TRANSPARENCY INTERNATIONAL UKRAINE

How to Improve Procurement Monitoring

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MOVING FORWARD TOGETHER

TRANSPARENCY INTERNATIONAL UKRAINE

DOZORRO

The study was 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 Prozorro analytics modules. 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.

The rest of our studies can be found in the Research section on the website of Transparency International Ukraine: bit.ly/DOZORRO-research

Contents:

Introduction

Efficient and rapid recovery of Ukraine requires purchasing an unprecedented amount of repair and reconstruction works, design services, goods for construction.

According to the Kyiv School of Economics, as of February 2023, the total amount of damage caused to the infrastructure of Ukraine due to the full-scale invasion of Russia was USD143.8 bln (at replacement cost),[1] and by the end of June, the amount of direct documented losses reached USD150.5 bln. According to Reuters, citing calculations by the World Bank, the UN, the European Commission, USD411 bln[2] is needed for the post-war reconstruction of Ukraine.[3]

On June 21–22, 2023, the Ukraine Recovery Conference was held in London on ways to effectively rebuild Ukraine. Among the prerequisites for reconstruction, experts have repeatedly mentioned ***a transparent procurement mechanism***, and, according to a joint statement of the conference participants, the Government of Ukraine should continue developing the national e-procurement ***system*** to ensure transparent recovery.[4] It is through public procurement that the selection of suppliers of goods, contractors, service providers, and the conclusion of contracts for reconstruction works will take place. Therefore, effective and lawful distribution of budgetary and donor funds in public procurement procedures, which should be conducted in compliance with the principles of transparency, legality, and fair competition, is crucial for the reconstruction of Ukraine. Preventing and combating corruption in procurement plays a special role and should be one of the priorities of the state.

Ukraine already has powerful tools and worthy positions in the field of public procurement development. The Ukrainian electronic procurement system Prozorro, recognized with many awards,[5] allows conducting procurement and participating in it online, and helps supervisory bodies and civil society organizations to quickly detect signs of violations and initiate investigations. The principle of "everyone sees everything," embodied in the Prozorro system, means the openness of information about procurement from the time of its planning to contract implementation.

However, no less important than the transparency of procurement is ***the effective control of the state*** over the legality of procedures, their competitiveness, and the efficiency of spending money in them. Such control is intended to be carried out by the State Audit Service of Ukraine,[6] its offices, and their subdivisions[7] (hereinafter referred to as the state financial control bodies or the SFCB).

The basis for the search for abuses in public procurement is the list of violations specified in Article 164–14 of the Code of Ukraine on Administrative Offenses.[8] It is the SFCB that is responsible for their detection, elimination, and prosecution for their commission in the first place.

Article 19 of the Constitution of Ukraine obliges public authorities and their officials to act only in the manner prescribed by the Constitution and laws of Ukraine. Therefore, the current legislation clearly defines the procedural ways in which SFCBs can detect offenses.

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1 KSE: During the year of the full-scale war, Russia caused damage to Ukraine's infrastructure at almost USD144 bln, March 22, 2023. URL: https://bitly.ws/YzSA

2 KSE: As of June 2023, the total amount of direct damage caused to the infrastructure of Ukraine due to the war exceeded USD150 bln. URL: https://bitly.ws/YzSH

3 Reuters: "Ukraine's recovery and reconstruction needs seen reaching USD411 bln – World Bank," 22.03.2023. URL: https://cutt.ly/Hws3n2pd

4 Co-chairs' Statement by the Governments of Ukraine and the United Kingdom, Co-hosts Ukraine Recovery Conference 2023, London. URL: https://globalcompact.org.ua/en/news/urc-co-chairs-statement/

5 Prozorro Awards. URL: https://cutt.ly/fws3QYk6

6 Regulation on the State Audit Service of Ukraine, approved by the Resolution of the Cabinet of Ministers of Ukraine dated February 3, 2016, No. 43. URL: https://zakon.rada.gov.ua/laws/show/43–2016-%D0%BF#Text

7 Order of the State Audit Service of Ukraine dated June 6, 2016, No. 23 On Approval of the Regulations on the Offices of the State Audit Service and Their Subdivisions. URL: https://zakon.rada.gov.ua/rada/show/v0023889–16#Text

8 Article 164–14 of the Code of Ukraine on Administrative Offenses. URL: https://cutt.ly/Vws3Q3Zs

In accordance with Article 2, part 2 of the Law of Ukraine On the Main Principles of the Public Financial Control in Ukraine, state financial control is ensured by the SFCB through the state financial audit, inspection, procurement verification, and procurement monitoring.

Control over compliance with the legislation *precisely in the field of procurement* is carried out by monitoring a procurement transaction in accordance with the procedure established by the Law of Ukraine On Public Procurement, conducting an audit of a procurement transaction, as well as during the state financial audit and inspection. The latter is carried out in the form of a revision.[9]

Thus, there are **four types of measures** of state financial control. The differences between them were one of the issues studied by the DOZORRO team in the report State Audit Service in Public Procurement: Is Monitoring Effective?, presented in 2021.[10] Among the measures of state financial control over public procurement, **procurement monitoring** plays a special part.

The regulatory basis of this control measure is Article 8 of the Law of Ukraine On Public Procurement, which regulates the monitoring of a procurement procedure.

Monitoring of the procurement procedure is an analysis of the procuring entity's compliance with the legislation in the field of public procurement during the procurement procedure, the conclusion of a procurement contract, and during its validity **in order to prevent** violations of the legislation in the field of public procurement.[11]

As can be seen from this definition, the main purpose of monitoring the procurement procedure is **preventive**, which is its advantage, and allows stopping the violation at the stage when it has not yet caused significant damage to the public interest and can be corrected.

In addition, the monitoring of the procurement procedure has other **features** that distinguish it from other measures of state financial control and provide a number of advantages:

- monitoring takes place *openly and publicly* in the Prozorro electronic procurement system; all its stages, information, and documents exchanged by the parties are published on the webpage of the procurement procedure; this should prevent abuse on both sides and allows generalizing the practice, identifying problems in the monitoring mechanism, and promptly developing proposals for its improvement, unification of practice;
- the opportunity to start monitoring on the basis of, in particular, information from public authorities and local self-government, data of risk indicators of the Prozorro electronic procurement system, appeals of civil society organizations, which creates conditions for an open dialogue between society and the supervisory body;
- the possibility of a quick start and *short deadlines for monitoring*, clearly defined by the Law – up to 15 working days;
- each monitoring provides for an analysis of compliance with procurement legislation within one specific procurement transaction, which allows focusing on identifying significant violations, their signs being the reason to initiate the monitoring;
- in the case of elimination of violations, SFCBs do not bring the procuring entity to administrative liability, which is an additional incentive to correct the mistakes.

The rest of the measures of state financial control are inferior to monitoring in these aspects. Thus, at the time of their conduct, a year or more may pass from the moment of committing the violation, which complicates its correction and overcoming of negative consequences, does not allow influencing the course of the procurement transaction.[12] The processes for the implementation of the rest of the control measures are not automated and are not reflected in the Prozorro electronic procurement system, which entails a risk of abuse and complicates the analysis of the practice. A wide range of issues during financial audit and inspection, such as the implementation of budget programs, requires significant resources and can hinder the focus on the most priority procurement transactions and significant violations in them. After all, the subject of analysis in them is the whole range of issues of financial and economic activities of the procuring entity, and not just public procurement.

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9 Articles 4, 5 of the Law of Ukraine On the Main Principles of the Public Financial Control in Ukraine

10 Report of the Dozorro team State Audit Service in Public Procurement: Is Monitoring Effective?. – P. 18. URL: https://ti-ukraine.org/wp-content/uploads/2020/07/Derzhaudytsluzhba-v-publichnyh-zakupivlyah-chy-efektyvni-monitoryngy-1.pdf

11 Article 1, part 1, clause 14 of the Law of Ukraine On Public Procurement.

12 For example, a scheduled on-site revision is carried out no more than once a calendar year, in accordance with Article 11, part 2 of the Law of Ukraine On the Main Principles of the Public Financial Control in Ukraine.

Of course, the rest of the measures of state financial control are necessary to identify violations of budget legislation in other areas of budget spending, such as the appointment of bonuses to the management of state-owned enterprises.

But in the field of public procurement, in our opinion, **ways to improve state financial control** are primarily related to improving the mechanism for **procurement monitoring.** Considering the existing advantages, it is possible to improve this mechanism in a short time, which is necessary for Ukraine to prepare for reconstruction.

Therefore, **the purpose** of this study is **to identify the main problems and formulate proposals** for improving the procurement monitoring mechanism as a promising measure of state financial control.

In the study, we focused on the analysis of the regulatory framework for procurement monitoring, statistical indicators of the SFCB's monitoring in procurement, problems of monitoring practice, as well as key trends in judicial practice to appeal against the conclusions on the results of monitoring.

The main period of time covering the objects of analysis is 2021–2022. Statistics from earlier years were considered in some issues to track the dynamics. In matters related to changes in public procurement legislation and judicial practice, the objects of analysis of 2023 were mainly used.

The sources of information for the study were: the database of Ukrainian legislation and explas of the Ministry of Economy of Ukraine in the field of public procurement, the Prozorro electronic procurement system, the BI Prozorro public analytics module, the Clarity App information base, the published texts of monitoring conclusions, the Unified State Register of Court Decisions, responses to inquiries for public information received from the SFCB and other stakeholders in the field of procurement.

Moreover, to identify problematic aspects of monitoring and discuss proposals, in April 2023, TI Ukraine held a roundtable on Procurement Monitoring: What Needs to Be Changed? The event was attended by representatives of the State Audit Service, the Ministry of Economy, the Antimonopoly Committee of Ukraine, law enforcement agencies, large procuring entities, and civil society organizations. The key points of the discussions of this event were worked out and used as a basis to identify problems and proposals in this study.

SECTION 1. Legal regulation of the public procurement monitoring mechanism

1.1. Overview of the regulatory framework and public procurement monitoring process

The main regulatory legal acts on which the monitoring of public procurement is based are the Laws of Ukraine On the Main Principles of Public Financial Control in Ukraine (hereinafter referred to as the Law on the Main Principles) and On Public Procurement.

The Law on Main Principles does not provide for a detailed procedure for monitoring procurement,[13] referring instead to the Law of Ukraine On Public Procurement.

In turn, the Law of Ukraine On Public Procurement (hereinafter referred to as the Law) **defines the monitoring** of the procurement procedure as **an analysis of the procuring entity's compliance with the legislation** in the field of public procurement during the procurement procedure, the conclusion of a procurement contract, and during its validity in order to prevent violations of the legislation in the field of public procurement.

Article 8 of the Law is devoted to the monitoring mechanism, the current version of which came into force in April 2020. Let's consider its key provisions.

The entities that carry out monitoring are the State Audit Service of Ukraine[14] and its interregional territorial bodies.

The objects of monitoring are procurement procedures. It should be noted that not all procurement transactions are procedures within the meaning of the Law. Parts one and two of Article 13 of the Law attribute open bidding, restricted bidding, and competitive dialogue to the procedures – these are competitive procedures. As an exception, procuring entities may apply the negotiation procurement procedure.

Simplified procurement and contracts concluded without the use of the electronic procurement system (so-called "direct contracts") are not attributed to the procedures. Article 8 of the Law provides for the monitoring of procurement procedures, therefore, according to the Law, simplified procurement and direct contracts are not subject to monitoring.[15]

The subject of monitoring is the analysis of the procuring entity's compliance with the legislation in the field of public procurement within the framework of a specific procedure and the contract concluded based on its results.

By analyzing whether the procuring entity has complied with the requirements of the legislation, SFCBs may detect the facts of violations by the authorized person of the procuring entity or their manager, provided for in Article 164–14 of the Code of Ukraine on Administrative Offenses (hereinafter referred to as the Code), and other violations of procurement legislation. If the procuring entity has not eliminated the detected violations,

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13 In addition to the provision that procurement monitoring is carried out at the location of the state financial control body.

14 The central executive body implementing the national policy in the field of state financial control, in accordance with the Resolution of the Cabinet of Ministers of Ukraine dated February 3, 2016, No. 43.

15 The features of procurement monitoring, determined by the Resolution of the Cabinet of Ministers No. 1178 dated October 12, 2022, for the period of the legal regime of martial law, are considered in the next subsection.

which led to their non-compliance with the requirements provided for by the Law; if they have not appealed against the monitoring conclusion in court, the SFCB initiates bringing the authorized person of the procuring entity (the head – for certain violations) to administrative liability, provided that the detected offense is envisaged in Article 164–14 of the Code. The elements of offenses for which administrative liability is provided, penalties for their commission, terms and entities imposing penalties are provided in Table 1.

Table 1. Violation of the procurement legislation, for the commission of which administrative liability is provided under Article 164–14 of the Code of Ukraine on Administrative Offenses.

No.	Part of Article 164–14 of the Code	Element of the offense	The amount of the fine and the person held liable	The period for imposing penalties	Role of the SFCB and/or the court
1	Part one	violation of the procedure for determining the scope of procurement*	a fine in the amount of UAH 1,700 for officials (officers), authorized persons of the procuring entity	No later than two months from the date of the offense, and in the case of an ongoing offense, no later than two months from the date of its detection[16]	SFCBs consider cases of administrative offenses and impose administrative penalties. The Head of the State Audit Service, their deputies, as well as other authorized officials of the SFCB act on their behalf[17]
2		the procuring entity's* untimely provision or failure to provide clarifications on the content of the bidding documents*			
3		bidding documents non-complying with the law			
4		the amount of security for the bid specified in the bidding documents exceeds the limits set by law			
5		non-disclosure or violation of the deadlines for disclosure of information on procurement			
6		non-disclosure or violation of the procedure for disclosure of information on procurement carried out under the Law of Ukraine On Amendments to Certain Legislative Acts of Ukraine Aimed at Preventing the Occurrence and Spread of Coronavirus Disease (COVID-19)			
7		failure to provide information and/or documents in cases provided for by law			
8		violation of the deadlines for consideration of the bid			
9	Part two	offenses No. 1–8 committed by a person who during the year has already been subjected to administrative penalties for the same violations	a fine in the amount of UAH 3,400 on officials (officers), authorized persons of the procuring entity		

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16 Article 38, part 1 of the Code of Ukraine on Administrative Offenses.

