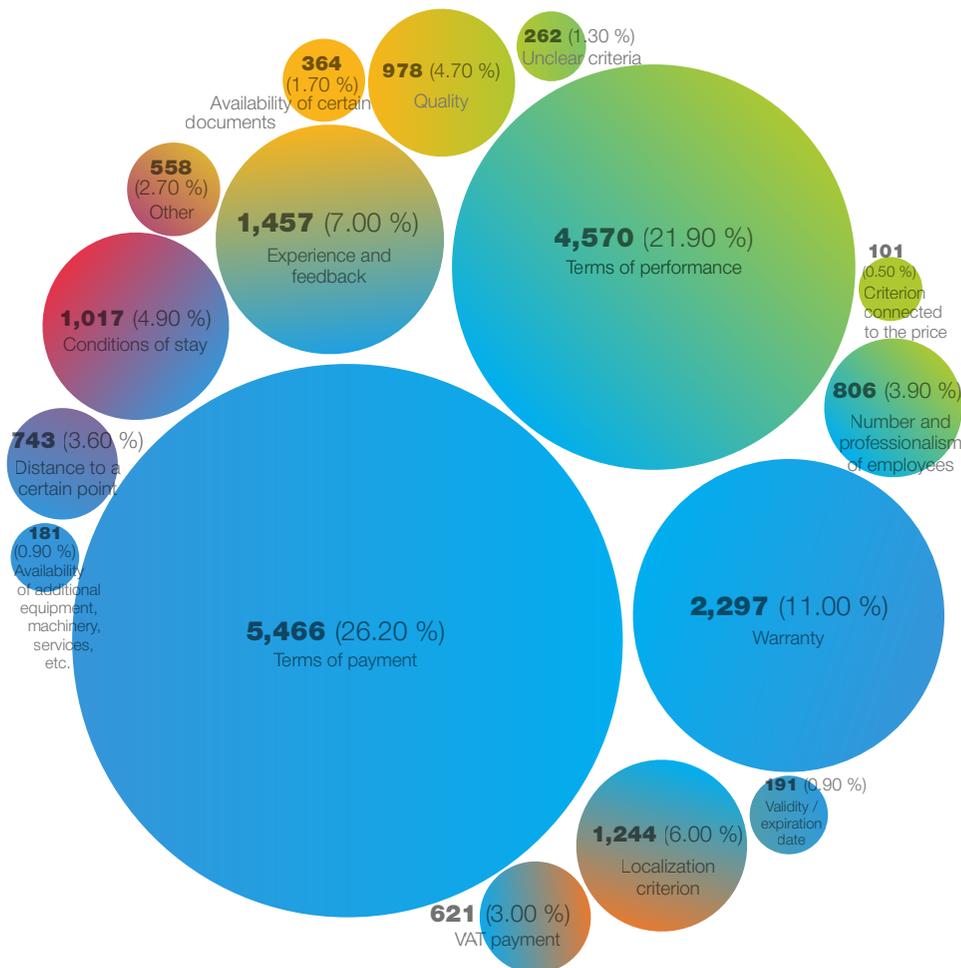
Conclusion: Procuring entities that organized procurement with non-price criteria did so in most cases quite rarely compared to procurement without such criteria. However, such lots could have a higher expected value.

What non-price criteria were chosen by procuring entities

Since 2017, procuring entities have applied 20,845 non-price criteria in 12,996 lots.

We analyzed all non-price criteria and grouped them into 75 groups based on what procuring entities expected from the participants. Below, we present the 15 most common groups, the criteria in which were used 100 times or more. These 15 groups account for 97.3% of all the applied non-price criteria.

We analyzed the criteria by their subject. We included even those with zero value or which were alone in their respective groups into our analysis. For example, "Participant must guarantee the quality of the product"²³ with 0 value was attributed to the "Quality" group.



23. [UA-2019-11-15-000537-c](#)



1. Terms of payment—26.2% of all non-price criteria by quantity

This group includes those non-price criteria of procuring entities where terms of payment were specified:

- advance payment;
- payment upon delivery of goods, performance of works or provision of services;
- with a delay of a specified number of days.

They could also indicate the different stages at which different parts of the total amount will be paid and the amount of work that can be done without pre-payment.²⁴ Conditions concerning payment currency were less common.²⁵

Procuring entities indicated these non-price criteria most frequently: a total of 5,466 times, or 26.2% of the total number.

It should be noted, that under Art. 49, part 2, clause 3 of the Budget Code of Ukraine,²⁶ the payment is made within the funding actually received by the procuring entity. Therefore, the expediency of use of some non-price criteria connected with a delay of payment is questionable.

2. Terms of performance — 21.9%

In these cases, procuring entities wanted the winners to deliver on the contract faster than initially planned. They could indicate the deadlines in the number of days from the date of signing the contract or in the final dates of delivery of works. Less often, the maximum performance time was indicated.

Since procuring entities are ready to pay extra for this option, it is important to answer the question whether it is possible to conduct procurement in the time

24. [UA-2017-03-17-000008-b](#)

25. [UA-2018-01-15-002622-a](#)

26. bit.ly/3sDbZ9d

frame preferred by procuring entities without overpaying due to the use of non-price criteria. For instance, if the problems lie with planning flaws or lengthy procurement processes, they can be resolved, which would reduce the use of such non-price criteria and, subsequently, save the funds that the procuring entities currently overpay for urgent delivery.

3. Warranty — 11.0%

In most cases, this criterion determined the duration of the warranty period. For example, for work performed or equipment delivered. There were also other cases when the warranty meant:

- the number of items of equipment with a certain warranty period;²⁷
- the term of free maintenance and warranty service;²⁸
- an extension of the warranty period,²⁹ etc.

4. Experience and feedback — 7.0%

This group included criteria that indicated the participant's experience and / or their interaction with previous clients. This could include:

- years of experience on the market;³⁰
- number of completed projects;³¹
- the number of works acceptance certificates³² or similar agreements;³³
- volume of work performed in hryvnias,³⁴ etc.

27. [UA-2018-07-18-001891-b](#)

28. [UA-2018-07-24-001108-b](#)

29. [UA-2018-08-01-000371-c](#)

30. [UA-2017-01-04-000292-b](#)

31. [UA-2017-01-16-000681-b](#)

32. [UA-2017-02-17-001202-c](#)

33. [UA-2017-02-20-002484-c](#)

34. [UA-2017-07-05-000324-a](#)

5. Localization criterion — 6.0%

This group includes non-price criteria, according to which preference is given to participants who:

- involve employees registered as temporarily displaced persons living in a certain area;³⁵
- involve Ukrainian subcontractors;³⁶
- pay taxes in a certain area;³⁷
- are registered in a certain area;³⁸
- sell goods from a certain country of origin,³⁹ etc.

In one of its decisions at the end of 2020, the AMCU Board ruled that one of the criteria which we included in the Localization Criterion group was against the Law.⁴⁰ However, not because it contradicts the principles of objective and impartial evaluation of proposals, as noted by the complainant, but because the Law does not contain such an evaluation criterion.

6. Conditions of stay — 4.9%

Such non-price criteria were mainly used in the procurement of recreational services or in the procurement of catering services for educational establishments.⁴¹ Among the criteria were, for example, the following:

- distance from the recreation center to the beach;⁴²
- the share of the cost of tours in the total cost of stay;⁴³

35. [UA-2017-07-10-001577-b](#)

36. [UA-2017-05-31-001077-a](#)

37. [UA-2017-06-15-001884-b](#)

38. [UA-2018-01-11-001355-c](#)

39. [UA-2017-08-17-001301-c](#)

40. Complaint UA-2020-12-04-002657-a.c2 in tender [UA-2020-12-04-002657-a](#)

41. Either 55000000-0 Hotel, restaurant, and retail trade services, or 85000000-9 Services in the sector of healthcare and social aid

42. [UA-2019-03-14-004034-a](#)

43. [UA-2019-03-15-001887-a](#)

- availability of dietary food;⁴⁴
- number of beds in rooms,⁴⁵ etc.