17 Article 234–1 of the Code of Ukraine on Administrative Offenses.

No.	Part of Article 164–14 of the Code	Element of the offense	The amount of the fine and the person held liable	The period for imposing penalties	Role of the SFCB and/or the court
10	Part three	purchase of goods, works, and services before/without procurement/simplified procurement procedures in accordance with the Law	a fine from UAH 25,500 to UAH 51,000 on officials (officers), authorized persons of the procuring entity	within six months from the date of its detection, but not later than two years from the date of its commission[18]	authorized officials of the SFCB draw up reports on offenses,[19] and judges of district, district in the city, city or city district courts hear cases about them[20]
11		application of competitive dialogue, selective tendering, or negotiated procurement procedure on terms not provided for by the Law			
12		non-rejection of the bids subject to rejection in accordance with the Law			
13		rejection of bids on grounds not provided for by the Law or not in accordance with the Law (unjustified rejection)			
14		entering into a procurement contract with the participant*, who became the winner of the procurement procedure, where the terms and conditions of the contract do not comply with the requirements of the bidding documents and/or the bid of the winner of the procurement procedure			
15		amending the essential terms and conditions of the procurement contract in cases not provided for by the Law			
16		entering unreliable personal data into the electronic procurement system and failure to update them in case of change			
17		violation of the deadlines for publication of bidding documents			
18	Part four	Actions No. 10–17 committed by a person who during the year was subjected to administrative penalties for the same violations	fine on officials (officers), authorized persons of the procuring entity from UAH 51,000 to UAH 85,000		
19	Part five	Failure to comply with the decision of the Antimonopoly Committee of Ukraine as an appeal body based on the results of consideration of complaints of appeal subjects, the submission of which is provided for by the Law	fine on the head of the procuring entity from UAH 34,000 to UAH 85,000		
20	Part six	Entering into contracts that provide for the procuring entity's payment for goods, works, and services before/without procurement/simplified procurement procedures, determined by the Law	fine on the head of the procuring entity from UAH 34,000 to UAH 170,000		

Consequently, as a result of monitoring the procurement procedure, public auditors may identify both significant violations (for example, unjustified rejection of the tender bid) and violations that do not always have a significant impact on the competitiveness and efficiency of the procurement transaction (for example, violation of the deadline for consideration of the tender bid for a short period). The legislation does not provide for the distinction between significant and insignificant violations, but to some extent, the significance of violations is reflected in the sanctions.

It should be emphasized that although Article 164–14 of the Code defines an exhaustive list of administrative offenses for the commission of which administrative liability may arise, SFCBs, when monitoring the procurement procedure, are **not limited to this list when searching for violations**. The Law defines the concept of "monitoring of the procurement procedure" as an analysis of compliance with "legislation in the field of public procurement," and not just one Law. Therefore, the SPFB has the authority to identify any non-compliance of the actual procurement process with the procedures established by the legislation in the field of public procurement – not only by the Law.

In particular, as a result of monitoring the procurement procedure, violations of such regulatory acts as the Resolution of the Cabinet of Ministers of Ukraine dated October 11, 2016, No. 710 On the Effective Use of Public Funds, the Procedure for Determining the Item of Procurement, approved by the Order of the Ministry for

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18 Article 38, part 3 of the Code of Ukraine on Administrative Offenses.

19 Article 255, part 1, clause 1 of the Code of Ukraine on Administrative Offenses.

20 Article 221, part 1 of the Code of Ukraine on Administrative Offenses.
*The terms, specified in the Code as "scope of procurement," "procuring entity," "bidding documents," "participant" shall hereinafter be referred to as "procurement item," "procuring entity," "tender documentation," "participant."

Development of Economy, Trade and Agriculture of Ukraine dated April 15, 2020, No. 708, the List of Formal Errors, approved by the Order of the Ministry for Development of Economy, Trade and Agriculture of Ukraine dated April 15, 2020, No. 710 and others may be detected.

In response to an inquiry for an exhaustive list of regulatory acts for compliance with which the SFCB analyzes procurement procedures, by letter No. 001200–16/8024–2023 dated July 17, 2023, the State Audit Service of Ukraine reported that ***the Law does not determine a clear list of legislation governing the field of public procurement.*** *The State Audit Service has not created and does not possess a document that contains a list of all current legislative acts in the field of public procurement (name, date, publisher), the analysis of compliance with which is carried out during the monitoring of procurement procedures.*[21]

Consequently, monitoring the procurement procedure usually consists in a comprehensive analysis of its compliance with the requirements of the current legislation.

Period of time during which SFCBs can carry out monitoring: *when* ***conducting*** *the procurement procedure,* ***concluding the procurement contract,*** *and during its* ***validity***.[22]

Outlining the period of "conducting the procurement procedure," let us determine the moment when it starts.

The reference to the term "**start** of a procurement transaction" is contained in Article 4, part 2, clause 2 of the Law and actually **coincides with the moment of announcing** the procurement transaction in the electronic procurement system. Thus, information on the "approximate start of a procurement transaction" should be contained in the annual procurement plan. The Ministry of Economy in response No. 951/971 dated November 2, 2021,[23] clarified *that the* ***beginning of the tender/simplified procurement transaction is the publication of an announcement*** *of competitive procurement procedures/announcement of a simplified procurement transaction.*

When determining ***the term of the procurement contract***, it is necessary to consider the provisions of civil and economic legislation. According to Article 631, part 1 of the Civil Code of Ukraine, the term of the contract is the time during which the parties can exercise their rights and fulfill their obligations under the contract. The contract shall enter into force from the moment of its conclusion, unless otherwise specified by the Law or the Contract. Article 180, part 3 of the Commercial Code of Ukraine refers the term of the contract to the conditions that the parties are obliged to agree upon in any case, that is, to the essential ones. Consequently, the term of the procurement contract is indicated in the text of the contract itself.

Based on this, *a procurement procedure may be subject to monitoring from the moment of publishing the notice of its conduct and until the expiration of the concluded procurement contract*. The number of monitoring sessions that are conducted for one procurement procedure is not limited by law.

The territorial boundaries of monitoring and the principles of division of work between the offices and departments of the State Audit Service by oblasts of Ukraine are not defined at the level of the Law. However, they are established in the regulation on the offices of the State Audit Service and in the exemplary regulation on the management of the offices of the State Audit Service in the oblasts, approved by the Order of the State Audit Service dated June 2, 2016, No. 23.

The Offices' apparatuses exercise state financial control in the territories of the oblasts where they are located. As part of the Offices, structural subdivisions are formed – administrations in the regions, which also work on the territory of the administrative and territorial unit at their location.

The regulation on the offices of the State Audit Service provides that in the territory of other (not "their") administrative and territorial units, offices, and administrations can exercise state financial control (including procurement monitoring) **on behalf of the Head of the State Audit Service and their deputies**. Although in practice, public auditors do not always adhere to this rule, monitoring the procurement procedure outside "their" oblast may be one of the grounds for recognizing the monitoring conclusion as

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21 The inquiry contained a request to provide a list of procurement legislation acts (in order to determine the "checklist" used by SFCBs to monitor procurement). State Audit Office's response, URL: https://drive.google.com/file/d/1AphdDmk6StSYSRLlcVD3EXnqjhWglaCd/view?usp=sharing

22 Article 8, part 1, paragraph 2 of the Law of Ukraine On Public Procurement.

23 Clarification of the Ministry of Economy provided in response No. 951/971 dated November 2, 2021. URL: https://www.me.gov.ua/InfoRez/Details?id=7b4ab469-84c7-4085-9918-cb8120b9d2a7&lang=uk-UA

illegal and its cancellation in court.[24]

The grounds for starting the monitoring of the procurement procedure are:

1. data of automatic risk indicators;
2. information obtained from public authorities, MPs of Ukraine, local self-government bodies on signs of a violation (violations) of legislation in the field of public procurement;
3. reports in the media containing information about signs of a violation (violations) of legislation in the field of public procurement;
4. signs of a violation (violations) of legislation in the field of public procurement in the information published in the Prozorro system, identified by the SFCB;
5. information received from public associations on signs of a violation (violations) of legislation in the field of public procurement, identified as a result of public oversight in the field of public procurement in accordance with Article 7 of the Law.[25]

Thus, the Law provides for a wide range of grounds for starting the monitoring of the procurement procedure. At the same time, the provisions of the Law do not provide for appeals of business entities, including participants in procurement procedures, as grounds for starting monitoring. Moreover, the Law does not contain instructions on the procurement to be subject to mandatory monitoring (for example, depending on the expected value of the procurement item), references to the methodology for forming a line of procedures to be monitored with the distribution of procurement transactions into groups and prioritization of each of them.

Let us consider in more detail the first of the grounds to start monitoring – data of automatic risk indicators. The methodology for determining automatic risk indicators, their list and procedure for application are approved by Order No. 647 of the Ministry of Finance of Ukraine dated October 28, 2020 (hereinafter referred to as Order No. 647 or the Methodology).[26]

In fact, automatic risk indicators are elements of the Prozorro electronic procurement system, which constantly automatically "scan" the procurement procedures for a number of signs that indicate a high probability of violations, and provide information about the procurement that these signs are inherent in: for example, an abnormally high number of rejections of bids, violation of certain deadlines in the procedure, etc.[27]

The risk indicators provided for by Order No. 647 **do not comply** with the current Resolution of the Cabinet of Ministers of Ukraine No. 1178 dated October 12, 2022, which approved the Features of Public Procurement of Goods, Works, and Services for Procuring Entities Provided for by the Law of Ukraine On Public Procurement for the Period of the Legal Regime of Martial Law in Ukraine and within 90 days from the Date of Its Termination or Cancellation. We will consider the problems of regulating the procurement process and their monitoring during martial law in the next subsection of this study.

Let us look at ***the monitoring process*** and build a scheme of options for how events may unfold during procurement monitoring, based on the options provided by the Law.

1. ***Start of monitoring***. Monitoring of the procurement procedure begins with the adoption of a decision on its start, which is adopted by the head of the SFCB, their deputy, or another person authorized by the head. The SFCB publishes a notice of such a decision on the procurement webpage in the Prozorro system, with a description of its grounds. The start of monitoring may be preceded by the work of public auditors from the preliminary analysis of the procedure, but it is not regulated by the Law and is in no way reflected in the Prozorro system before the start of monitoring.

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24 For example, the Rivne District Administrative Court in case No. 460/49777/22 came to the following conclusions: "The defendant did not provide **any evidence to confirm the existence of an order** from the Head of the State Audit Service and/or their deputies regarding the monitoring of the procurement procedure UA-2021–08–27–013052 in the **territory of Rivne Oblast by the North-Eastern Office of the State Audit Service.** Taking into account the above, it can be concluded that the North-Eastern Office of the State Audit Service **implemented measures** of state financial control in the **territory of Rivne Oblast by monitoring** public procurement transaction UA-2021–08–27–013052-a in **violation of the requirements of clauses 1, 3 of Regulation No. 23 on the procedure for such monitoring, which, in the opinion of the court, is an independent ground for the court to cancel the appealed conclusion**," the decision of March 16, 2023. URL: https://reyestr.court.gov.ua/Review/109597179

25 Article 8, part 2 of the Law of Ukraine On Public Procurement.

26 Methodology for determining automatic risk indicators, approved by the Order of the Ministry of Finance of Ukraine dated October 28, 2020, No. 647. URL: https://zakon.rada.gov.ua/laws/show/z1284–20#n8

27 The full list of risk indicators approved by the Order of the Ministry of Finance of Ukraine dated October 28, 2020, No. 647 can be found at: https://zakon.rada.gov.ua/laws/show/z1285–20#Text

Already at this stage, the course of events in the procurement procedure is roughly divided into two branches: monitoring takes place separately and the procedure continues separately because the beginning of monitoring **does not stop** its conduct.

2. ***Monitoring*** should last no more than 15 working days, starting from the next working day after the notification of its start.

For the analysis of data indicating signs of violation of the law, the following can be used:

- information published in the Prozorro system;
- information contained in the unified state registers;
- information in databases open to access by the State Audit Service of Ukraine.

An inquiry for information was sent to the State Audit Service for detailed information on which databases are open for access by the SFCB. In response, with letter No. 001200–16/8021–2023 dated July 17, 2023,[28] the State Audit Service informed, in particular, about the following **sources of information**:

1) **Information and telecommunication systems Tax Block and Single Window for Electronic Reporting**; access to them can be obtained in the premises of the State Tax Service of Ukraine. Access is granted on the basis of the Agreement on Information Cooperation between the State Tax Service of Ukraine and the State Audit Service. After establishing information interaction through the information system of the National System of Confidential Communication, access is planned to be provided in the premises of the State Audit Service.
2) On obtaining information from the Unified State Register of Legal Entities, Individual Entrepreneurs and Public Organizations, an agreement No. 02–01/115 On Information Interaction, dated September 7, 2021, was signed by the State Audit Service, the Ministry of Justice of Ukraine, and the Ministry of Digital Transformation of Ukraine.
3) Automated access protocols were signed between the State Audit Service and the Ministry of Justice of Ukraine regarding the State Register of Encumbrances on Movable Property, the State Register of Real Property Rights, **but information interaction is not currently established due to the lack of a secure information exchange channel.**
4) The State Audit Service purchased the right to use YOUCONTROL, an information and analytical system for searching and processing information in the field of economic and other activities, from LLC YouControl.
5) The State Audit Service also uses information of:

- the Ministry of Economy of Ukraine (https://prozorro.gov.ua);
- the Antimonopoly Committee of Ukraine (AMCU): consolidated a list of natural monopolies[29] and information on distortion of the results of bidding (tenders);[30]
- the information database of shareholders posted on the portal https://smida.gov.ua (the exchange of such information is not automated, but an agreement on information cooperation was concluded by the State Audit Service, the National Securities and Stock Market Commission. The relevant protocols for obtaining information under this agreement will be agreed upon after the finalization of the e-auditor information and analytical decision support system;
- the Unified State Register of Persons Who Committed Corruption or Corruption-Related Offenses (currently unavailable).

As for the automated access to the Unified State Register of Court Decisions, which is used during procurement monitoring, in 2021, preliminary negotiations were held with the State Judicial Administration of Ukraine; at the same time, due to the suspension of developing the e-auditor information and analytical decision support system, the relevant information interaction has not yet been established.

Thus, although Article 8 of the Law provides for the use of databases open for access by the SFCB, and the SFCB has access to some databases, the current legislation does not contain a detailed procedure for granting such access. Gaining access to the necessary registers, databases,

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28 Letter of the State Audit Service of Ukraine No. 001200–16/8021–2023 dated July 17, 2023. URL: https://drive.google.com/file/d/1F2fVWEdby5MT2D3vZCriGfvn4bZW2Zj0/view?usp=sharing

29 Consolidated list of natural monopolies, URL: https://amcu.gov.ua/napryami/konkurenciya/arhiv-zvedenogo-pereliku-prirodnih-monopolij

30 Summary information on the distortion of the bidding results. URL: https://amcu.gov.ua/napryami/oskarzhennya-publichnih-zakupivel/zvedeni-vidomosti-shchodo-spotvorennya-rezultativ-torgiv

information and telecommunication systems is the result of concluding agreements, taking organizational measures. Information interaction with some registers is complicated due to the lack of a secure information exchange channel.

The State Audit Service reported, in particular, that in order to strengthen the analytical component of its activities and effectively perform tasks and functions, there is a need for direct automated access to state registers and systems, the list of which was provided in the annex to the letter, and which includes 20 state registers, information systems, and databases.[31]

The sources of information that public auditors use during monitoring also include the ***explanations of the procuring entity*** regarding the procurement transaction. During the monitoring period, a SFCB official responsible for monitoring has the right *to request explanations (information, documents) from a procuring entity* through the Prozorro system regarding the decisions taken and/or actions or inaction committed, which are the subject of research within the framework of monitoring.

Responding to the request, the procuring entity is obliged to provide relevant explanations (information, documents) through the Prozorro system within 3 working days from the date of publication of the request. Regardless of the requests received, the procuring entity also has the right to provide explanations on their own initiative – within the subject of research.

3. ***Monitoring results:*** The results of the work of public auditors on monitoring the procurement procedure take the form of a written conclusion. This conclusion is approved by the head of the SFCB or their deputy. Similar to the decision to start the monitoring and correspondence with the procuring entity, the conclusion is published in the Prozorro system; the publication period is 3 working days from the date it was drawn up.

The form of the conclusion on the results of monitoring the procurement procedure and the procedure for completing it was approved by the Order of the Ministry of Finance of Ukraine dated September 8, 2020, No. 552.

The conclusion is in the form of an electronic document, a qualified electronic signature is used to sign it; the document is then uploaded to the procurement web page in the Prozorro system.

The Law contains imperative **requirements for the content of the conclusion**, detailed in the Order of the Ministry of Finance of Ukraine dated September 8, 2020, No. 552[32]:

– informative items of the introductory part of the conclusion, which are filled in based on the data of the Prozorro system:
  - details of the procuring entity (name, location, and identification number), in respect of which the monitoring was carried out;
  - details of the procurement procedure (name of the procurement item, its lots, codes according to the Unified Procurement Dictionary, expected cost, notice number, date of publication, type);
  - the basis on which the head of the SFCB or their deputy decided to start the monitoring, the date of commencement of the monitoring.

– informative items of the statement of the conclusion, which are filled in by the SFCB official:
  - ***the issue that became the subject of*** the analysis of the procuring entity's compliance with the legislation in the field of public procurement, ***the list of analyzed documents and information***, the actions of the SFCB, which were taken in accordance with the legislation to ensure monitoring, as well as the end date of monitoring.

    The reference to the *"issue that has become the subject of consideration"* indicates that the monitoring of the procedure does not always have to mean a full analysis of compliance with procurement legislation in the procedure, but can still be carried out in part. However, the Law does not regulate in detail in which cases monitoring can be carried out partially, and in which

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31 Annex to the letter of the State Audit Service of Ukraine No. 001200–16/8021–2023 dated July 17, 2023. URL: https://docs.google.com/document/d/1DrpsRrBbLNAiVUe8jXqylxr1ClWClyrm/edit?usp=sharing&ouid=110364243299420582399&rtpof=true&sd=true

32 Order of the Ministry of Finance of Ukraine dated September 8, 2020, No. 552 On Approval of the Form of the Conclusion on the Results of Monitoring the Procurement Procedure and the Procedure for Completing It. URL: https://zakon.rada.gov.ua/laws/show/z0958-20#n18

cases it must be carried out in full. Obviously, since monitoring is possible from the moment the procedure is announced, it can be partial, at least for those procedures that have not passed all stages at the time of the start of monitoring and in which a contract has not yet been concluded.

- ***a description of the violation*** (violations) of the legislation in the field of public procurement identified as a result of monitoring, **OR** information on the absence of violations, if they are not identified.[33] If there is a violation, it is necessary to indicate the structural unit of the regulatory act, whose provisions are violated, its details, titles, and details of the documents based on which the conclusion on the existence of a violation is made; if necessary, the essence and circumstances of the violation are detailed.

Such requirements for the description of the regulatory act serve as an additional confirmation that the subject of monitoring is the analysis of compliance not only with the Law, but also with other regulatory acts in the field of procurement.

- ***the obligation to eliminate*** the violation (violations) of the legislation in the field of public procurement, in particular the structural unit of the competent regulatory act, based on which the SFCB obliges the procuring entity **to eliminate such violations in accordance with the procedure established by law**,[34] **OR**, if signs of a violation are detected, but during the monitoring the tender is canceled, it is recognized as such that did not take place – the description of the violation is indicated without an obligation to eliminate it.

The scheme of possible options for the content of the conclusion on the results of monitoring (in terms of the description of the violation and the obligation to eliminate it) is shown in Diagram 1. It can be seen from the regulatory framework that the only exception when the obligation to eliminate the violation does not need to be indicated is the case when the tender is canceled or recognized as such that did not take place during the monitoring. For other cases, such an exception is not provided, in particular:

- for cases when the violation cannot be eliminated due to other reasons (for example, it was committed at the stage of the procurement procedure, while monitoring was carried out at the stage of contract implementation);
- for cases where the violation cannot be eliminated in any other way than by canceling the procurement procedure, but the violation does not have significant harmful consequences for the procurement transaction (for example, the position of the authorized person is not indicated in the tender documentation);
- and even in cases where there is no violation – formally, there are no exceptions for this case and the requirement to indicate the obligation to eliminate the violation remains relevant.

The Law and other regulatory acts do not contain a list of options detailing **the ways to eliminate violations** that the obligation specified in the conclusion may contain.

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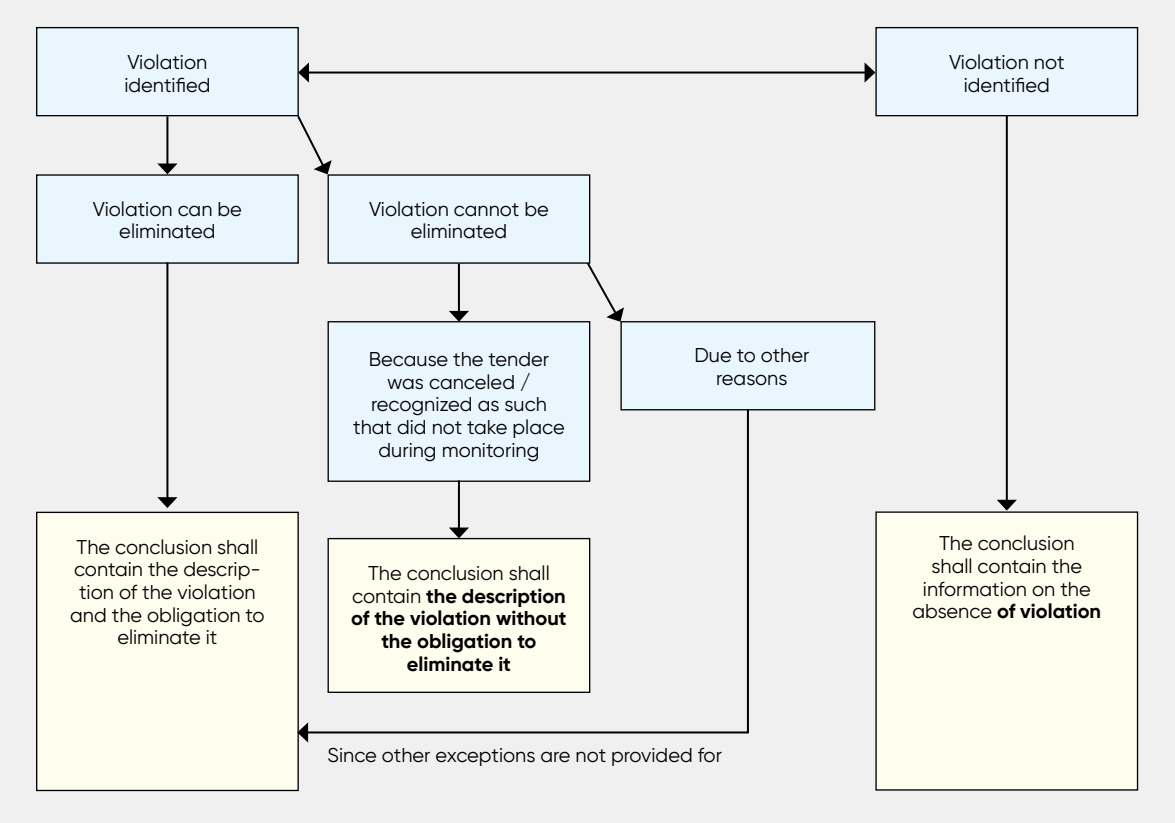
33 Detailed requirements for this clause are contained in the Procedure for Completing the Form of the Conclusion on the Results of Monitoring the Procurement Procedure, approved by the Order of the Ministry of Finance of Ukraine dated September 8, 2020, No. 552.

34 Order of the Ministry of Finance of Ukraine dated September 8, 2020, No. 552 On Approval of the Form of the Conclusion on the Results of Monitoring the Procurement Procedure and the Procedure for Completing It. URL: https://zakon.rada.gov.ua/laws/show/z0958-20#n18

Diagram 1. The options for the content of the conclusion based on the results of monitoring the procurement procedure, in terms of the description of the violation and the obligation to eliminate it.



In the conclusion, the SFCB official may also indicate additional information.

4. **Implementing the monitoring conclusion.** Let us consider the processes that take place after the publication of the monitoring conclusion, and possible options for the development of events, provided by the Law.

The procuring entity has 3 working days from the date of the publication of the conclusion in order to exercise their right to appeal to the SFCB for clarification of the content of the conclusion and their obligations specified therein. Let us note that this norm does not provide for a period within which the clarification is provided, requirements for it and, in general, a direct indication of the obligation of the SFCB to provide a response.

The procuring entity has 5 working days from the date of the publication of the conclusion in order to fulfill the obligations specified in the conclusion. There are 3 options for the lawful reaction of the procuring entity to the monitoring conclusion:

1) eliminate the violation specified in the conclusion and publish information and/or documents indicating its ***elimination*** through the Prozorro system. If the procuring entity chooses this option, the SFCB has **5 working days** to assess the procuring entity's actions and confirm in the Prozorro system that the violation has been eliminated. The procuring entity is not brought to administrative liability for the violation that was eliminated.
2) publish ***reasoned objections*** to the conclusion in the Prozorro system;
3) publish ***information in the Prozorro system about the reasons that make it impossible to eliminate the detected violations.***

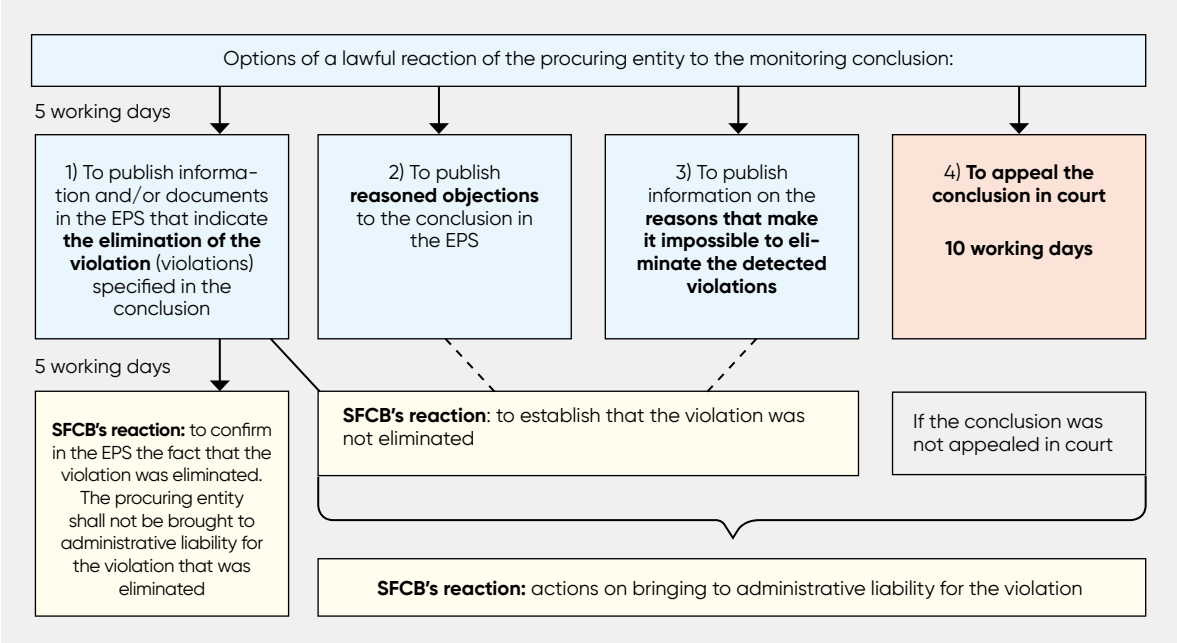
In addition, the procuring entity has the right ***to appeal*** the conclusion in court within 10 working days from the date of its publication. The fact of the appeal is "indicated" in the Prozorro system

within the next working day from the date of the appeal.[35] The procuring entity shall also indicate in the Prozorro system the fact of opening of proceedings in the case within the next working day from the day when they received information about the opening of such proceedings and their number.

Unless the procuring entity eliminates the violation specified in the conclusion, which led to their non-compliance with the requirements provided for by the Law, and appeals the conclusion in court, the SFCB shall take actions **to bring them to administrative liability** for the violation. In the Prozorro system, the number of the protocol (the next working day from the date it was drawn up) and the date, "the number of the opening of proceedings in the case" (within the next working day from the date of the receipt of information) are "indicated."[36]

The options of the lawful behavior of the procuring entity as a reaction to the monitoring conclusion and their consequences provided for by the Law are shown in Diagram 2.

Diagram 2. Options of a lawful reaction of the procuring entity to the monitoring conclusion and their consequences.



Analysis of the above options and their relationships with the consequences shows that even if the procuring entity publishes reasoned objections to the conclusion or information on the reasons that make it impossible to eliminate the violation in the Prozorro system, the decisive factors on which their exemption from liability depends are the fulfillment of the precepts of the conclusion or appeal to the court. If the procuring entity does not eliminate the violation and does not appeal the conclusion with the court, the SFCB has the authority to take measures to bring them to administrative liability.

In addition, the Law does not regulate the further actions of the parties and the terms of their implementation in cases where the procuring entity filed an administrative claim to appeal the monitoring conclusion, but the court upheld the claim, refused to open proceedings, or refused to satisfy the claim. If we consider the concept of "appealing" and the concept of "filing an administrative claim with the court" to be identical, then in these cases, the procuring entity also appealed the conclusion and formally this excludes bringing them to justice for not eliminating the violation since the case has not been considered on the merits or the conclusion has been recognized as lawful and the claim has been dismissed.

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35 Obviously, the information about this should be published by the procuring entity, but the provision has an impersonal wording.

36 This provision also has an impersonal wording, but obviously this information should be entered into the electronic procurement system by the SFCB.

Measures to bring a procuring entity to administrative liability

One of the possible consequences of monitoring is bringing the procuring entity to administrative liability; if the procuring entity has not eliminated the violation specified in the conclusion and at the same time has not appealed the conclusion in court.

According to the information published on the website of the State Audit Service[37] and received in a letter from it, the possibility of bringing the procuring entity to justice is associated with the problem of access of the SFCB to the personal data of the person who committed an administrative offense.