7. Quality — 4.7%

Non-price criteria of this group evaluated a certain qualitative characteristic of the procurement item or concerned the confirmation of such a characteristic. Namely:

- calorie content of the food;⁴⁶
- paper quality;⁴⁷
- professionalism in the performance of a musical work;⁴⁸
- temperature of dishes;⁴⁹
- confirmation of the organic nature of the product by means of certification;⁵⁰
- amount of video memory,⁵¹ etc.

8. Number and professionalism of employees — 3.9%

The following criteria were preferred by participants who:

- have more employees;⁵²
- have employees with more experience;⁵³

44. [UA-2019-03-22-001108-b](#)

45. [UA-2019-04-03-000798-a](#)

46. [UA-2020-08-06-008132-a](#)

47. [UA-2020-09-07-008330-b](#)

48. [UA-2020-09-10-000763-b](#)

49. [UA-2020-10-13-004841-b](#)

50. [UA-2020-11-10-008344-c](#)

51. [UA-2020-07-10-004379-b](#)

52. [UA-2020-02-17-000648-b](#)

53. [UA-2020-02-20-001502-a](#)

- are staffed at a certain level;⁵⁴
- have employees based on civil contracts as opposed to labor contracts,⁵⁵ etc.

9. Distance to a certain point — 3.6%

In almost 70% of cases, this criterion was used in the procurement of fuel,⁵⁶ and customers preferred those participants whose gas stations are located closest to them.

10. VAT payment — 3.0%

In such cases, preference was given to participants who are residents and VAT payers.⁵⁷

It is better for procuring entities which are enterprises to enter into contracts with VAT payers, because this way, they increase their tax credit (reduce the amount of taxes to be paid). In view of this, some procuring entities set the weight of the “VAT payment” criterion at 20%, trying to “make up” for the difference between payers and non-payers of the VAT.

However, this approach does not take into account that non-payers of VAT also pay taxes depending on the chosen tax rate, and therefore, according to this logic, the non-price criterion “VAT payment” should have less weight. Otherwise, it discriminates against those who do not pay VAT.

However, not all procuring entities follow this logic, and some of them established the weight of the VAT payment criterion at 0.85%.⁵⁸

54. [UA-2020-03-11-001158-a](#)

55. [UA-2020-02-18-002724-b](#)

56. 09000000-3 Petroleum products, fuel, electricity, and other energy sources

57. [UA-2017-04-18-000171-c](#)

58. [UA-2017-07-04-002143-b](#)

11. Availability of certain documents — 1.7%

A wide range of documents fell into this category. If it was clear from the description of the criterion that this document certifies the quality of the subject of procurement, we included it in the group “Quality” instead. In other cases, such criteria fell into this group. Among them are:

- availability of a document on the organization of the children's health and recreation institution's operation;⁵⁹
- results of certification of the institution;⁶⁰
- availability of a manufacturer's certificate,⁶¹ etc.

12. Unclear criteria — 1.3%

This group included criteria whose content we could not understand. They may have been created by procuring entities by accident, or they may have included an error in the description.⁶²

13. Validity / expiration date — 0.9%

This criterion was mostly used in the procurement of medical equipment. Procuring entities either determined the useful life⁶³ or established the expiration date.⁶⁴

Among these criteria, there are often cases when all options within one criterion are the same, although they have different weights.⁶⁵

59. [UA-2020-03-11-001158-a](#)

60. [UA-2020-03-31-001606-b](#)

61. [UA-2020-04-24-002650-b](#)

62. Criterion “Services on calibration and verification of measuring equipment, devices, counters” in tender [UA-2018-10-24-000404-c](#). See also [UA-2018-11-21-001394-a](#) or [UA-2019-06-03-000240-a](#).

63. [UA-2017-06-29-000300-a](#)

64. [UA-2017-02-13-001334-a](#)

65. [UA-2017-02-10-001054-c](#)

14. Availability of additional equipment, machinery, services, etc. — 0.9%

In such cases, procuring entities preferred those participants who were willing to provide, for example, two additional chains included with the chainsaw,⁶⁶ or had their own or leased equipment and machinery to perform work,⁶⁷ or had specialized software,⁶⁸ and so on.

15. Criterion connected to the price — 0.5%

In most cases, such criteria were set by either the Lviv Oblast Road Service or the Lviv Oblast State Administration. The non-price criterion with greater weight was received by the participant whose total value of unit prices was lower.⁶⁹

Conclusion: almost half of all non-price criteria are accounted for by only two groups: terms of payment and terms of performance. At the same time, it is theoretically possible to increase the professionalism of procuring entities and improve the legislation so that problems with payment and deadlines would occur much less often. Accordingly, the need to apply these non-price criteria and overpay for them may decrease.

If this could be done, money could be saved in at least a half of all those cases.⁷⁰ This can be a significant factor, given most lots with non-price criteria have an expected value of UAH 500,000 or more.

At the same time, it should be borne in mind that some procuring entities may use such criteria to compare participants with different conditions and choose a more reliable one.

66. [UA-2017-01-17-000070-b](#)

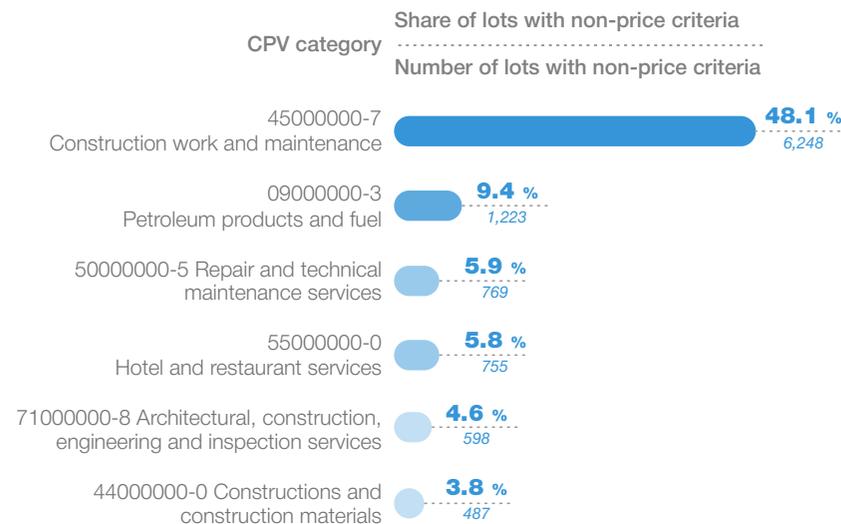
67. [UA-2017-03-24-000037-b](#)

68. [UA-2017-04-14-000773-b](#)

69. [UA-2018-01-04-001790-a](#)

70. These two groups account for 48% of all non-price criteria

Procurement items with the largest number of non-price criteria



78% of all lots with non-price criteria fall under six CPV categories out of a total of 43, and almost half of them are for the purchase of construction works and maintenance repairs.

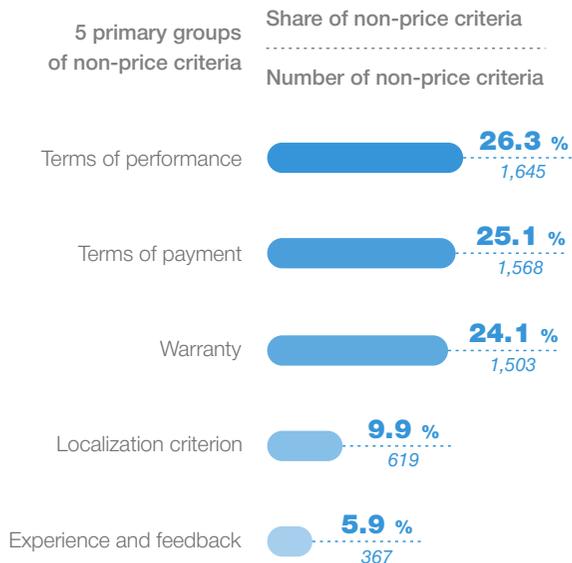
At the same time, procurement under CPV 44 and 71 can partially overlap with construction works and maintenance repairs.