To prosecute a person at various stages, the following personal data are required:

- *To indicate in the protocol* under Article 256 of the Code: information about the person who is brought to administrative liability;
- *For further ruling* in the case under Article 283 of the Code: information about the person in respect of whom the case is being considered (**last name, name, and patronymic (if any), date of birth, place of residence or stay**). Moreover, information about the person is needed to subpoena them to the court under Article 277–2 of the Code.
- *To enforce* the ruling in accordance with the requirements of Article 4 of the Law of Ukraine On Enforcement Proceedings, the enforcement document must contain: **last name, name and, if available, patronymic of the debtor, address of residence or stay, date of birth** of the debtor, who is a natural person, **identification code or passport series and number (for those persons who do not have the identification code).** If the enforcement document does not meet these requirements, it is returned to the collector without acceptance.[38]

Therefore, to bring a person to administrative liability, the following information about them is required: full name, date of birth, place of residence/stay, identification code / passport data (for those persons who do not have the identification code. However, the current legislation does not contain a full-fledged procedure for obtaining this information by the SFCB. Therefore, SFCBs turn to procuring entities with inquiries for personal data.

According to the information on the website of the State Audit Service, during 2019, the State Audit Service apparatus sent 93 inquiries to procuring entities (who did not eliminate the violation and did not appeal the conclusions in court) to obtain personal data. However, 42 procuring entities that did not take measures to eliminate the identified violations during 69 procurement procedures worth more than UAH 755.2 mln contributed to their officials (officers) avoiding administrative liability, who committed such violations by failing to provide the requested information.[39]

In 2021, the State Audit Service tried[40] to initiate the submission of a draft law that would regulate the issue of access of the SFCB to the personal data of violators. But as of July 2023, the problem remains relevant.

In the letter No. 001200–16/8021–2023 dated July 17, 2023, regarding the problem of the regulatory framework for access to personal data, the State Audit Service reported, in particular, the following:

"*in accordance with Article 11, part 2 of the Law of Ukraine On Public Procurement, when using the electronic procurement system, the authorized person enters personal data into the electronic procurement system, gives consent to their processing, and updates such data in case of their change.*

However, despite a number of meetings with representatives of the State Enterprise Prozorro, the Ministry of Economy of Ukraine, the State Migration Service of Ukraine, ***the issue of providing access of the relevant supervisory bodies to the personal data of authorized persons has not been resolved,*** *which does not contribute to bringing offenders to administrative liability.*

To solve the problematic issue <...>, amendments were initiated to the Procedure for Electronic Information Interaction of the Ministry of Internal Affairs of Ukraine, the Ministry of Finance of Ukraine, and central

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37 News "Evil intention or unfortunate accident, or who prevents us from exercising our powers?" URL: https://dasu.gov.ua/ua/news/775

38 Article 6, part 4, clause 6 of the Law of Ukraine On Enforcement Proceedings.

39 News "Evil intention or unfortunate accident, or who prevents us from exercising our powers?" URL: https://dasu.gov.ua/ua/news/775

40 Letter of the State Audit Service On Submission of the Draft Law for Consideration by the Government No. 002500–15/11369–2021 dated September 7, 2021. URL: https://cutt.ly/bwlprOEd

executive bodies, the activities of which are directed and coordinated by the Cabinet of Ministers of Ukraine through the Minister of Internal Affairs of Ukraine and the Minister of Finance of Ukraine, approved by the order of the Ministry of Internal Affairs of Ukraine, the Ministry of Finance of Ukraine dated May 13, 2020, No. 386/208 <...>, regarding the receipt from the Unified State Demographic Register of relevant personal data on persons in respect of whom protocols on administrative offenses are drawn up. ***However, the relevant amendments to this order were not introduced based on the results of a number of meetings that took place in 2021–2023."***[41]

Thus, at the stage of bringing procuring entities to administrative liability, there is a problem of access of the SFCB to the personal data of persons who committed an administrative offense.

The adoption of the Law of Ukraine dated July 13, 2023, No. 3233-IX, which provided for criminal liability for non-compliance with the legal requirements of the SFCB, the creation of artificial obstacles to the work of the SFCB, and the provision of knowingly false information to them, looks promising in this aspect.[42]

One of the rights of the SFCB is *the right to receive information*, documents, and materials necessary for the performance of the assigned tasks[43] from state bodies and local self-government bodies, enterprises, institutions, organizations of all forms of ownership, other legal entities and their officials and individual entrepreneurs. Therefore, the potential failure to provide personal data at the request of the SFCB can also be considered as non-compliance with legal requirements and lead to criminal liability. The final conclusion on whether these changes will solve the problem of SFCB's access to personal data can be made with the advent of relevant practice.

Distribution of powers

The State Audit Service of Ukraine and its subdivisions (Sate Financial Control Bodies) are not the only bodies authorized to consider violations of the law in public procurement. Therefore, there is a need to delineate the powers of SFCB and other bodies in related issues.

First of all, the Law delineates the power of the SFCB and the appeal body – the relevant Commission (Commissions) to consider complaints about violations of legislation in the field of public procurement of the Antimonopoly Committee of Ukraine (hereinafter referred to as the AMCU Commission).

The key rules for such a delineation are as follows:

- Monitoring of the procurement procedure is not carried out *to identify requirements that restrict competition* and lead to discrimination of participants[44]; this issue falls within the competence of the AMCU Commission when considering complaints.
- If the AMCU Commission has accepted the complaint for consideration, the SFCB ***does not begin*** to monitor those violations, circumstances, grounds that were or are the subject of consideration by the AMCU Commission, regardless of the decision taken by the appeal body regarding such violations, circumstances, grounds.
- If the AMCU Commission has accepted the complaint for consideration after the beginning of the monitoring or after the publication of the conclusion, the head of the SFCB (their deputy) and the procuring entities shall take the following actions:
  1) the head of the SFCB or their deputy shall ***suspend*** the decision of the SFCB within the next working day from the date of placement of the complaint in the Prozorro system until the moment of publication of the AMCU decision. Let us note that the obligation to suspend the decision of the SFCB within the next working day from the date of placement of the complaint contradicts the grounds for doing so in case of accepting the complaint for consideration, since the AMCU Commission accepts the complaint for consideration within three working days from the date of its placement in the Prozorro system.[45] However, within the next working day

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41 Letter of the State Audit Service No. 001200–16/8021–2023 dated July, 17, 2023. URL: https://drive.google.com/file/d/1F2fVWEdby5MT2D3vZCriGfvn4bZW2Zj0/view?usp=sharing

42 The Law of Ukraine On Amendments to the Criminal and Criminal Procedure Codes of Ukraine to Eliminate Contradictions in the Punishment of Criminal Offenses. URL: https://zakon.rada.gov.ua/laws/show/3233-IX#Text

43 Article 10, clause 11 of the Law On Main Principles.

44 In practice, as a result of monitoring, the SFCBs sometimes detect cases of establishing discriminatory conditions, but qualifies such actions of the procuring entity as a violation of Article 22 of the Law in terms of establishing conditions, for example, regarding another procurement item (or as another violation, the detection of which falls within the competence of SFCBs). We will consider such cases in more detail in the section on monitoring practice research.

45 Article 18, part 11 of the Law of Ukraine On Public Procurement.

from the date of its placement, in most cases, it is not known whether the AMCU Commission will accept the complaint for consideration.

2) the procuring entity suspends the fulfillment of obligations to eliminate the violation (violations) set out in the conclusion regarding those violations, circumstances, grounds that have become the subject of consideration by the AMCU Commission.

- After the AMCU Commission publishes its decision on the complaint, the procuring entity eliminates the violation specified in the monitoring conclusion only in the part that was not considered by the AMCU Commission.
- If the decision of the AMCU Commission is appealed in court, the SFCB does not begin monitoring the procedure for those violations, circumstances, grounds that were or are the subject of litigation.
- Even if the SFCB receives information about signs of procurement violations that were not the subject of consideration by the AMCU Commission and/or the court, the SFCB decides to start monitoring for other signs of violations after the AMCU Commission publishes its decision or the court decision enters into force.

Thus, the rules on the distribution of powers of the SFCB and the AMCU Commission can be traced to a certain **priority of decisions, procedural actions, conclusions of the AMCU Commission as an appeal body compared to the actions, decisions, and conclusions of the SFCB.**

Regarding ***the distribution of powers of SFCB and other bodies*** on issues related to the monitoring of procurement procedures, the Law states the following. If, based on the results of monitoring, the SFCB finds signs of a violation of the law, the consideration of which does not fall within the competence of the SFCB, the relevant state bodies are "notified in writing." Obviously, this provision is intended, first of all, to resolve situations when the SFCB detects signs of criminal offenses and must report them to the relevant law enforcement agencies. During the monitoring, signs of actions that can be further qualified as the following crimes may be detected:

- Misappropriation, embezzlement, or seizure of someone else's property by abuse of office (Article 191 of the Criminal Code of Ukraine (hereinafter referred to as the Criminal Code of Ukraine)).
- Abuse of power or office (Article 364 of the Criminal Code of Ukraine);
- Forgery in office (Article 366 of the Criminal Code of Ukraine);
- Neglect of official duty (Article 367 of the Criminal Code of Ukraine).

The authority to apply to law enforcement agencies is assigned to the State Audit Service in the Regulation on the State Audit Service of Ukraine, approved by the Resolution of the Cabinet of Ministers of Ukraine dated February 3, 2016, No. 43. According to it, the State Audit Service *transfers, in accordance with the established procedure, materials to law enforcement agencies* based *on the results of state financial control* in case of establishing violations of the law, for which criminal liability is provided or which contain signs of corruption.[46]

Consequently, the mechanism for monitoring the procurement procedure is regulated by the Law in detail, but it does not have clear regulation in all aspects. Analysis of the legal regulation of the monitoring mechanism makes it possible to identify the following signs of shortcomings and problems:

- there are no principles for determining the order of procurement transactions to be monitored, indications of priority categories of procurement transactions that are subject to mandatory or urgent monitoring;
- SFCBs have the authority to detect any violations of legislation in the field of public procurement during monitoring, this creates prerequisites for blurring the focus of SFCB's attention, searching for formal and insignificant violations;
- the access of the SFCBs to state registers, databases, information systems, which the SFCB needs for quality analysis of information, as well as to the personal data of offenders, is insufficiently regulated;
- there are no indications of specific ways to eliminate violations, within which the SFCB can formulate obligations for the procuring entity;
- the obligation to eliminate the violation should be indicated in the conclusion even in cases where the violation cannot be eliminated procedurally (except by canceling the procurement transaction or terminating the contract);
- the right of the procuring entity to publish reasoned objections to the conclusion or information on the reasons that make it impossible to eliminate the violation does not relieve them of the obligation to comply with the requirements of the conclusion, only court appeal;

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46 Regulation on the State Audit Service of Ukraine, approved by the Resolution of the Cabinet of Ministers of Ukraine dated February 3, 2016, No. 43. URL: https://zakon.rada.gov.ua/laws/show/43-2016-%D0%BF#Text

- further actions of the parties in the event of a court appeal are superficially regulated: no further actions of the parties and deadlines for their implementation are regulated in cases where the procuring entity filed an administrative claim, but the claim was not satisfied;
- there is no direct obligation of the SFCB to provide an explanation at the request of the procuring entity, requirements for it, terms of provision;
- timeframes of suspension of the SFCB decision in connection with the submission of a complaint to the AMCU Commission and the grounds for such suspension are not coordinated;
- some obligations have impersonal wording: the fact of appealing the conclusion is "indicated" in the Prozorro system, the relevant state bodies are "notified in writing" of signs of violations, the number of the protocol is "indicated" in the Prozorro system.

Some features of regulation, which under certain conditions may constitute or be considered as a problem, have also been identified, namely:

- insufficient regulation of the grounds and limits of partial monitoring (within the content of the inquiry or the risk indicator that was activated, etc.), which may lead to the expenditure of SFCB resources for a full analysis of the procurement procedure, even in cases where it is inappropriate;
- notification of the start of monitoring of the procurement procedure does not stop its conduct;
- there is no such reason to start monitoring as an appeal of business entities.

The hypotheses regarding the problems associated with the regulatory framework of monitoring are provided in subsection 1.3 of this study in more detail.

1.2. Features of regulation of public procurement monitoring during the legal regime of martial law

With the adoption of the Decree of the President of Ukraine No. 64/2022 dated February 24, 2022, the legal regime of martial law began to operate in Ukraine. During the period of martial law, the legal regulation of public procurement and, consequently, its monitoring, has undergone significant changes.

First of all, at the end of February 2022, the Government adopted Resolution No. 169, according to which defense and public procurement of goods, works, and services was carried out without the use of procurement procedures and simplified procurement procedures defined by the Laws of Ukraine On Public Procurement (hereinafter referred to as the Law) and On Defense Procurement.[47]

Since June 29, 2022, as a result of changes made to the Resolution of the Cabinet of Ministers No. 169, public procurement in the amount of UAH 50,000 and more has been conducted using the electronic catalog and/or the procedure for simplified procurement.