Conclusion: in terms of procurement items, procuring entities use non-price criteria unevenly. Almost half the lots are under construction or repairs.

This may be due to the fact that such procurement is usually announced for large amounts, and procuring entities try to mitigate their risks by using non-price criteria. These risks are discussed in detail in Section 3. Interviews with procuring entities.

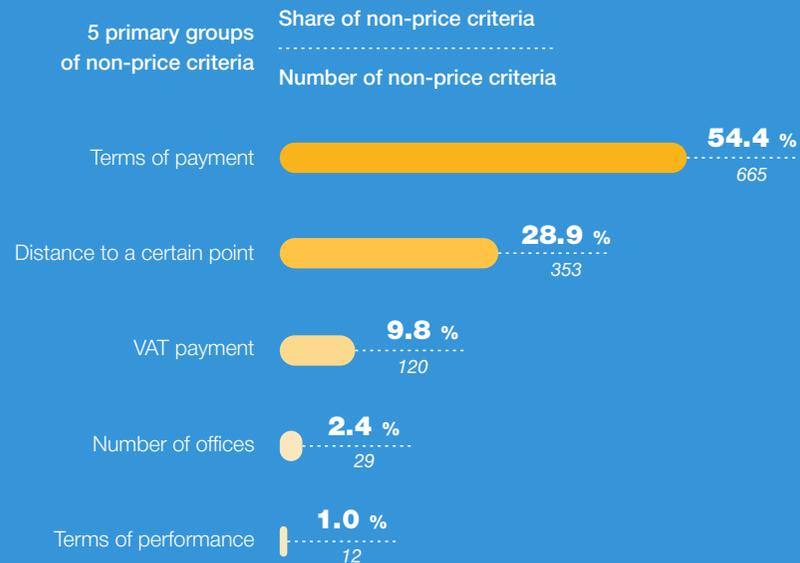
Non-price criteria depending on the procurement item

Non-price criteria in lots in CPV category 45000000-7 Construction work and maintenance



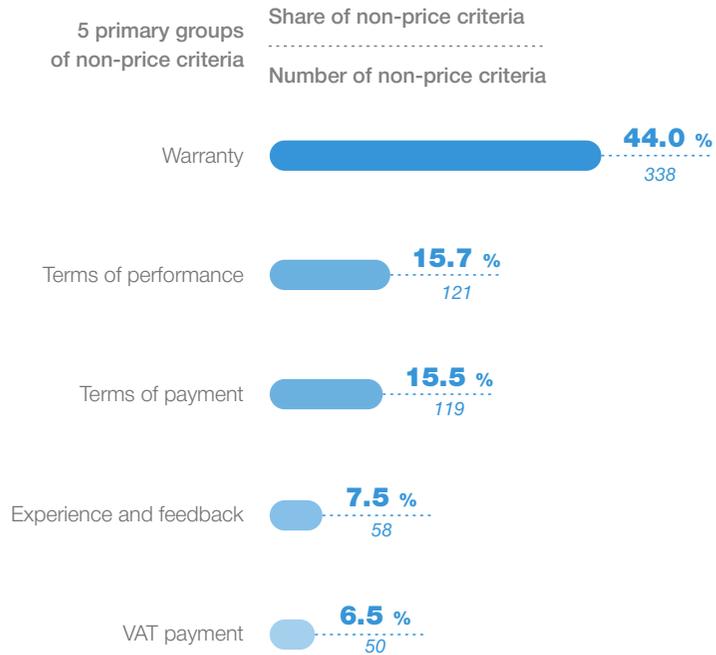
Depending on the CPV category, procuring entities preferred to use certain non-price criteria. For some CPV categories, more than half of all lots had the same non-price criterion.

Non-price criteria in lots in CPV category 09000000-3 Petroleum products and fuel

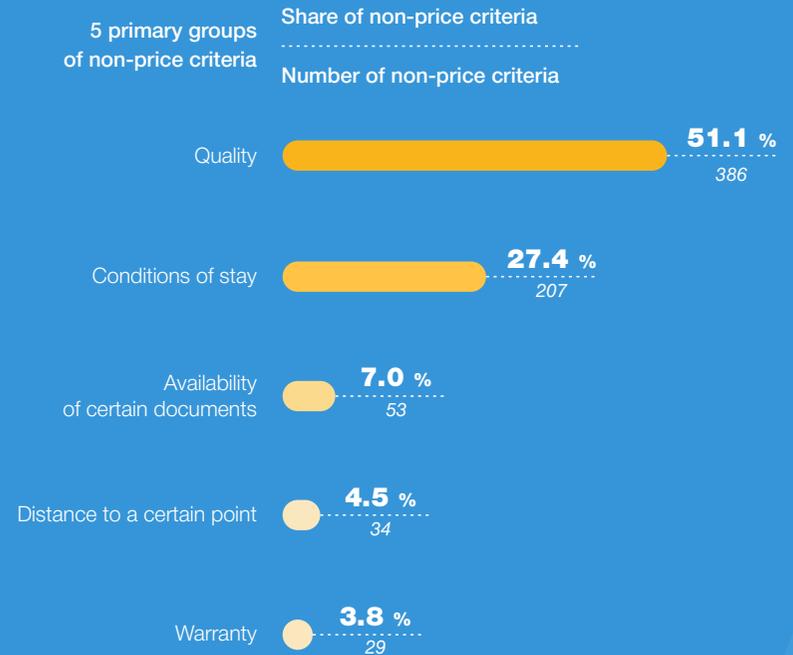


For example, in the procurement of construction works, such criteria as “Terms of performance,” “Terms of payment,” and “Warranty” were used most commonly. In procurement of fuel, 83% of all non-price criteria were “Terms of payment” and “Distance to a certain point.”

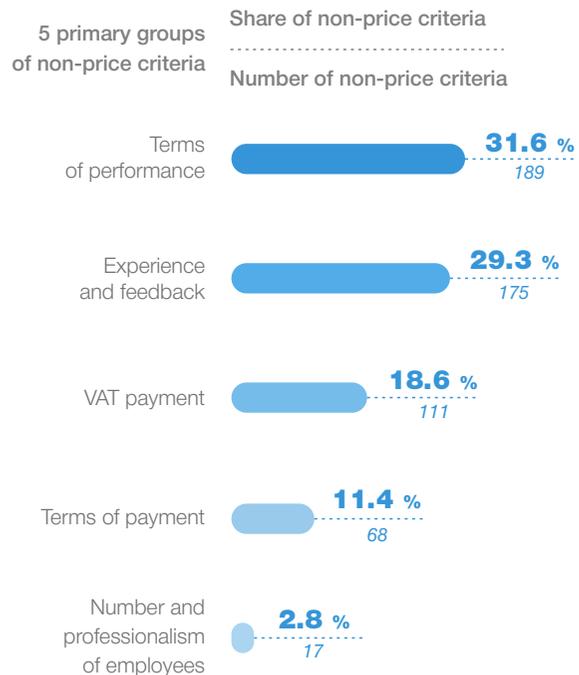
Non-price criteria in lots under CPV category
50000000-5 Repair and technical maintenance services



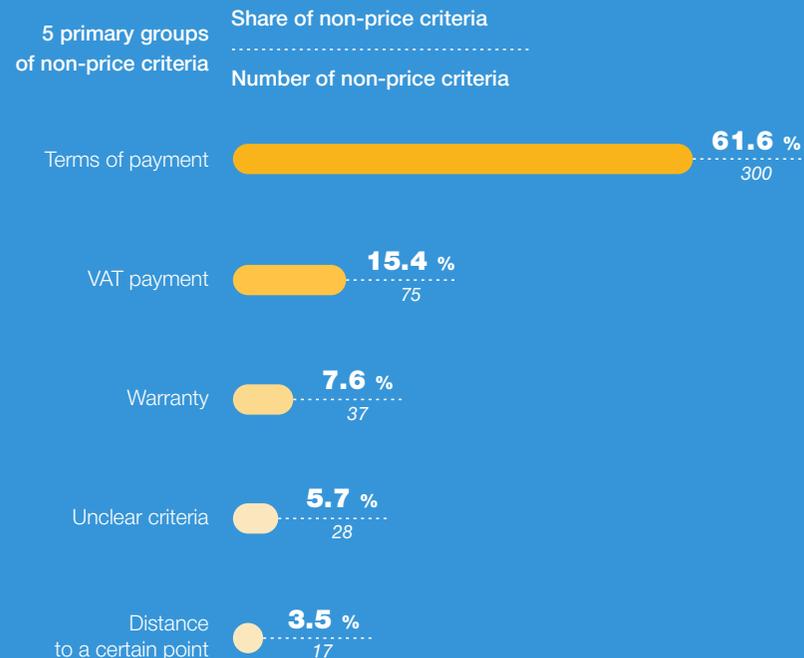
Non-price criteria in lots in CPV category
55000000-0 Hotel and restaurant services



Non-price criteria in lots in CPV category 71000000-8
Architectural, construction, engineering and inspection services



Non-price criteria in lots in CPV category
44000000-0 Constructions and construction materials



Conclusion: non-price criteria are unevenly presented in lots depending on the CPV category. Procuring entities frequently use 1–3 identical criteria within a CPV category.

The value of non-price criteria set by procuring entities

In most lots, the maximum total value of all non-price criteria set by procuring entities was at 30% (48% of lots), 20% (16% of lots), or 10% (8% of lots).

However, certain customers set non-standard values of non-price criteria, such as 16.7%,⁷¹ 9.77%,⁷² or 4.81%.⁷³ This may be due to the fact that they first determined the amount of money they wanted to put in the non-price criterion, and then deducted its share of the expected procurement price.

Conclusion: only in half of the cases the procuring entities set the total weight of non-price criteria at the maximum level allowed by law. It can be assumed that there is hardly a need to increase the statutory limit of 30%.

If individual procuring entities, indeed, first define the amount and then calculate its share in relation to the expected price, it would make sense to provide for the possibility to indicate the absolute value in Prozorro, so that the system can calculate the share by itself. However, there were only 233 cases when procuring entities indicated specific values.⁷⁴

71. [UA-2020-10-22-005800-c](#)

72. [UA-2017-12-27-001297-a](#)

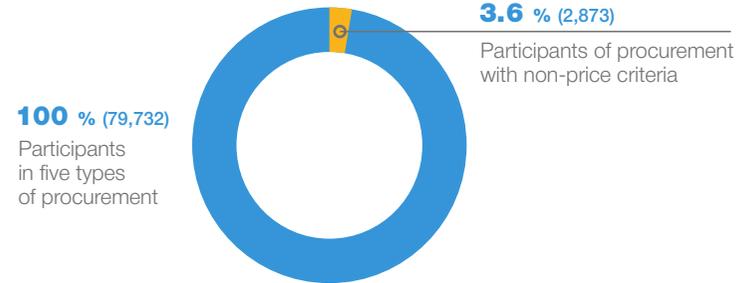
73. [UA-2017-12-27-001553-a](#)

74. We understand that specific values are those where the percentage was not an integer. There were also 846 values which are not divisible by 5.

Bidders who participated in procurement with non-price criteria

We analyzed participant activity during 23 months, from January 1, 2019, to November 30, 2020.

Overall, 79,732 bidders took part in procurement of one of the five types during this period. Of these, only 2,873 (3.6%) participated in lots with non-price criteria. 1,064 participants (37%) won at least once.

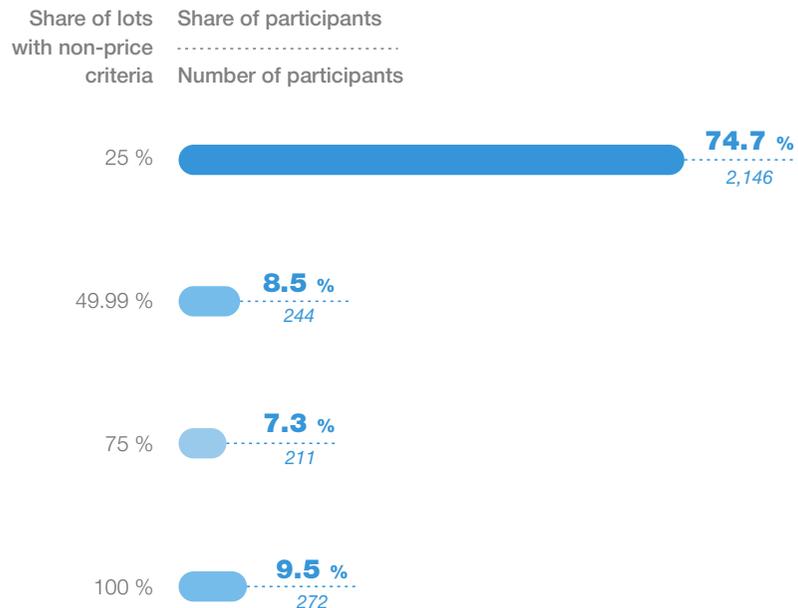


For the majority of businesses (83%) that participated in procurement with non-price criteria, this procurement accounted for less than half of all their lots. Only 483 participants (17%) paid significant attention to participation in these tenders specifically (for them such lots accounted for more than 50% of all).

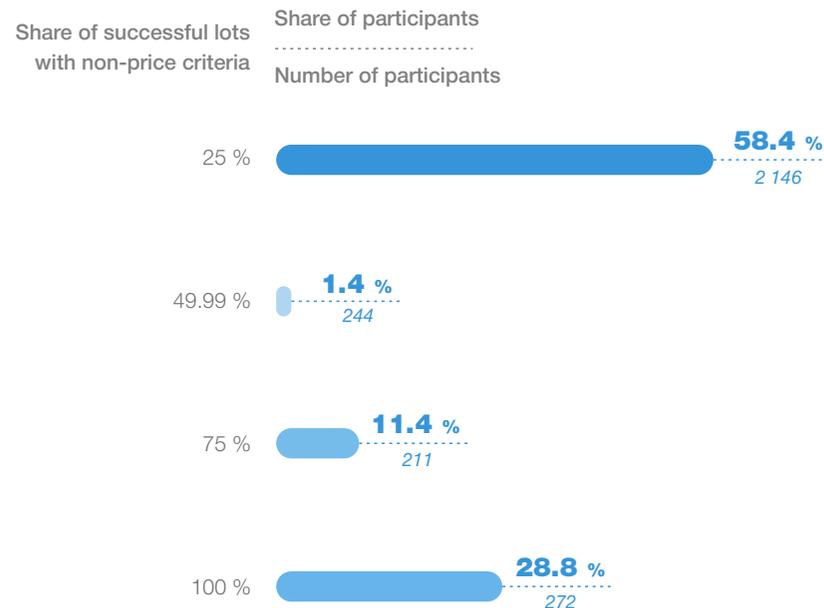
Here are the examples of ranges:

- 25% should be read as "up to 25% inclusive";
- 49.99% should be read as "from 25% (not inclusive) up to 49.99% inclusive."