But, as already noted in the previous subsection, neither contracts concluded without the use of the electronic procurement system (so-called "direct contracts"), nor procurement of goods through the electronic catalog, nor simplified procurement are among the procurement procedures, and therefore, they **could not be subject to monitoring in accordance with Article 8 of the Law.**

Subsequently, the Ministry of Economy provided clarification No. 3323–04/50213–06 dated July 19, 2022, on the grounds for procurement under Resolution No. 169[48] According to it, the procuring entity must use the relevant regulatory acts of the Cabinet of Ministers of Ukraine adopted under martial law *to ensure an unlimited range of needs, which are objectively related to the exercise of powers and/or taking the necessary measures during the special legal regime.* Instead, procurement transactions whose implementation *does not require the use of special procurement mechanisms inextricably related to the imposition of martial law, must be conducted in compliance with the requirements of the Law.*

However, despite the explanation provided, as a result of February changes in legal regulation, a significant

47 Resolution of the Cabinet of Ministers of Ukraine No. 169 dated February 28, 2022. URL: https://zakon.rada.gov.ua/laws/show/169–2022-%D0%BF/ed20220228#Text

48 Clarification of the Ministry of Economy No. 3323–04_50213–06 dated July 19, 2022. URL: https://cutt.ly/KwdTcRD6

part of procurement dropped out of the range of monitoring objects. Thus, if we compare the number of procurement transactions conducted using different methods for the period from February 28 to October 18[49] in 2021 and in 2022, we see the following differences:

Table 2. The number and expected value of procurement transactions carried out using different methods in the period from February 28 to October 18 in 2021 and in 2022.[50]

Procurement method	Number of lots in 2021 (from February 28 to October 18)	Number of lots in 2022 (from February 28 to October 18)	Expected value in 2021 (from February 28 to October 18), thousand UAH	Expected value in 2022 (from February 28 to October 18), thousand UAH
Procurement without the use of the electronic system (basic)	2,651,639 (83.25%)	1,156,968 (89.53%)	**43,768,183 (4.87%)**	**54,930,054 (19.90%)**
Simplified procurement	192,457 (6.04%)	80,959 (6.26%)	**34,909,354 (3.89%)**	**71,619,285 (25.95%)**
Open bidding	**150,455 (4.72%)**	**26,104 (2.02%)**	**181,818,234 (20.25%)**	**33,271,350 (12.05%)**
Negotiation procedure due to the urgent need	15,006 (0.47%)	6,260 (0.48%)	12,360,227 (1.38%)	15,726,683 (5.70%)
Negotiation procedure	**29,755 (0.93%)**	**6,771 (0.52%)**	38,882,801 (4.33%)	45,000,614 (16.30%)
Open bidding with publication in English	**26,435 (0.83%)**	**4,006 (0.31%)**	**540,932,803 (60.23%)**	**52,269,931 (18.94%)**
Below-threshold procurement	53,266 (1.67%)	775 (0.06%)	29,782,067 (3.32%)	895,570 (0.32%)
Request for quotation	6,647 (0.21%)	4,137 (0.32%)	201,750 (0.02%)	346,261 (0.13%)
Direct procurement via e-catalog	7,436 (0.23%)	4,347 (0.34%)	127,595 (0.01%)	211,232 (0.08%)
Procurement without the use of the electronic system (COVID-19)	50,670 (1.59%)	1,835 (0.14%)	9,441,152 (1.05%)	263,782 (0.10%)
Procurement under the framework agreement	483 (0.02%)	115 (0.01%)	5,822,508 (0.65%)	1,476,531 (0.53%)
Simplified procurement procedure (for defense needs)	1,047 (0.03%)	–	26.8 (0.00%)	–

Consequently, in the period of almost 8 months of 2022, fewer procedures for which monitoring is possible were announced than in the same period of 2021. In particular, there is a decrease in the share of open bidding and open bidding with publication in English ("Eurobidding") in terms of quantity and expected value, an increase in the share of simplified procurement and direct contracts in terms of expected value.

Return to open bidding as the main procurement method

One of the key updates in the regulation of procurement during martial law was the opportunity for the Cabinet of Ministers of Ukraine to determine the features of public procurement by its acts. Thus, the Law of Ukraine No. 2526-IX dated August 16, 2022, supplemented the Final and Transitional Provisions of the Law with clause 3^{-7}, according to which, for the period of the legal regime of martial law in Ukraine and within 90 days from the date of its termination or cancellation, **the features of procurement** of goods, works, and services for procuring entities provided for by this Law **are determined by the Cabinet of Ministers of Ukraine**, ensuring the protection of such procuring entities from military threats.

In fact, this meant an opportunity for the Cabinet of Ministers of Ukraine to introduce procedures different from those provided for by the Law. The first version of such features was approved by the Government by Resolution No. 1178 dated October 12, 2022 (hereinafter referred to as Resolution No. 1178 or the Features),[51] they entered into force on October 19, 2022.

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49 The period of validity of the legal regulation of public procurement by the Resolution of the Cabinet of Ministers No. 169 dated February 28, 2022, until the entry into force of the Resolution of the Cabinet of Ministers No. 1178 dated October 12, 2022.

50 Data updated as of August 5, 2023. The data may not take into account procurement information that is not reflected in the Prozorro electronic procurement system as of the date of uploading (for example, due to the concealment of sensitive information under martial law).

51 Features of public procurement of goods, works, and services for procuring entities provided for by the Law of Ukraine On Public Procurement for the period of the legal regime of martial law in Ukraine and within 90 days from the date of its termination or cancellation, approved by the Resolution of the Cabinet of Ministers of Ukraine dated October 12, 2022, No. 1178. URL: https://zakon.rada.gov.ua/laws/show/1178-2022-%D0%BF#Text

Introducing open bidding with features and other innovations, these Features, however, **did not change the procedure for monitoring procurement procedures.** Thus, in accordance with clause 23 of the Features, monitoring of open bidding is carried out by the State Audit Service and its interregional territorial bodies in accordance with Article 8 of the Law. The conditions for the application of automatic risk indicators have become an exception: they are applied taking into account the Features.

At the same time, it cannot be said that the adoption of the Features did not affect the monitoring of procurement procedures, since the procurement procedures themselves have changed. Therefore, public auditors compare the course of procurement and the procuring entity's actions in it not with the rules provided for by the Law "in pure form," but with the requirements of the Features. Thus, when monitoring procurement procedures announced in the period from October 19, 2022, SFCBs should consider differences in regulation; the main ones are the following:

- *difference in the types of procedures*: lack of open bidding with publication in English, negotiation procedures;
- *difference in the thresholds of expected value*: open bidding with features is held to purchase goods and services worth UAH 100,000 and more, current repair services worth UAH 200,000 and more, works worth UAH 1.5 mln and more; the electronic catalog is an alternative for the purchase of goods;
- the opportunity to determine the winner and conclude a procurement contract with *the only participant* who submitted the tender bid in accordance with the terms of the tender documentation;
- the possibility of submitting a tender bid whose price *exceeds the expected value* if the procuring entity has provided for such a possibility in the conditions of the tender documentation;
- a broader scope of the *"24-hour rule,"* according to which the procuring entity must provide the participant with the opportunity to correct inconsistencies in their tender bid;
- reduced deadlines for the procuring entity's actions at different stages of the procedure;
- the possibility not to establish qualification criteria in case of procurement of goods;
- changes in the grounds for rejecting bids, grounds for amending the contract, etc.

Thus, the central regulatory act for compliance with which public auditors analyze procurement procedures announced in the period from October 19, 2022, is Resolution No. 1178.

The change in procurement procedures has affected the relevance of risk indicators, whose data are one of the grounds to start the monitoring. The list of these indicators was approved by the Order No. 647 of the Ministry of Finance of Ukraine dated October 28, 2020 (hereinafter referred to as Order No. 647). Among them are:

- Risk indicators RISK-1–1, 1–2, 1–2–1, 1–3, 1–17, 1–18 refer to a negotiation procedure, which is not conducted in accordance with the Features.
- Risk indicators RISK-1–4, 1–4–1, 1–12, 1–21–1, 2–10 refer to open bidding with publication in English, which is not conducted in accordance with the Features.
- Risk indicators RISK-1–9, 1–9–1, 1–19, 2–5 – 2–8–1 are based on the thresholds of expected value established by the Law. They do not consider changes in cost thresholds due to the adoption of the Features and do not take into account the wide range of grounds for concluding direct contracts for above-threshold amounts during martial law.

Thus, the risk indicators provided for by Order No. 647 are partially inconsistent with the current Resolution No. 1178.

Studying the positions of stakeholders and responsible parties on this issue, we sent an inquiry to the State Audit Service of Ukraine and the State Enterprise Prozorro. The inquiry raised the issue of the work of automatic risk indicators, as well as the development of regulatory changes for their improvement, unification with the current legislation.

With letter No. 001200–16/8250–2023 dated July 21, 2023, the State Audit Service reported, in particular, the following:

*"…**Currently, the existing set of automatic risk indicators does not provide full coverage of possible risks inherent in procurement** conducted in the Prozorro electronic procurement system, it requires a fundamental revision of the algorithms for forming the line of risky procurement procedures and assigning certain procedures to priority ones, which makes it impossible for the State Audit Service to properly exercise these powers."*

Regarding the developed draft amendments and proposals, the State Audit Service of Ukraine reported that it *"**developed a draft order of the Ministry of Finance of Ukraine On Amendments to the List of Automatic Risk Indicators"** <…> and sent it to the Ministry of Finance of Ukraine.*

At the same time, to optimize the implementation of state financial control in the field of public procurement, the State Audit Service appealed <...> to the Ministry of Economy of Ukraine and the State Enterprise Prozorro regarding the need to eliminate critical problems in the algorithms of the Prozorro system, which will cover all procurement risks with indicators as much as possible for the purposes of the monitoring process.

The Ministry of Economy of Ukraine, with letter No. 3311–05/62043–03 dated August 29, 2022, and the State Enterprise Prozorro, with letter No. 206/01/837/11 dated August 15, 2022, provided an answer that the possibility of reviewing automatic risk indicators in order to improve their work should be considered after the termination of martial law or its cancellation, stabilization of the electronic procurement system, and considering the amendments to the legislation that will change the algorithms for calculating automatic risk indicators."[52]

Thus, during the period of martial law, the State Audit Service developed proposals for changes to Order No. 647, but such proposals had been developed earlier than the adopted Resolution No. 1178, and therefore could not take into account the Features.

SE Prozorro in response to an inquiry regarding the state of operation of risk indicators by letter No. 206/01/999/11 dated July 3, 2023, in terms of the regulatory framework, reported, in particular, the following:

"*...The descriptions and methodology of risk indicators do not reflect the changes that have occurred in the regulatory framework of public procurement, especially during the full-scale invasion of Russia. In particular, the Order, and, accordingly, the methodology for calculating risk indicators, uses outdated procurement thresholds,* ***it does not provide for the operation of risk indicators in the Open Bidding with Features procedure, which is now used by procuring entities most often, etc.***

*<...>****SE Prozorro considers it expedient to urgently revise the current legislation on the use of automatic risk indicators by the State Audit Service, to determine the current list of risk indicators and develop their methodology,*** *as well as to abandon the complex mechanisms of forming a line of risky procedures. It is necessary to regulate the number of procedures that fall into the list of risky ones due to a decrease in the number of risk indicators and the use of only those indicators that indicate the likelihood of significant violations in the procurement and contract implementation process."*[53]

Based on the above, the automatic procurement risk indicators defined by Order No. 647 are not only partially inconsistent with the Features, but even those that are consistent (for example, the risk associated with a large number of deviations) are not provided for use in open bidding with features at all that has been the main competitive procurement procedure since October 19, 2022. Consequently, the regulatory framework of automatic risk indicators in procurement procedures and, as a result, their technical implementation need to be updated.

Separately, it is necessary to highlight the impact of changes in procurement legislation that occurred during martial law on the monitoring of non-competitive procurement.

According to Article 13 of the Law, the procedures include the negotiation procurement procedure, which is used as an exception. It is non-competitive, but since it is recognized as a procedure within the meaning of the Law, it could be monitored. Among the grounds for its conduct are such circumstances as the absence of competition for technical reasons, the need to supply an additional volume of goods or the need to purchase additional similar works or services from the same participant, etc.

As noted, with the adoption of Resolution No. 169, some procurement dropped out of the circle of monitoring objects. The adoption by the Government of Resolution No. 1178 significantly improved the situation, but even in October 2022, non-competitive procurement **was not included** in the range of monitoring objects, since, unlike the Law, Resolution No. 1178 does not provide for negotiation procedures. Instead, most of the grounds for the former negotiation procedure became the grounds for concluding a contract without the use of the electronic procurement system (in practice referred to as a "direct contract"). In turn, a direct contract is not attributed to the procedures within the meaning of the Law and is not subject to monitoring, as well as an appeal with the relevant commission of the Antimonopoly Committee of Ukraine. Thus, the Features continued ***the trend of monitorings not covering non-competitive procurement*** for a long time.

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52 Letter of the State Audit Service of Ukraine No. 001200–16/8250–2023 dated July 21, 2023. URL: https://drive.google.com/file/d/10IhM87D0Zwk_-VCg65SSms788rDBEnXc/view?usp=sharing

53 Letter of SE Prozorro No. 206/01/999/11 dated July 3, 2023. URL: https://drive.google.com/file/d/1WO8_CF6PJfYO4H6E6t1133I-RSZZ5Ra3/view?usp=sharing

This situation should have radically changed on May 19, 2023, with the entry into force of the changes[54] that the Government introduced to Resolution No. 1178. Thus, starting from May 19, 2023, the State Audit Service and its interregional territorial bodies monitor not only procurement procedures, **but also procurement, for which a report on a procurement contract concluded without the use of the electronic procurement system is published in the electronic procurement system,** in the manner prescribed by Article 8 of the Law.[55]

Such a step is an important shift in control over the spending of public funds. After all, according to the Prozorro system, in the incomplete two months of the updated version of the Features from May 19 to July 16, 2023, procuring entities concluded more than 13,440 direct contracts to purchase goods and services in the amount of UAH 12.14 bln. The amount of each of these contracts was more than UAH 100,000. During this period, 298 direct contracts to purchase works were concluded for a total amount of UAH 40.54 bln. The legitimacy of these procurement transactions requires careful attention and scrutiny; and now SFCBs have the legal tools to do so.

However, there are discussions as to the new powers of the SFCBs.

Firstly, ***the issue of covering direct contracts concluded before the entry into force of the amendments with monitoring,*** that is, before May 19, 2023, is debatable.

Article 58 of the Constitution of Ukraine stipulates that laws and other regulatory acts do not have a retroactive effect, except in cases when they mitigate or cancel a person's liability.

At the time of the conclusion of direct contracts before May 19, 2023, there was no rule that such procurement could be monitored.

The Ministry of Economy in its webinar[56] expressed the position that the retroactive effect of the provisions in time does not take place in this case. Experts of the Ministry of Economy explain this by the fact that the principle of non-retroactivity of provisions in time refers primarily to **actions** that began in the conditions of a certain legal regulation and must be completed in accordance with it. Monitoring of procurement outside the procedures is not one of such cases, according to the Ministry of Economy. The grounds and procedure for the procuring entity's actions have not changed, their legal relations and liability have not changed either. Instead, public auditors were empowered to check these actions for legality and validity through monitoring. Moreover, public auditors will analyze these procurement transactions for compliance with the legislation that was in force on the date of the contract conclusion.

However, it is possible that the courts will take a different position on this issue. Thus, in the decision of the Constitutional Court of Ukraine No. 1-rp/99 dated February 9, 1999,[57] it is clarified that the law or other regulatory act during which the event and fact took place is applied to them.

The decision of the Constitutional Court of Ukraine No. 6-rp/2012 of March 13, 2012, also draws attention.[58] In this case, the question was whether the provision of the Law of Ukraine On the Principles of Preventing and Combating Corruption was constitutional, according to which declarants must submit information about expenses incurred before the provision on this had come into force. The Constitutional Court concluded:

"...Clause 2 of Section VIII Final and Transitional Provisions of the Law ***establishes control over the expenses incurred by these persons in the period*** *from July 1, 2011, to December 31, 2011, that is, over* ***the relations that arose before*** *the entry into force of Article 12 of this Law, which violated the constitutional requirement for the non-retroactivity of laws and other regulatory acts in time.*

In view of the above, the Constitutional Court of Ukraine considers that the provisions of clause 2 of Section VIII Final and Transitional Provisions of the Law on the provision of information on expenses in the declaration for 2011 from the date of entry into force of this Law contradict Article 58, part 1 of the Constitution of Ukraine."

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54 Resolution of the Cabinet of Ministers of Ukraine dated May 12, 2023, No. 471. URL: https://zakon.rada.gov.ua/laws/show/471–2023-%D0%BF#Text

55 Such a report is not published for direct contracts for the purchase of goods, works, services worth up to UAH 50,000.