Share of lots with non-price criteria in which businesses participated in relation to all their lots



The share of successful lots with non-price criteria among all the successful lots for active participants



We decided to study the active participants separately. That is, those for whom tenders with non-price criteria accounted for 50% or more of all their procurement during the researched period. For most of them (58%), successful non-price criteria constituted a minority of all their successful procurement.

However, for 139 participants, non-price criteria proved to be an important component of their success in Prozorro. For 134 of them, being awarded tenders with non-price criteria provided for over 75% of the total amount of their contracts. 107 of them signed contracts with *only one procuring entity* with non-price criteria.

The most interesting case in this respect is TOV BK LIDER STROI, which took part only in 20 competitive tenders, all of which were organized by the Department of Housing and Utility Services of the Executive Committee of Poltava City Council (and it also signed two more direct agreements with the same procuring entity). The procurement was connected with major repairs of heat exchangers, sidewalks, playgrounds, etc.

All 20 tenders (simplified procurement and open bidding) had the non-price criterion "Delayed payment for works provided." In all cases, the participant chose the maximum values of the non-price criterion, agreeing to the maximum late payment for a period of 241 days or more (in one case for a period of more than 181 days). Thus, the participant effectively agreed to wait for the payment for eight months or more (in one case, for six months or more).

The company was registered on March 22, 2019.⁷⁵ It won its first tender six months later in September 2019, and all the others a year after that.

Interestingly, Prozorro contains information on SP Isayan, Shalva Gevorgovich, whose name coincides with the name of TOV BK LIDER STROI founder. This sole proprietor signed 34 contracts with the aforementioned department between September 2017 and July 2019.

Conclusion: we can assume that, for most companies (83%) that participated in lots with non-price criteria at least once, non-price criteria were not the main reason to participate in the bidding (for example, because there was a conspiracy between the participant and the procuring entity, or the procuring entity could easily comply with all non-price criteria and thus believed they had a high chance to win).

At the same time, there are at least 107 participants in the system, for whom tenders with non-price criteria have become an important source of income on Prozorro.

75. bit.ly/3bRr29f

The value of non-price criteria selected by participants

In a quarter of all cases (26%), participants of procurement with non-price criteria chose the criterion with a weight of 30%. In about 22%, the criterion with the value 0%.

In addition, businesses chose the maximum possible value of non-price criteria in 52% of cases⁷⁶ (the maximum value is not always 30%). They chose the minimal possible value in 22% of cases.

Conclusion: participants only agreed to select the maximum possible values of non-price criteria only in about a half of all cases. In 22% of cases, they chose the minimal value.

This may be due to the fact that procuring entities set very high requirements in the non-price criteria, or the criteria were discriminatory, or the participants did not understand how this system works, and so on.

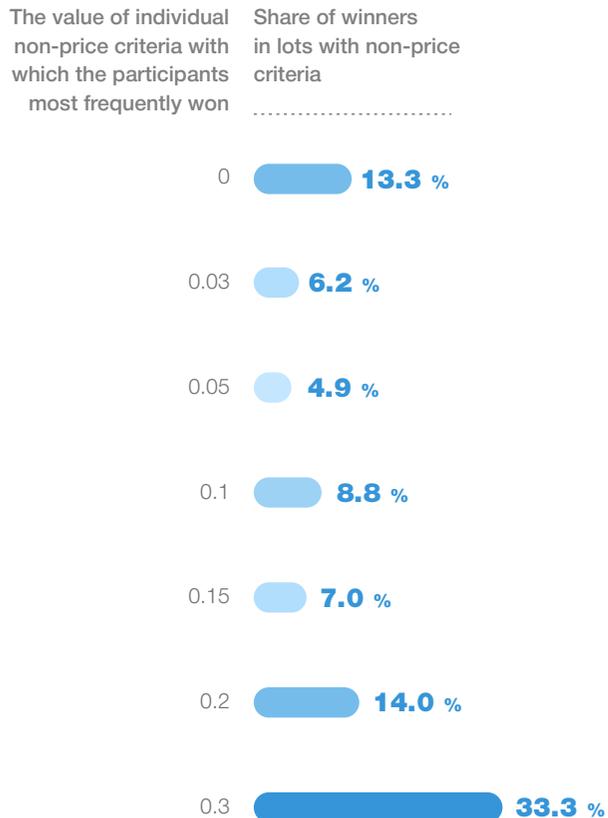
The values of non-price criteria selected by winners

In 13% of cases (947), participants signed the contract having chosen the minimal possible value of the non-price criterion. In 65% of cases (4,636) they won having chosen the maximum value (for 33% of cases, this value was 30%).

Note that these two groups overlap, as zero value sometimes was always the maximum value.

In at least 21% of cases, participants (1,522) won without having indicated the maximum values of all non-price criteria.

76. By "case" we mean the selection of non-price criterion options by a unique procuring entity within a unique lot.



Conclusion: in most cases, participants who agreed to the maximum requirements of procuring entities to non-price criteria were awarded the contracts. In at least a fifth of all cases, they chose intermediate values, and in 13% of values, the minimal values.

Practice of the AMCU Board

In the tenders announced until April 19, 2020, participants mostly complained about the illegitimate use of non-price criteria. They pointed out their discriminatory nature and the fact that “...the tender documentation of the procuring entity does not contain the justification of their use”.⁷⁷

In other cases, the complainants alleged that a competitor agreed to one option of the non-price criterion and instead proved another, and was thus illegitimately awarded the contract.⁷⁸ Or the AMCU Board obliged the procuring entity to make changes to tender documentation⁷⁹ concerning non-price criteria, but the procuring entity announced a new tender with the same criteria but with slightly different weight.⁸⁰

We decided to focus on procurement complaints about tenders announced after April 19, 2020. Our hypothesis was that under the new version of the Law, the participants may change the focus of their complaints, and the AMCU Board may change its practice. In total, we found 12 lots, in which 20 complaints were filed against the application of non-price criteria by procuring entities.

Five lots (13 complaints) related to the procurement of only one customer—the Department of Education of the Novomoskovsk Rayon State Administration,^{81,82} which purchased fire alarm equipment services for five schools. In all cases, the complaints concerned two situations:

- the complainant stated that the winner had not confirmed its compliance with the non-price criterion.⁸³

77. See complaint UA-2019-06-25-001327-c.a1 in tender [UA-2019-06-25-001327-c](#) or complaint UA-2019-01-18-000010-a.a3 in tender [UA-2019-01-18-000010-a](#)

78. See complaint UA-2017-06-16-000240-b.c1 in tender [UA-2017-06-16-000240-b](#)

79. See complaint UA-2019-08-14-000652-b.b2 in tender [UA-2019-08-14-000652-b](#)

80. See complaint UA-2019-10-21-000559-c.c2 in tender [UA-2019-10-21-000559-c](#)

81. District state administration

82. [UA-2020-06-23-008286-a](#), [UA-2020-06-23-009054-a](#), [UA-2020-06-23-009417-a](#), [UA-2020-06-23-009588-a](#) and [UA-2020-06-24-010120-a](#)

83. E.g., complaint UA-2020-06-23-009417-a.a5 in tender [UA-2020-06-23-009417-a](#)

The AMCU Board ruled that the complainant had failed to prove that the winner of the contract had provided false information;⁸⁴

- the complainant alleged that it had provided specific information on the non-price criteria he had chosen. The procuring entity denied this and used this to justify rejection of the participant (based on providing false information).

The AMCU Board ruled that the complainant's proposal had been wrongly rejected by the procuring entity.⁸⁵

In other seven lots (seven complaints):

- the bidder claimed that it had duly formalized the documents for non-price criterion "Terms of Payment," but the procuring entity denied this.⁸⁶

The AMCU board concluded that, since the documentation did not contain specific requirements on additional proof as part of the proposal, the complainant had been wrongly rejected;

- the participant stated that they could not confirm any of the proposed components of the non-price criterion "Business standing." In addition, although the procuring entity had established the name of the non-price criterion "Business standing," the documents that were supposed confirm it were not relevant to business standing. In addition, this criterion is not among those listed in the Law.⁸⁷

The AMCU Board sided took the complainant's side, arguing that the Law did not contain such an evaluation criterion as "Business standing";

- in other five cases, bidders indicated that procuring entities had established discriminatory non-price criteria⁸⁸ or that the winner was the bidder who uploaded a document to prove their compliance with the non-price criterion after the auction ended.⁸⁹

In some of these cases, the AMCU Board sided with the complainants, acknowledging that the Law did not provide for such non-price criteria as "Organic nature of the product", "Storage of goods at a specific distance from the procuring entity" and "Production facilities located in Kyiv." The AMCU Board effectively ruled that procuring entities could only use the non-price criteria listed in the Law.

As for the last case, as of mid-January 2021, the Board had not yet reached a decision.⁹⁰

Practice of the State Audit Service

The first monitoring which identified violations in the use of non-price criteria started on March 6, 2019, concerning the procurement of gas.⁹¹

In total, we managed to identify 32 monitoring findings related to violations in the application of non-price criteria.

In 19 cases, the State Audit Service stated in its conclusions that the procuring entity did not prove the absence of a permanent market for the purchase of gas,⁹² food,⁹³ and overhaul of the soft roof of a residential building.⁹⁴

84. See complaint UA-2020-06-23-008286-a.a5 in tender [UA-2020-06-23-008286-a](#)

85. See complaint UA-2020-06-23-009054-a.c4 in tender [UA-2020-06-23-009054-a](#)

86. Complaint UA-2020-09-10-000227-a.a1 in tender [UA-2020-09-10-000227-a](#)

87. Complaint UA-2020-10-02-001044-a.b1 in tender [UA-2020-10-02-001044-a](#)

88. E.g., complaint UA-2020-11-08-000093-c.c1 in tender [UA-2020-11-08-000093-c](#)

89. Complaint UA-2020-11-17-002448-a.c4 in tender [UA-2020-11-17-002448-a](#)

90. Complaint UA-2020-11-17-002448-a.c4 in tender [UA-2020-11-17-002448-a](#)

91. [UA-2018-11-29-000172-b](#)

92. See tender [UA-2018-11-29-000172-b](#)

93. See tender [UA-2020-01-24-002686-b](#)

94. See tender [UA-2020-01-30-002046-c](#)

In six more cases, the auditors found it a violation that the procuring entity:

- required that within two days of the award/rejection of the previous most economically viable proposal, the participants provide documents to confirm the compliance with the non-price criterion;
- indicated in the tender documentation that the participant's failure to comply with the selected non-price criterion constitutes grounds for rejection.⁹⁵

In three cases, it was found that the procuring entity specified a mathematical formula for calculating the quoted price / non-price criteria in the open tender announcement, and not as part of the tender documentation.⁹⁶

In two cases, the State Audit Service found it a violation that the procuring entity entered into a contract with the winner not in accordance with the terms of the tender proposal of the latter. In particular, the deadlines specified by the procuring entity as non-price criteria, were different.⁹⁷

In two other cases, the State Audit Service stressed that Prozorro lacked information on the deadline proposed by the participants in the procurement procedure for the execution of works (as a non-price criterion).⁹⁸

95. See tender [UA-2018-04-23-001493-b](#)

96. See tender [UA-2019-03-13-003238-a](#)

97. See tender [UA-2020-04-16-002470-a](#)

98. See tender [UA-2019-04-05-000878-c](#)



SECTION 3

Interviews with procuring entities

We selected 13 procuring entities who had the largest number of lots with non-price criteria from January 2017 to November 2020, or who were the leaders in the number of such lots in 11 months of 2020. Of the 13 procuring entities, we were able to talk to seven.

Please note that the information provided in this section is not representative. We cannot claim that such views are shared by all procuring entities.

Why procuring entities started using non-price criteria

All procuring entities use the same regulatory framework for procurement. However, only a small part of them have used non-price criteria. We wondered why procuring entities started doing this, as their experience can be used to encourage others.

Some procuring entities claimed that they used non-price criteria because they were simply provided by law. According to them, the relevant decision was made collectively at a meeting of the tender committee. Other procuring entities responded that they had participated in training organized by local governments, seminars, etc. Some stated that they had adopted this practice from other procuring entities, who had previously been responsible for making these purchases, or had found relevant information on the Internet.

How non-price criteria were chosen

Some procuring entities used the non-price criterion "VAT payment" to save the company money, because in the case of signing a contract with a VAT payer, the amount of their tax credit increases. Some others emphasized that the deadlines mattered to them, since they had objects to be completed in the current year.

In our opinion, the more interesting purpose of using non-price criteria was to check the potential contractor for reliability and integrity.

In this context, one procuring entity described the following problems:

- many bidders engage in price dumping and block purchases;
- some participants are often enterprises who do not fully understand the requirements of the procuring entity;
- some participants participate in auctions "just in case," and then refuse to sign the agreement. But a procuring entity may have limited time and thus need to carry out the procurement successfully on the first try. Therefore, the task is to select those who are really ready to work.

« ... We wanted them [participants] to realize that we need decent businesses. We need quality roads, experience, enough similar completed agreements, and construction as the primary sector of their work. We need all kinds of shady companies to understand right away that we are looking for high-quality, serious contractors. »

According to them, participants immediately pay attention to non-price criteria that help to understand the requirements of the procuring entity. This filters out unscrupulous participants, and the procuring entity can select among experienced professionals. The respondents claimed that the number of refusals to sign the agreement dropped, as did cases of price dumping (this happened before the anomalously low price mechanism was introduced).

For the same purpose, procuring entities used the criterion of advance payments. According to them, if the participant agrees to receive an advance payment, it indicates that they have no money to start repairs. If an enterprise did not take an advance payment, the procuring entity interpreted this as a certain stability of the company and its reliability as a contractor.

The respondents explained that it made sense to introduce this verification in procurement for big amounts. Some tried to combine non-price criteria with the requirement to provide performance security / tender security. According to them, they did not have cases when an unscrupulous participant chose the maximum value of non-price criteria and refused to sign the contract.

Why procuring entities stopped using non-price criteria

During the interview, most procuring entities said that they found the non-price criteria very useful. At the same time, there are cases when they have departed from the practice of their application.

Some procuring entities stopped using the “Terms of performance” criterion because such tenders tend to be disputed with the AMCU board, which takes time.

« ... The tender itself lasts two months. And if there is a delay in the AMCU, it is another two months. Participants already find it hard to meet deadlines. And if they also fought for the shortest terms in non-price criteria, then because of this delay they will refuse to fulfill the contract completely. This has happened quite often.

They [the participants] are actually trying to do everything faster themselves. They don't stall on purpose. The faster they do the job, the more jobs they can complete and the more money they can make. »

At the same time, another procuring entity claimed that provided there are objective reasons (such as delays due to a complaint), they extend deadlines and adjust plans.

Another procuring entity stopped using the non-price criterion “Warranty,” because it did not yield the desired result.

« ... As for the warranty, we filed a lawsuit, and the company had already disbanded. The participant did something, the trial lasted 2-3 years, and there is no one to recover damages from. Because they closed. It doesn't make sense to arrange for a warranty over five years, even over three. »

Another procuring entity stopped using the “Warranty” criterion, because the warranty for road repairs is stipulated by government standards, and the representatives of the entity did not see a point in reduplication. However, procuring entities still use other non-price criteria, which are not stipulated by standards.

In one case, the procuring entity stopped using non-price criteria due to the introduction of a new version of the Law of April 19, 2020.