56 Webinar "WEBINAR ON BRINGING AUCTIONS BACK TO THE SYSTEM" URL: https://infobox.prozorro.org/articles/vebinar-na-temu-povernennya-aukcioniv-v-sistemu

57 Decision of the Constitutional Court No. 1-rp/99 dated February 9, 1999. URL: https://zakon.rada.gov.ua/laws/show/v001p710–99#Text

58 Decision of the Constitutional Court of Ukraine No. 6-rp/2012 dated March 13, 2012. URL: https://zakon.rada.gov.ua/laws/show/v006p710–12#Text

Thus, despite the exceptional importance and expediency of monitoring the procurement transactions not carried out according to the "procedures within the meaning of the Law," including before May 19, 2023, there is a risk of interpretation of this rule by courts as impossible to apply to procurement carried out before May 19, 2023. In this case, the volumes of above-threshold procurement in 2022–2023, for which it will be impossible to monitor, will reach the following indicators:

- For the period from February 28 to the end of 2022–72,600 direct contracts to purchase goods and services, each had a value of UAH 100,000 or more, in total – ***UAH 120.76 bln***.
- During the same period, 1,210 direct contracts to purchase of works worth UAH 1.5 mln or more, totaling ***UAH 17.99 bln***.
- For the period from January 1 to May 18, 2023–59,270 direct contracts to purchase goods and services worth UAH 100,000 or more, in total – ***UAH 91.61 bln***.
- During the same period – 611 direct contracts to purchase works worth 1.5 mln or more, a total of ***UAH 8.15 bln***.[59]

To clarify the approach of the State Audit Service to resolving the issue of monitoring direct contracts concluded before May 19, 2023, we sent information on signs of violations in the conclusion of direct contracts to the State Audit Service, its offices, and administrations.

The State Audit Service, with letter No. 003100–16/7651–2023 dated July 6, 2023,[60] reported:

"The State Audit Service and its interregional territorial bodies monitor procurement, according to which, from May 19, 2023*, a report on a procurement contract concluded without the use of the electronic procurement system is published in the electronic procurement system <…>.*

According to Article 58 of the Constitution of Ukraine, laws and other regulatory acts do not have a retroactive effect in time, except when they mitigate or cancel the liability of a person.

Conclusions on the interpretation of the content of Article 58 of the Constitution of Ukraine, set out in the decisions of the Constitutional Court of Ukraine dated May 13, 1997, No. 1-zp, dated February 9, 1999, No. 1-rp/99, dated April 5, 2001, No. 3-rp/2001, dated March 13, 2012, No. 6-rp/2012, laws and other regulatory acts apply only to those relations that arose after the entry into force of laws or other regulatory acts."

The same position was expressed by the territorial bodies, in particular the Administration of the Western Office of the State Audit Service in Zakarpattia region by letter No. 130717–14/1633–2023 dated July 27, 2023.[61]

Thus, state financial control over the legality of concluding contracts before May 19, 2023, for above-threshold amounts without the use of Prozorro and the efficiency of spending budget funds in them can be conducted only by carrying out those measures of state financial control that were provided for as of the day of their conclusion – procurement verification, as well as during the state financial audit and inspection.

Secondly, the question arises **whether it is acceptable to monitor those contracts that had already been fulfilled by the parties before the monitoring started.**

As a general rule, in accordance with Article 8 of the Law, such monitoring is not possible, since it is carried out during the validity of the procurement contract. But at the same time, Article 8 of the Law regulates the monitoring of procurement procedures, and therefore, for "non-procedural" contracts for the purchase of goods, works, and services, the regulation may differ. Final clarification on this issue is expected from the Ministry of Economy.

On May 17, 2023, the Ministry of Economy issued Clarification No. 3323–04/22523–06 On Amendments to the Features of Public Procurement for the Period of the Legal Regime of Martial Law and within 90 Days from the

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59 These data did not include reports on contracts concluded and published by organizers that are not procuring entities within the meaning of the Law. The data may not cover information about contracts for which information is not displayed in the Prozorro electronic procurement system as of July 2023, in particular due to the need to conceal sensitive information during martial law.

60 Letter of the State Audit Service No. 003100–16/7651–2023 dated July 6, 2023 https://drive.google.com/file/d/1E0DC45nOGDPmQ0xPz1iZoqVBkZGMHN3r/view?usp=sharing

61 Letter of the Administration of the Western Office of the State Audit Service in Zakarpattia Oblast No. 130717–14/1633–2023 dated July 27, 2023. URL: https://drive.google.com/file/d/1yzw_H0gbgrHUkXEm7JMwxEopENeLeySn/view?usp=sharing

Date of its Termination or Cancellation,[62] which contained the part On Procurement Monitoring. However, this Clarification does not contain significant additions to the interpretation of the provisions available in clause 23 of the Features.

Summing up, during the period of the legal regime of martial law, the key problem in the regulatory framework that affects the monitoring of public procurement was the permission to conduct a wide range of procurement transactions not as a procedure within the meaning of the Law. This made it impossible to monitor the procurement transactions conducted before May 19, 2023.

In October 2022, the Government returned the lion's share of procurement to the competitive plane, introducing a new procedure for the period of martial law – open bidding with features. It is the main object of monitoring procurement procedures during martial law. But due to changes in the legislation, automatic risk indicators that should increase the efficiency of detecting violations have lost their relevance.

1.3. Hypotheses for problems concerning the regulatory framework of public procurement monitoring

Having considered the regulatory model of monitoring public procurement under the Law and the impact on it of changes in legislation under martial law, it is possible to form hypotheses about the problems of the regulatory framework for monitoring.

It should be noted that the conclusions of the Main Legal Department, the Main Scientific and Expert Department of the Apparatus of the Verkhovna Rada of Ukraine to the draft law No. 1076, by which MPs initiated amendments to the Law of Ukraine On Public Procurement, did not contain comments on Article 8 of the Law (in terms of monitoring provisions).

However, a detailed consideration of the regulatory monitoring model, as well as the features of regulation after the full-scale invasion, demonstrate the likelihood of the following problems:

1. **At the stage of determining the object of monitoring and the beginning of monitoring:**

   1) **Lack of legally defined priorities for mandatory or priority monitoring.**

      The Law defines the grounds for starting the monitoring of the procurement procedure, but **does not provide for priorities** in the selection of procurement transactions, principles for determining the order of procurement transactions for monitoring, indications of priority categories of procurement transactions that are subject to mandatory and/or priority monitoring (for example, at the expected cost, according to the history of violations of a particular procuring entity, etc.). In resource-constrained environments, this may lead to the monitoring of procurement procedures with relatively low expected value and minor violations.

   2) **Inconsistency of the list of automatic risk indicators with the current legislation.**

      The list of automatic risk indicators approved by the Order of the Ministry of Finance of Ukraine No. 647 dated October 28, 2020, does not comply with the Resolution of the Cabinet of Ministers No. 1178 dated October 12, 2022. Risk indicators do not function at all in open bidding with features that has been the main competitive procurement procedure since October 19, 2022.

   3) **Regulatory obstacles to monitoring for some categories of procurement.**

      The possibility to monitor procurement transactions that are not procedures appeared only starting from May 19, 2023, and, according to the principle of non-retroactivity of the law in time, does not apply to procurement transactions conducted earlier than this date. As a result,

62 Clarification of the Ministry of Economy No. 3323–04/22523–06 dated May 17, 2023 On Amendments to the Features of Public Procurement for the Period of the Legal Regime of Martial Law and within 90 days from the Date of Its Termination or Cancellation. URL: https://cutt.ly/cwdPfNhu

monitoring is not possible for contracts concluded during 2022–2023 without the use of the electronic procurement system for above-threshold amounts, which collectively amount to more than UAH 230 bln. However, the legality of these procurement transactions can be verified through other control measures – procurement verification, as well as during the state financial audit, and inspection.

In addition, certain features of regulation of this stage, which under certain conditions may constitute or be considered as a problem, have also been identified, namely:

4) **Procurement procedures are not suspended for the period of monitoring.**

   Notification of the start of monitoring of the procurement procedure does not suspend the procurement procedures. Even though the maximum duration of monitoring according to the requirements of the Law is 15 working days, monitoring does not stop the course of the procurement procedure, and they continue. This entails the risk of changing the procurement stage and losing the procedural opportunity to correct violations that will be detected during monitoring. On the other hand, the procuring entity's right to continue the procedure, despite the monitoring, serves as a safeguard against abuse by the SCFB.

5) **The issue in which cases it is necessary to conduct full monitoring of the procurement, and in which – partial monitoring, is insufficiently regulated.**

   The definition of the concept of monitoring involves an analysis of compliance with procurement legislation and does not specify whether monitoring is always carried out in full, or whether it can be carried out partially – within the framework of individual issues. Article 8 of the Law indicates the right of the SFCB to send requests for decisions, actions/inaction that are *the subject of research* within the framework of monitoring. Procedure No. 552 also refers to the "matter that is the subject of consideration." This may indicate the possibility of partial monitoring (for example, within the framework of an activated risk indicator or information received in an appeal to the SFCB), but its conditions and limits are not regulated. This can lead to a waste of resources for a full analysis of the procedure, when several obvious significant violations have already been identified, and, conversely, to the analysis of the procurement only in the part that does not contain violations, without fixing violations in other parts.

6) **Lack of information from business entities among the grounds to start monitoring**.

   The grounds to start monitoring do not include information from business entities, although they, as market participants, may have information about violations by procuring entities and notice abuses, for example, the facts of procurement without conducting competitive procedures in which they could participate.

   To protect the rights and legitimate interests of persons involved in procurement procedures, the relevant commission of the Antimonopoly Committee of Ukraine acts as an appeal body. However, it is possible to file a complaint only in the procurement procedure within the meaning of the Law. One can contest the terms of the procurement procedure, decisions, actions, or inaction of the procuring entity, which violated the rights or legitimate interests of the subject of appealer. Effectively, discriminatory or non-transparent conditions of the tender documentation, the decision to reject the tender bid, the determination of the winner, the cancellation of the procedure are subject to appeal. Consequently, the powers of the appeal body do not cover the consideration of all possible offenses provided for in Article 164–14 of the Code. For example, if a business entity has discovered the facts of evasion of the procuring entity from conducting a competitive procedure, direct procurement from their competitor at inflated prices, unreasonable conclusion of additional agreements between the procuring entity and their competitor, the business entity may be interested in reporting such cases to the supervisory bodies, but the Law does not provide for such appeals as a basis for starting monitoring. Finally, non-compliance with the decision of the appeal body, in respect of which the business entity has a direct interest, can neither be appealed in the conditions of inaction of the procuring entity.

7) The regulations on the offices of the State Audit Service provide that in the territory of other (not "their") administrative and territorial units, offices, and administrations can exercise state financial control (including procurement monitoring) on behalf of the Head of the State Audit Service and their deputies.

2. **In the process of monitoring:**

1) Insufficient regulation of the scope of issues to be analyzed.

The definition of monitoring under the Law provides for an analysis of the procuring entity's compliance with procurement legislation. But the Law does not contain restrictions that these should be precisely those provisions for the violation of which administrative liability is provided. The Law does not limit or establish a list of regulatory acts for compliance with which auditors conduct procurement analysis. Therefore, effectively, monitoring involves an analysis of the procurement procedure for compliance with the entire regulatory framework of public procurement. This can lead to the waste of resources by the SFCB for a full analysis of the procurement and the search for any, even insignificant violations in it, in cases where the risk indicator or information received by the SFCB indicated the likelihood of a significant violation.

2) **Insufficient regulatory provision of access to the necessary databases for SFCBs.**

Article 8 of the Law provides that the SFCB uses databases open for access for monitoring. In practice, the SFCB has access to some information bases. In particular, we are talking about the ITS Tax Block and the ITS Single Window for Electronic Reporting, the Unified State Register of Legal Entities, Individual Entrepreneurs and Public Organizations.

But the current legislation does not contain a detailed procedure for granting the SFCBs access to the registers and databases, conditions and procedure for interaction with database owners to ensure such access. There is no regulatory act that would directly oblige and stimulate the relevant bodies and institutions that own the bases to provide the SFCB with access to them in an automated mode, within a reasonable time, in particular during the legal regime of martial law.

Gaining access to the necessary bases is the result of organizational measures, efforts, and negotiations of the SFCBs, the conclusion of agreements by them. The State Audit Service of Ukraine reported that in order to enhance the analytical component of its activities and effectively perform its tasks and functions, **there is a need for direct automated access to state registers and systems, the list of which was provided upon request** (20 state registers and systems),[63] namely:

1	State Register of Real Property Rights	Ministry of Justice of Ukraine
2	State Register of Encumbrances over Movable Property	Ministry of Justice of Ukraine
3	Automated System of Enforcement Proceedings	Ministry of Justice of Ukraine
4	Unified Register of Powers of Attorney	Ministry of Justice of Ukraine
5	State Registers of Individuals – Taxpayers	State Tax Service of Ukraine
6	State Land Cadastre	Ukraine State Service of Geodesy, Cartography and Cadastre
7	Unified State Register of Court Decisions	State Judicial Administration of Ukraine
8	E-Data Portal	Ministry of Finance of Ukraine
9	Transparent Budget System	Ministry of Finance of Ukraine
10	Unified State Electronic System in the Field of Construction	Ministry of Infrastructure of Ukraine
11	Unified State Demographic Register	State Migration Service of Ukraine
12	Unified Automated Information System of Customs Authorities	State Customs Service of Ukraine
13	Unified Information System of the Ministry of Internal Affairs	MIA of Ukraine
14	Unified State Register of Persons Who Committed Corruption Offenses	National Agency on Corruption Prevention
15	Lists of individuals and legal entities subject to personal special economic and other restrictive measures (sanctions)	National Security and Defense Council
16	Mobile application Statistics	State Statistics Service of Ukraine
17	Summary of decisions of the Antimonopoly Committee bodies on the recognition by business entities of violations of the legislation on the protection of economic competition in the form of distortion of the results of bidding and the imposition of a fine.	Anti-Monopoly Committee of Ukraine
18	Database of Ukrainian exporters	Ministry of Economy of Ukraine
19	Unified Licensing Register	State Regulatory Service
20	Electronic system for disclosing information of stock market participants	National Commission on Securities and Stock Market

63 Annex to the letter of the State Audit Service of Ukraine No. 001200–16/8021–2023 dated July 17, 2023. URL: https://cutt.ly/awdSdCWa

3. **The requirements for the conclusion on the results of monitoring:**

1) **Regardless of the significance and consequences of the violation, the possibility to eliminate it at a certain stage, the conclusion on the results of monitoring should contain an obligation to eliminate the violation.**

The only exception when the conclusion does not indicate the obligation to eliminate the violation is the cancellation of the tender or its recognition as not having taken place during the monitoring. If the violation cannot be eliminated for other reasons (for example, the inability to amend the annual plan or the procurement announcement, the inability to change the tender documentation at a certain stage, the inability to adopt a different decision on the consideration of bids of participants at the stage when the contract is concluded), *the monitoring conclusion should nevertheless contain an obligation to eliminate* the violation.

2) **Lack of explicitly provided ways to eliminate violations that the SFCB can encourage the procuring entity to do based on the results of monitoring.**

The provisions of the Law ***do not contain specific ways to eliminate violations***, in particular, depending on their type, significance, consequences, stage of the procedure, the possibility of elimination in one way or another. Although according to the procedure No. 552, the monitoring conclusion should contain a reference to the structural unit of the competent regulatory act, on the basis of which the SFCB obliges the procuring entity to eliminate the violation *in accordance with the procedure established by law*, ***the legislation does not contain an exhaustive procedure and a list of ways to eliminate violations***, especially in cases where the stage of the procedure at which the violation was committed has already passed.

For example, violations in the tender documentation can be eliminated by amending the tender documentation – at the relevant stage of the tender; violations regarding the rejection or non-rejection of tender bids can be eliminated by canceling the relevant decisions – at the stage of consideration of tender bids. But if these stages have already passed, the only relevant provision for such cases is the provision of Article 32, part 1, clause 2 of the Law, according to which the procuring entity *cancels the tender in case of impossibility to eliminate violations* that have arisen due to the identified violations of the legislation in the field of public procurement, with a description of such violations that cannot be eliminated. However, the elimination of violations by canceling the tender may not in all cases be considered an appropriate way to eliminate them, especially if the violations are formal in nature and do not affect the results of the procurement transaction. In addition, at the stage when the contract has already been concluded, it is no longer possible to eliminate the violation by canceling the procurement procedure, even with reference to Article 32, part 1, clause 2 of the Law.

In addition to the uncertainty of how the violation should be eliminated, the consequence of this problem is a high risk of litigation for any obligations that the SFCB will determine regarding the procuring entity. After all, public authorities must act solely on the basis, within the powers, and in the manner prescribed by the Law.

4. **In the processes after publishing the conclusion on the results of monitoring:**

1) **Gaps in regulating the consequences of identifying violations for the commission of which administrative liability is not provided.**

If the procuring entity has not eliminated the violation for which administrative liability is provided, the SFCB shall take measures to bring them to justice. But the Law does not provide for which consequences should take place if the procuring entity **has not eliminated the violation, which is not envisaged** in Article 164–14 of the Code on Administrative Offenses. At the same time, the provision on measures to prosecute the procuring entity in the event that the violations are not eliminated does not contain exceptions for cases where administrative liability for violation is not provided.

2) **The problem of access of SFCB officials to the personal data of persons who committed an administrative offense.**

In order to bring a person who committed an administrative offense to administrative liability, did not eliminate it and did not appeal the monitoring conclusion in court, personal data of such a person is required. In particular: full name, date of birth, place of residence/stay,

identification number / passport data (for persons who do not have an identification number). Such data are required for drawing up a protocol, resolution, its enforcement. However, the current legislation does not contain a full-fledged procedure for obtaining this information by the SFCB. Therefore, SFCBs contact procuring entities with inquiries for personal data, and procuring entities evade providing this information. SFCBs need guarantees of access and rules of interaction for obtaining verified personal data.

3) **Gaps in regulating the options of the lawful reaction of the procuring entity to the monitoring conclusion and their consequences.**

   The law does not fully regulate the cause-and-effect relationships between variants of legitimate behavior of the procuring entity as a reaction to the monitoring conclusion and bringing or not bringing them to justice.

   Thus, through the Prozorro system, the procuring entity publishes information and/or documents indicating the elimination of the violation (violations) of the legislation in the field of public procurement set out in the conclusion, or reasoned objections to the conclusion, or information on the reasons for which it is impossible to eliminate the detected violations. That is, *there are three options for the lawful behavior* of the procuring entity.

   But Article 8, part 9 of the Law connects the **non**-bringing the procuring entity to administrative responsibility with **only one of the options** – **elimination** of the violation. The alternative, which also excludes the procuring entity's liability, is only to appeal the conclusion in court. The Law does not explicitly provide for what the further reaction of the SFCB to reasoned objections or information about the reasons for the inability to eliminate the violation should be. Since the possibility of non-bringing to administrative liability is provided only in the case of elimination of the violation, it turns out that the provision of reasoned objections or information about the impossibility of eliminating the violation does not exempt the procuring entity from liability. Under such conditions, these two options lose their meaning, since the procuring entity, in order to avoid liability, shall either eliminate the violation or appeal it in court.

4) **Lack of rules on further actions of the procuring entity and the SFCB after a judicial appeal.**

   The relationship between the procuring entity and the SFCB regarding the fulfillment of the requirements of the conclusion is not sufficiently regulated, depending on the different results of the filing of the claim. In particular, the Law does not establish a list and deadlines for further actions of the parties in cases where the appeal against the conclusion did not end with the satisfaction of the claim.

   In addition, the Law does not provide for the synchronization of the Prozorro electronic procurement system with the Judicial Power portal (in terms of information about the stage of consideration of the court case) and the Unified State Register of Court Decisions. Instead, the Law imposes the obligation to enter information on the appeal of the monitoring conclusion in court on the procuring entity. As a result, there is a risk of a "human factor," which affects the completeness and reliability of information on judicial appeal of conclusions, in particular, the risk of the procuring entity entering inaccurate information. The Law does not provide for further updating of information on the progress of the court case in the Prozorro system, except for the notification on the procurement page about the fact of the appeal and the opening of proceedings.

5) **There is no liability for failure to comply with the conclusion on the results of monitoring.** This may result in a minimum level of compliance with the requirements of the conclusions in which violations are recorded that are not provided for in Article 164–14 of the Code, since the procuring entity is not in for administrative liability for failure to comply with them.

6) The absence of a direct indication obliging the SFCB to provide a clarification at the request of the procuring entity, the requirements for such a clarification, the deadline of its provision. This may lead to difficulties in obtaining more detailed information by procuring entities, in particular about violations committed by them and how to eliminate them.

7) The provisions on the delineation of powers of the SFCB and the appeal body contain a discrepancy between the terms of suspension of the SFCB's decision and the grounds for such suspension. Namely: the head of the SFCB shall suspend the decision of the SFCB if the complaint is accepted for consideration by the appeal body, but the deadline for such

suspension shall be within the next working day from the date of placement of the complaint by the appealer in the Prozorro system. The deadline of one working day from the date of placement of the complaint is shorter than the period of acceptance of the complaint for consideration by the appeal body, which according to the Law is three working days. That is, at the moment when the head of the SFCB has to suspend the decision of the SFCB, the complaint may have been placed, but not accepted for consideration by the appeal body.

5. **Technical deficiencies:**

Instead of clearly indicating the entity that must perform a certain action, the Law sometimes contains impersonal wording of obligations: the fact of appeal is "indicated" in the Prozorro system, the relevant state bodies signs are "notified in writing" of violations, the number of the protocol is "indicated" in the Prozorro system. These provisions need to be adjusted in terms of legal technique.

In the next section, we will examine the performance indicators of the SFCB at each stage of monitoring from its inception to the elimination of the violation or judicial appeal and check whether these hypotheses are confirmed in practice, as well as which of the outlined problems are identified the most.

SECTION 2. Results of the work of state financial control bodies on public procurement monitoring

2.1. Analysis of data on the beginning and process of monitoring, identified violations

With the help of the BI Prozorro public analytics module, we obtained and analyzed numeric indicators that characterized the conducted monitoring of public procurement at various stages. In identifying key indicators for the study, we were guided by which characteristics reflected the effectiveness of monitoring and its impact on the procurement process.

First of all, we studied: the number of monitorings, the indicator of their coverage of procurement, the grounds for monitoring, the types of violations most often detected by auditors in monitoring.

Number of monitorings

To assess the scope of work of the SFCBs in monitoring public procurement, we studied the quantitative indicators of their activities in this area. According to the Prozorro electronic procurement system,[64] the annual number of the launched monitorings started from 267 in 2018 and reached 11,920 monitorings in 2022.

- 2018–267 monitorings (of which the conclusions were published in 266 monitorings)
- 2019–8,740 monitorings (of which the conclusions were published in 8,720 monitorings)
- 2020–9,960 monitorings (of which the conclusions were published in 9,950 monitorings)
- 2021–10,380 monitorings (of which the conclusions were published in 10,350 monitorings)
- 2022–11,920 monitorings (of which the conclusions were published in 11,870 monitorings)[65]

Thus, the number of monitorings initiated by public auditors has been growing annually. At the same time, almost all of them were brought to the end; they had a conclusion published in the Prozorro system.

During the first half of 2023, public auditors initiated 6,530 monitorings, that is, the upward trend in the quantitative indicators of their work remains, and the number of monitoring in 2023 could potentially reach 13,000 per year.

Coverage of procurement procedures by monitoring

Despite the convincing indicators of the number of monitorings carried out annually, it is only possible to fully assess their sufficiency – in quantitative terms – if we check how fully the procurement is covered by them.

According to the legislation in force during 2020–2022, not all types of procurement were subject to monitoring. Therefore, it is possible to fairly assess the coverage indicator only in relation to the number of those

64 Information on monitoring indicators was studied using the BI Prozorro public analytics module, which does not display information on monitoring and stages of competitive dialogue and framework agreements.

65 Data on the number of monitoring sessions is automatically rounded to ten if the number exceeds 1,000.

procurement transactions that the law allowed to monitor. As noted above, Article 8 of the Law provides for the procedure to monitor only public procurement **procedures**. They are open bidding, restricted bidding, competitive dialogue, as well as, as an exception, the negotiation procurement procedure.

In addition, sometimes, through the Prozorro electronic procurement system, procurement is carried out by organizers who are not procuring entities within the meaning of the Law; such procurement is neither subject to monitoring by the SFCB. Therefore, when determining the coverage indicator, it will be correct to exclude it from the volume of procurement transactions that we consider.

According to the Prozorro electronic procurement system, in 2020–2022, the following shares of procurement were covered by monitoring (among the methods by which it was possible to conduct monitoring and which are reflected in the BI Prozorro public analytics module in the context of monitoring[66]):

Table 2.1. Monitoring coverage of procurement transactions in terms of their number[67]

Procurement procedure	Procurement announced in 2020	Procurement announced in 2021	Procurement announced in 2022
Open bidding	3.66%	3.73%	3.75%
Open bidding with publication in English	9.78%	9.23%	5.45%
Negotiation procedure	3.18%	3.92%	6.38%
Negotiation procedure due to the urgent need	2.86%	2.06%	2.97%
Negotiation procedure for defense purposes	3.50%	–	–
Open bidding with features	–	–	2.23%
Procurement under the framework agreement	–	0.52%	0.74%
Total coverage[68]	**3.95%**	**4.00%**	**4.00%**

It should be noted that monitoring of procurement procedures can be carried out during the entire period of the procurement contract. Therefore, the above indicators may increase, and the number of monitored procurement transactions may grow at the expense of those under which the procurement contract is still in force.

Table 2.2. Coverage of procurement with monitoring in terms of expected value[69]

Procurement procedure	Procurement announced in 2020	Procurement announced in 2021	Procurement announced in 2022
Open bidding	20.79%	26.06%	16.96%
Open bidding with publication in English	25.49%	26.15%	16.97%
Negotiation procedure	16.95%	27.97%	5.85%
Negotiation procedure due to the urgent need	10.12%	9.20%	6.73%
Open bidding with features	–	–	19.74%
Procurement under the framework agreement	–	4.39%	4.91%
Total coverage[70]	**23.38%**	**25.42%**	**15.46%**

Additional information on the coverage of procurement in physical indicators can be obtained from the reports of the State Audit Service. Thus, according to the report for 2021, 6,161 procuring entities were covered by monitoring, in particular, their procurement in the amount of UAH 247.43 bln was covered by monitoring[71].

In 2022, 7,904 procuring entities were covered by monitoring**,** in particular, their procurement in the amount of UAH 261.9 bln was covered by monitoring[72].

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66 Information on monitoring indicators was studied using the BI Prozorro public analytics module, which does not display information on monitoring and stages of competitive dialogue and procedures for concluding framework agreements.

67 Data as of August 6, 2023. Multi-lot procurement transactions are reflected by the number of lots.

68 Defined as the ratio of the number of lots monitored to the total number of lots announced under the methods monitored in the year under study, excluding procurement by persons who are not procuring entities within the meaning of the Law.

69 Data as of August 6, 2023. Multi-lot procurement transactions are reflected by the number of lots.

70 Defined as the ratio of the expected value of lots in which the monitoring was carried out to the total expected value of lots announced under the methods monitored in the year under study, excluding procurement by persons who are not procuring entities within the meaning of the Law.

71 Statistical report of the State Audit Service of Ukraine for 2021. URL: https://dasu.gov.ua/ua/plugins/userPages/1985

72 Statistical report of the State Audit Service of Ukraine for 2022. URL: https://dasu.gov.ua/ua/plugins/userPages/2652

In terms of the expected value, the situation with the coverage of procurement procedures by monitoring looks better than in terms of the number of procurement transactions. But still, the coverage indicators reach only a quarter of the amount of the expected value of procurement, which it is possible to monitor.

When assessing coverage indicators, it is worth comparing them with indicators for detecting violations. Thus, if the SFCB began monitoring the procurement procedure, this led to the detection of violations in:

- 88.74% of cases – in monitoring started in 2020;
- 77.96% of cases – in monitoring started in 2021;
- 66.06% of cases – in monitoring started in 2022.

It should also be noted that the indicators of procurement coverage by monitoring cannot characterize the effectiveness of the SFCB, since even the highest indicators of coverage do not guarantee that the focus will be on identifying significant violations, eliminating them, and bringing the perpetrators to justice in case of non-elimination of the violation.

Coverage of "direct" contracts by monitoring

Taking into account changes in the legal regulation of monitoring during martial law and granting the SFCB the authority to monitor procurement transactions, which are not procedures within the meaning of the Law, it is **worth separately assessing the first results of monitoring contracts concluded without the use of an electronic system (so-called direct contracts)**. To do this, let us consider the monitoring initiated by the SFCB for the period from May 19 to August 6, 2023.

According to the Prozorro system, for the two-month period from May 19 to July 19, 2023, SFCBs initiated only **4 monitorings** of procurement conducted without the use of the electronic procurement system (reports on direct contracts concluded). But at the end of July, public auditors began to work more actively in the direction of monitoring direct contracts and initiated **9 monitorings** of direct contracts on July 27 and August 1–2.

Consequently, having received the authority to monitor direct contracts, in the first two and a half months after that, the SFCBs almost did not exercise it. A total of 13 monitorings were initiated. Of these, in two cases, no violation was detected; in one case, monitoring was canceled; in two cases, a violation was detected regarding the non-publication of information and documents on the conclusion of the contract (in violation of clause 13, subclause 16, paragraph 4 of the Features, the Procuring entity did not publish the procurement contract in the electronic procurement system and did not indicate the grounds for the procurement transaction in accordance with subclause 6 of clause 13 of the Features). The rest of the monitoring is ongoing[73].