« ... There are inaccuracies [in the Law]. Nobody will explain to us on the platform how it should be. And monitoring is still there. That's why we stopped using it.

I don't understand whether this is an exhaustive list [of non-price criteria in the Law]. How do I understand them? If there is an inspection, and we have made a mistake, this is bad. »

The respondent also said she was not sure how to interpret the slash in the first sentence of Art. 29, part 3, clause 3 of the Law: non-price criteria can be used only with the life cycle or both with the life cycle and the price?

... **The price / life-cycle cost** alongside other evaluation criteria, in particular: terms of payment, delivery period, warranty service...

In one case, a local government unit stopped specifying non-price criteria because a former employee who had been using them had resigned.

Procuring entities also mentioned cases when the participants themselves were not sure what the non-price criteria meant: *“They selected them several times, and they did not even know why they'd won.”*

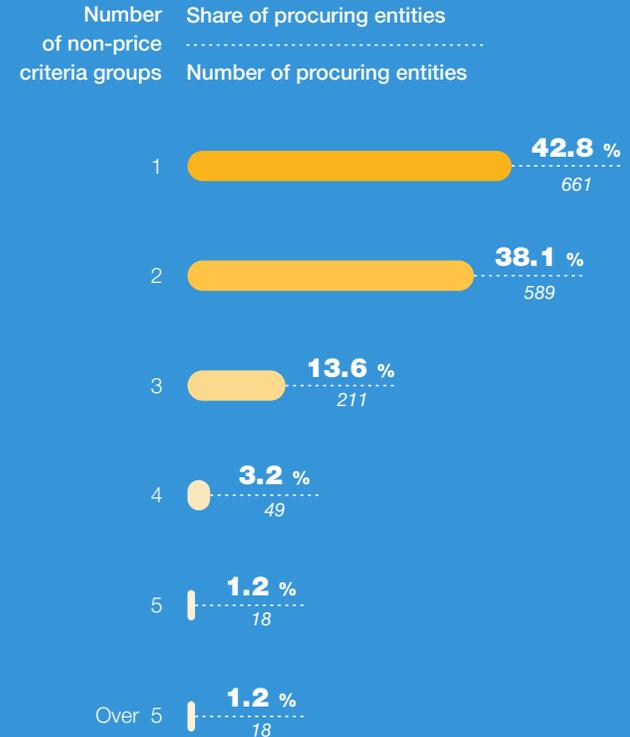
Among the reasons why procuring entities no longer use non-price criteria have also been participants' complaints. Businesses complained of discrimination, and the procuring entity, having failed to find uniform case law and AMCU Board practice on this issue decided to remove non-price criteria from the tender documentation.

Note that the majority of procuring entities (95%) used only 1-3 groups of non-price criteria. Therefore, the decision to stop using one or more non-price criteria is in many cases equivalent to stopping the use of non-price criteria altogether.

Here are the examples of ranges:

- 1 should be read as “up to 1 inclusive”;
- 2 should be read as “from 1 (exclusive) up to 2 inclusive.”

5 primary groups of non-price criteria used by procuring entities



Time required to work with non-price criteria

Procuring entities mostly said they did not need much time to work with non-price criteria. For the most part, the work consists of:

- receiving the terms of reference from the person or department that is ordering procurement and making the decision on the use of certain non-price criteria;
- checking the participant for compliance with the stated criteria.

The second task, according to respondents, took more time than the first.

Problems

Among the problems faced by procuring entities in the context of non-price criteria, they named the following:

- lack of understanding how a procuring entity can verify whether a participant complies with the selected non-price criteria.

Respondents argued that the law should regulate this issue and the procuring entity should not "invent options." For example, the law should oblige the participant to confirm their compliance with non-price criteria in the manner specified by the procuring entity in tender documentation;

- participants themselves sometimes do not choose any of the non-price criteria;
- not all procuring entities understand what non-price criteria can be in general. During one interview, a procuring entity representative heard about the non-

price criterion "Supply deadline" for the first time and agreed that it could indeed be useful;

- lack of an exhaustive list of non-price criteria;
- the lack of a clear rule on whether the Law offers an exhaustive list of non-price criteria or if they are just examples;
- lack of a clear understanding of what should be considered discrimination in non-price criteria.



"... We had a non-price criterion 'Availability of repair, warranty and service shop in a certain oblast.' If our tractor breaks down and the service is located in Kyiv or Dnipro, it will take forever to fix it. If there are 2-3 companies in our city that can do this, should such a criterion be considered discriminatory or not?"



- lack of a unified approach in case law and decisions of the AMCU Board.

SECTION 4

Problems in the system of non-price criteria

In addition to the problems mentioned by procuring entities during the interview, we would like to draw attention to the shortcomings in the system of non-price criteria that we found during the analysis.

Non-price criteria with only one option

We found that the system allows creating a tender with only one option for a non-price criterion instead of two or more (with 16 options being the high score).⁹⁹

In practice, it could look as follows:

The participant must be located and have production facilities within the city of Ivano-Frankivsk, with the shortest distance to the procuring entity, as food delivery is carried out by the procuring entity's transport (self-pickup), with fuel and delivery time to avoid cooling (overheating) and spoilage of food.

- *Option 1: Participant location — 30%.*¹⁰⁰

In this case, the bidder is forced to either agree to the only option of the non-price criterion, or the system will not allow to continue participating in the procurement. This contradicts the idea of non-price criteria, as they should either increase / decrease the participants' chances of winning unchanged or leave them unchanged, but not prevent them from taking part in the procurement.

Starting from 2017, we have identified 342 groups of non-price criteria with only one option in 331 lots. In addition, 192 groups had options with a zero value and

thus had no impact on the procurement results (they also were not displayed on the procurement page). However, 150 groups of non-price criteria in 150 lots also had a single option with a non-zero value of non-price criteria. Such lots were announced by 55 bidding organizers.¹⁰¹

The State Historical and Memorial Reserve of Lukyanovka had the largest number of such lots, a total of 21.¹⁰²

It is advisable to make relevant changes to the Law or, to make it easier, to the algorithm of Prozorro (since the Law does not regulate this issue anyway).

However, this step will not completely solve the problem, as the procuring can still create two identical options for the non-price criterion.

Unclear non-price criteria

Procuring entities could create an unclear non-price criterion with no explanation of what was meant (either in the documentation or in the description).¹⁰³

In this example, the procuring entity also offered a non-price criterion which benefits not the procuring entity but the participant.

Winner selection criteria

Price: 70 %

No deferred payment: 30 %

no deferred payment: 30 %

99. [UA-2017-03-31-001899-b](#)

100. [UA-2017-01-11-000042-c](#)

101. For example, see [UA-2020-11-25-001469-b](#), [UA-2020-11-11-002088-c](#) and [UA-2019-09-04-000562-c](#)

102. E.g. see [UA-2017-03-16-001870-b](#)

103. [UA-2017-05-26-000693-c](#)

Similar unclear criteria can be seen in tenders [UA-2020-12-04-002130-c](#) and [UA-2017-11-04-000012-b](#).

Winner selection criteria

Price: 99 %
 Price: 1 %
 price: 1 %

Winner selection criteria

Price: 95 %
 Processor frequency and model: 5 %
 frequency: 5 %
 other: 0 %

In other cases, procuring entities could enter semantically meaningless symbols instead of criteria.¹⁰⁴ Interestingly, one bidder in this tender chose this option. And although this did not help him win, the question arises: in what way from a formal point of view should the results of such an auction be interpreted? If this participant wins, can the result be considered valid?

Winner selection criteria

Price: 98 %
 -: 1 %
 0: 1 %
 -: 0 %
 -: 1 %
 -: 1 %
 -: 0 %

104. [UA-2020-02-05-001777-a](#)

Procuring entities can also specify two identical options of the same criterion but with a different weight ([UA-2020-08-19-000597-c](#)). In a sense, such a tender would be no different from lots where non-price criteria have only one non-zero option. A bidder who does not meet either option suggested in the criteria will not be able to participate in procurement.

Winner selection criteria

Price: 70 %
 Additional non-price criterion: 30 %

production, industrial facilities or 30 %
 sales office, located in the city of Kyiv,
 and the presence of a certificate from
 the Kyiv Chamber of Commerce and
 Industry that the equipment is
 manufactured in the city and
 is certified

production, industrial facilities or 0 %
 trade representative office located
 in the city of Kyiv, and the presence
 of a certificate from the Kyiv Chamber
 of Commerce and Industry that
 the equipment is manufactured
 in the city and is certified

Procuring entities have also included logically incompatible requirements to the options of a non-price criterion ([UA-2017-09-15-001472-c](#)).

Winner selection criteria

Price: 70 %

Qualification requirements: 30 %

availability of a valid license, which 30 %
must meet the license conditions
approved by the Cabinet of Ministers
№ 960 dated 11/18/2015

operative response time - 25 %
up to 7 minutes

Procuring entities could also indicate non-price criteria which made no sense to create ([UA-2018-11-21-001394-a](#)).

Winner selection criteria

Price: 90 %

Requirements of the law 10 %
on public procurement:

compliance with the law: 10 %

compliance with the law: 0 %

Including non-price criteria in the agreement

The vagueness of a non-price criterion can be an issue as well. For example, in tender [UA-2017-05-22-000630-c](#) the procuring entity specified the criterion “Providing consultations on the collection of source data and on the content of the service.” However, neither the tender documents nor the contract specify such details as the frequency of consultations, the specific subject of consultations, the format of consultations, etc. Theoretically, such wording and the lack of a clear indication of the nature of the consultation process could create a problem in the implementation of this commitment.

The law does not stipulate that the non-price criteria chosen by the bidder must become part of the contract. At the same time, some procuring entities do that to formalize the participant's choice and mutual commitments in the context of non-price criteria.

However, not all procuring entities include such obligations in the contract. In this case, the question arises: from a legal point of view, does the participant have to comply with the non-price criteria he has chosen, as it is not provided for in the contract?

It would make sense to amend the Law to resolve this problem.

Defining the assessment methodology

Under the Law¹⁰⁵ and according to clarifications by the MEDT,¹⁰⁶ the assessment methodology is defined by the procuring entity. In fact, however, there is a situation when the formula to calculate the adjusted price (the formula is part of the assessment methodology) exists in one single form, and the procuring entity must either agree with it or refuse to use non-price criteria in the first place.

In this situation, it makes sense to either develop several assessment methodologies and integrate them all in Prozorro, or to amend the law without changing the system, so that the real situation is in line with the provisions of the Law.

In addition, it is advisable to explain what is meant by the assessment methodology. Such a recommended list can help procuring entities draft better tender documentation which would include all the important details.

In practice, procuring entities could include the following in the methodology:

- the relative weight of criteria;

105. The Law, Art. 22, part 2, clause 10, and Art. 14, part 3, clause 10: [bit.ly/3nXuZf1](#)

106. [bit.ly/2M1tlvF](#)

- the description of non-price criteria for their more accurate understanding by participants and avoidance of ambiguities;
- confirmation of compliance with the selected criteria that participants must provide;
- explanation of the need to apply these non-price criteria.

Rejection of a participant due to a failure to comply with non-price criteria

It makes sense that procuring entities try to verify whether the participants comply with the selected criteria. However, in some situations, this leads to the fact that procuring entities invent non-existent rules and prescribe in the tender documents that one of the reasons for rejection may be:

non-compliance with the selected relative weight under the criterion “total cost of unit prices” in the tender proposal form submitted by the participant in accordance with Attachment No. 9 to the tender documentation.¹⁰⁷

The following steps could probably solve this problem:

- provide in the Law that a procuring entity must explain in the announcement / tender documentation how compliance with the selected non-price criteria will be assessed;
- provide in the Law that in case if a bidder does not comply with the selected non-price criteria, the procuring entity rejects their bid / tender proposal on the basis of Article 31, part 1, clause 1, paragraph 3 of the Law.¹⁰⁸

107. [UA-2018-04-23-001493-b](#)

108. [bit.ly/2EmiGZe](#)

Non-price criteria that procuring entities can choose

According to the explanation of the MEDT, the list of non-price criteria provided in Art. 29, part 3, clause 3 of the Law is not an exhaustive list of all possible non-price criteria. However, as we have already noted in the chapter “Practice of the AMCU Board,” in 2020, at least five decisions were made in which the AMCU Board actually indicated that procuring entities can apply only those non-price criteria that are defined in the Law.

The best (though not the easiest) way to resolve this problem is to change the phrasing of the provision in question to ensure its interpretation is unambiguous.

The interpretation of non-price criteria

Some procuring entities indicated they wanted to have an exhaustive list of all the possible non-price criteria with an explanation of their options and content.

From a theoretical standpoint, there is a large number of non-price criteria; thus, their collection and description may be an ineffective way to spend the time of the MEDT staff.

At the same time, our study showed that only a relatively small number of non-price criteria are used very often. It can be assumed that a description of their application and possible options could help procuring entities if not in all, then in most cases.

No indication of non-price criteria in the announcement / tender documentation

There are cases when procuring entities create non-price criteria in the electronic form of procurement, but do not specify them in the announcement / tender documentation contrary to the Law.

In such situations, the question arises whether it should be interpreted as a violation (the State Audit Service considers it a violation). If so, Article 164-14 of the Code of Ukraine on Administrative Offenses does not provide for liability for such a violation in the field of simplified procurement. Perhaps, this should be changed.

CONCLUSIONS

The frequency of use of non-price criteria by procuring entities is constantly reducing. The new version of the Law of April 19, 2020, could not change this trend.

Since January 2017, procuring entities have used non-price criteria in only 0.7% of lots in which they could be used.

A disproportionately large number of tenders with non-price criteria were announced by procuring entities in Donetsk oblast. The respondents explained it by their own initiative, recommendations of authorities, tracking the procurement of other procuring entities, and search for information online.

Non-price criteria are more common for procuring entities that spend large amounts on procurement, as well as in tenders for large sums. At the same time, procuring entities announced such lots quite infrequently compared to tenders without non-price criteria.

Almost half of all non-price criteria are accounted for by either terms of payment or terms of performance. At the same time, it is theoretically possible to increase the professionalism of procuring entities and improve the legislation so that problems with payment and deadlines would occur much less often. Accordingly, the need to apply these non-price criteria and overpay may decrease.

Almost half of all non-price criteria were used in tenders for construction and repair works. This is most likely due to the high expected value of such lots and the higher risks.

For most companies participating in lots with non-price criteria, these criteria can hardly be considered the primary reason for participation.

Participants only agreed to select the maximum possible values of non-price criteria only in about a half of all cases. In 22% of cases, they chose the minimal value. This may be due to the fact that procuring entities set very high requirements in the non-price criteria, or the criteria were discriminatory, or the participants did not understand how this system works.

In most cases, it was the participants who chose the maximum weight of non-price criteria that ended up being awarded the contract.

The AMCU Board effectively ruled that procuring entities could only use the non-price criteria listed in the Law. This may significantly reduce the use of non-price criteria by procuring entities, especially considering that most criteria available in Prozorro are not stipulated by the Law.

Procuring entities mentioned the following problems:

- lack of understanding of how to check the participants' compliance with non-price criteria;
- reluctance of participants to choose non-price criteria;
- lack of understanding concerning what non-price criteria can be used;
- lack of an exhaustive list of non-price criteria;
- lack of understanding whether the list of criteria in the Law is exhaustive;
- lack of a clear understanding of what should be considered discrimination;
- lack of a unified approach in case law and decisions of the AMCU Board.

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