The State Audit Service of Ukraine is the most active in implementing this authority (5 monitorings); three contracts were monitored by the Administration of the Western Office of the State Audit Service in Khmelnytskyi Oblast. The Administration of the Southern Office of the State Audit Service in Mykolaiv Oblast tried to conduct two monitorings in early July, but found no violations.

From the above data, **several problematic issues can be seen:**

1. *The number of monitorings of direct contracts is low.* Thus, for the period from May 19 to August 6, 2023, procuring entities reported on the conclusion of more than **691,000 contracts** without the use of the electronic procurement system (direct contracts) for a total amount of **UAH 91.66 bln.**
2. Sometimes there is *an irrational distribution* of SFCB resources for monitoring: for example, the Administration of the Eastern Office of the State Audit Service in Zaporizhzhia Oblast initiated the monitoring of a direct contract for the purchase of 5 packs of breadcrumbs with a cost of UAH 65 (possibly, in this way, the Administration tested a new opportunity)[74].
3. When the new powers began to be in force, there was an uncertainty about the approaches of the SFCB to the question of whether it is possible to monitor "non-procedural" procurement for contracts concluded before May 19, 2023: for example, the Eastern Office of the State Audit Service began monitoring the contract, the report on which was published on January 16, 2023, but subsequently issued an order to cancel this monitoring[75].

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73 As of August 19, 2023.

74 URL: https://prozorro.gov.ua/tender/UA-2023-05-04-008471-a

75 URL: https://prozorro.gov.ua/tender/UA-2023-01-16-003890-a

Let us note that if the procuring entity does not publish a report on the conclusion of the contract for "non-procedural" procurement, then it will be impossible to monitor such a procurement transaction.

Taking into account the limited human resources and time, the preliminary selection of those procurement transactions in which **most likely** a significant violation is to be detected is crucial for the effectiveness of monitoring as a legal institution. **The grounds for conducting monitoring** are directly related to the selection of such procurement transactions – those provided for by law and actual.

Grounds for monitoring

According to the Prozorro electronic procurement system, monitoring in 2020–2022 began on the following grounds:

Table 2.4. Grounds for monitoring.

In 2020:

Grounds for monitoring by the monitoring body	Number of monitorings
State financial control bodies	6,730 (67.57%)
Risk indicator	1,990 (19.99%)
Public authorities, MPs, local self-government bodies	916 (9.20%)
Public associations	805 (8.08%)
Media	93 (0.93%)

In 2021:

Grounds for monitoring by the monitoring body	Number of monitorings
State financial control bodies	8,230 (79.27%)
Risk indicator	1,030 (9.90%)
Public authorities, MPs, local self-government bodies	899 (8.66%)
Public associations	562 (5.41%)
Media	18 (0.17%)

In 2022:

Grounds for monitoring by the monitoring body	Number of monitorings
State financial control bodies	11,200 (93.94%)
Public authorities, MPs, local self-government bodies	511 (4.29%)
Risk indicator	169 (1.42%)
Public associations	118 (0.99%)
Media	6 (0.05%)

Thus, every year the share of monitoring initiated **directly by SFCB was growing** and reached 93.94%, and the share of monitoring initiated on other grounds decreased. Therefore, according to the system, the main work on finding problematic procurement transactions auditors do by themselves. However, it is possible that public auditors also identify other circumstances that have become a factor for monitoring as their own initiative. Moreover, these statistics do not cover requests and messages that were received by the SFCB but not yet monitored by public auditors.

Special attention is drawn to the indicator of the number of monitoring sessions initiated based on automatic **risk indicators**: from **19.99%** in 2020, this **indicator has dropped** to **1.42**% in 2022.

As noted in the previous section, the list of risk indicators approved by Order No. 647 of the Ministry of Finance of Ukraine dated October 28, 2020 has lost its relevance due to amendments in procurement legislation. Among other things, it does not comply with the Resolution of the Cabinet of Ministers of Ukraine No. 1178 dated October 12, 2022.

The trend to reduce the frequency of use of risk indicators arose earlier than the problem with the regulatory framework, so to find out the reasons, a request was sent to SE Prozorro and the State Audit Service of Ukraine about whether there were problems or failures in risk indicators, whether the State Audit Service of Ukraine contacted SE Prozorro about such problems and reasons for not using risk indicators.

In response, by Letter No. 001200–16/8250–2023 dated July 21, 2023, the State Audit Service of Ukraine notified that during 2021–2022 it contacted SE Prozorro regarding the proper functioning and display of automatic risk indicators in the electronic procurement system and in the electronic account of the state financial control body. The letters provided by the State Audit Service refer, among other things, to ***the failure to display information about procurement procedures in the State Audit Service's dashboard with risk indicators that worked in the web interface of the Ukraine Procurement Risk Indicators & Monitoring Explorer analytical module*** developed by Data Pass Analytics LLC. This renders it unfeasible to establish the foundation for initiating monitoring of the procurement procedure solely based on data from automated risk indicators. To monitor these procurement procedures, the State Audit Service is **compelled to choose the signs of violations of the procurement legislation detected by the state financial control body** in information published in the electronic procurement system[76] as the basis for such monitoring.

Additionally, in Letter No. 003100–14/14646–2021 dated November 18, 2021, the State Audit Service specified the numerical indicators of that problem: "*When analyzing the information published in the electronic procurement system, to make a decision to start the monitoring of public procurement procedures using the web interface Ukraine Procurement Risk Indicators & Monitoring Explorer, a register of 19,223 procurement procedures for January – October 2021 was created, where automatic risk indicators were activated as of November 17, 2021. However, as per the queue of procurement procedures that activated automatic risk indicators, as documented in the Account of the State Audit Service, only 3,084 procedures fall into this category.*"[77]

In response, SE Prozorro informed that the risk system operates normally and in line with the Procedure for Using Automatic Risk Indicators, approved by the Order of the Ministry of Finance of Ukraine No. 647 dated 28.10.2020, and the operation of the web interface of Ukraine Procurement Risk Indicators & Monitoring Explorer is not the responsibility of SE Prozorro and is not regulated by the said Procedure[78].

Later, during martial law, the State Audit Service sent Letter No. 002200–14/5682–2022 dated July 28, 2022 to the Ministry of Economy and SE Prozorro to notify them that the practice of using indicators as a basis for deciding to start monitoring revealed **significant problems in Prozorro algorithms that needed urgent solutions:**

- Individual indicators are triggered once the procurement procedure winner is determined until the contract is finalized, and subsequently, they vanish. This renders it impractical to subject the procurement procedure to monitoring based on these automatic risk indicators after the contract has been concluded with the winner. For example, on May 18, 2022, procurement procedures that were in the queue of risky procedures formed on May 17, 2022, disappeared (a "queue" refers to a systematically organized list of procurement procedures for which indicators were activated and is accessible within the State Audit Service's personal account);
- the queue of risky procurement procedures on average consists of 70% of procurement procedures that the procuring entity "left" (the procuring entity did not make managerial decisions on the procurement finalization in accordance with the established procedure) and which are useless for control purposes;
- the queue is not filled with current procedures. For example, in procurement procedure UA-2022–03–14–000493-c the contract was published on May 17, 2022, even considering the previously mentioned challenges in establishing a queue, this procedure should have been part of the queue as of the morning of May 17, 2022, and removed from it by May 18, 2022. However, it was not in the queue on the morning of May 17, 2022;
- the queue includes procurement procedures that have already been monitored, in particular on grounds other than risk indicators, and procurement procedures that are being appealed to the Antimonopoly Committee of Ukraine, and for which monitoring is currently suspended in accordance with the procedure established by the Law;

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76 Letter of the State Audit Service No. 003100–14/3500–2021 dated 18.03.2021. URL: https://drive.google.com/file/d/1-FlodZ_QBFuFkpawrWEduW6-vNcITOCA/view?usp=sharing

77 Letter of the State Audit Service No. 003100–14/14646–2021 dated 18.11.2021. URL: https://drive.google.com/file/d/1l0nfKBZMXsELEFQ88C_DFBnUYGT8i8-K/view?usp=sharing

78 Letter of the State Enterprise "Prozorro" No. 206/01/2606/11 dated 26.11.2021. URL: https://drive.google.com/file/d/10H-2Kw6SZyc6EJhg-W8laQUsUp9uNlqA/view?usp=sharing

- pre-threshold procurement procedures that are not monitored in accordance with Article 8 of the Law are selected in the queue;
- procurement transactions are in the queue when the procuring entity rejected all tender proposals of participants, but neither the Procuring entity nor the Prozorro system canceled the tender, etc.

In light of this, the State Audit Service determined that the life cycle of a procurement procedure within the auditor's queue is unpredictable and does not align with the monitoring's intended objective, which is to prevent violations of legislation in public procurement.

Furthermore, as a contributing factor to the State Audit Service auditors' decreased productivity, it was observed that the Prozorro system's data environment has a detrimental impact on the algorithms used for computing indicators. In particular, the indicators are triggered unreasonably for the following reasons:

- the indicator perceives the procurement item as a product or service, but in fact the Procuring entity buys work, or vice versa;
- the protocol was published in the Prozorro system later than 5 business days in advance;
- the indicator does not take into account the date of making a decision to determine the winner, which is not available in the Prozorro in machine-readable format but is displayed only in the procuring entity's published protocol in.doc or.pdf format;
- algorithms of indicators for timely publication do not take into account public holidays;
- the procurement procedure was initiated on the basis of canceled bidding for the lot, etc.

The State Audit Service reported on the need to fundamentally review the algorithm used to form a queue of risky procurement procedures and assign individual procurement procedures to priority ones for control. Specifically, the queue should solely consist of competitive procedures, each of which must remain in the risk queue from the moment the indicator is activated until the contract is fully executed. A procurement procedure can only exit the queue under the following circumstances: if the procedure is canceled, the contract progress report is made public, or if the procurement failed[79].

Additionally, in this communication, the State Audit Service requested that the SE Prozorro furnish information regarding procurement procedures where risk indicators were activated. SE Prozorro by Letter No. 206/01/837/11 dated 15.08.2022 informed that the provision of such information in the context of each risk (procurement ID, risk indicator, risk ID, risk indicator name, procurement item, procurement price, prioritization (availability in the queue) **on a specific date, it is technically impossible.** Prozorro also mentioned that all procurement transactions and plans created by procuring entities for defense needs were hidden in the e-procurement system. Regarding the proposal to modify risk indicators, Prozorro is in the position that in a setting where the rules governing procurement transactions undergo frequent amendments, revising existing algorithms or introducing new ones for identifying automatic risk indicators may not be effective. This is due to the constantly evolving data environment, which makes it challenging to sustain the relevance of such risk indicators at an optimal level[80].

In response to the same Letter of the State Audit Service by Letter No. 3311–05/62043–03 dated August 29, 2022, the Ministry of Economy, among other things, proposed to consider reviewing automatic risk indicators after the termination or cancellation of martial law and stabilizing the operation of the electronic procurement system[81].

Thus, the State Audit Service of Ukraine before and after the start of the full-scale invasion saw technical shortcomings in the operation of risk indicators.

In response to our request regarding the status of risk indicators, SE Prozorro described the history of its interaction on that matter with the State Audit Service of Ukraine in Letter No. 206/01/999/11 dated July 3, 2023. In particular, Prozorro mentioned that at the request of the State Audit Service, **they updated the list of risk indicators, their weights, and the procedure of forming the queue of** risky procedures in the account of the State Audit Service in the e-procurement system at the end of 2020.

"During 2021, the State Audit Service contacted Prozorro three times <...> with a request to provide an

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79 Letter of the State Audit Service of Ukraine No. 002200–14/5682–2022 dated July 28, 2022. URL: https://drive.google.com/file/d/1wZtPA_5VLnklbJVQuSSmpwmcaZ490ekq/view?usp=sharing

80 Letter of the State Enterprise "Prozorro" No. 206/01/837/11 dated August 15, 2022. URL: https://drive.google.com/file/d/1d6rKkxuiZOyqwtIXEXx4nJskYZ2m9kjr/view?usp=sharing

81 Letter of the Ministry of Economy No. 3311–05/62043–03 dated August 29, 2022. URL: https://drive.google.com/file/d/1jO2MtAFT8VNBHI7nHYl6VBuZvVohsAar/view?usp=sharing

explanation of why the queue of risky procedures in the State Audit Service's e-procurement account differs from the queue in a separate web interface developed by Data Pass Analytics LLC for the State Audit Service. Each time after receiving the request from the State Audit Service, SE Prozorro checked the queue formation settings and the operability of the risk indicator system. ***No problems were found in the e-procurement system,*** *and the State Audit Service was explained that* ***the queue in the State Audit Service e-procurement account is dynamic, constantly updated,*** *and configured in accordance with legal requirements. Moreover, officials of the State Audit Service were provided with a link to the risk indicator API so that they could check the functionality.*

On July 28, 2022, the State Audit Service sent a letter <...> to Prozorro notifying of a decrease in the number of risk indicator activations and suggested changing the life cycle of risk indicators. On August 15, 2022, the Enterprise responded that the number of procedures in the system decreased, some information was restricted during the war, and the regulation of public procurement by a resolution of the Cabinet of Ministers of Ukraine, which had been amended three times, did not allow maintaining the relevance of risk indicators."

SE Prozorro also notified that it **did not have unambiguous data on the reasons for the decrease in the share of monitoring initiated based on risk indicators.** The company noted the need to coordinate legal regulations and risk indicators with the current legislation.

SE Prozorro also notified about the ***developed 11 new risk indicators***[82]**.** They are publicly available and process all competitive procurement procedures on EPS. A web interface has also been developed where everyone can view the results of activating these risk indicators: https://risks.prozorro.gov.ua/.

The list of new automatic risk indicators developed by SE Prozorro:

- sas 3–1. Failure by the procuring entity to comply with the decision of the appeal body.
- sas 3–2. The procuring entity rejected the tender proposals of all participants in the procurement of goods or services, except for the winner.
- sas 3–2–1. The procuring entity rejected the tender proposals of all participants during the procurement of works, except for the winner.
- sas 3–3. Procurement of goods and services from one participant.
- sas 3–3–1. Procurement of works from one participant.
- sas 3–4. Change in the essential terms of the contract (unit price).
- sas 3–5. The procuring entity rejected at least 2 participants.
- sas 3–6. Obvious overestimation of the expected value.
- sas 3–7. Short term of contract execution when purchasing works.
- sas 3–8. Application of 24-hour rule after the decision of the appeal body.
- sas 3–9. Re-recognition of the participant as the winner after the decision is made by the appeal body[83].

Note that **these risk indicators are implemented outside the limits of e-account** of the State Audit Service in the Prozorro system, and therefore, **they cannot be officially used as grounds for starting monitoring of procurement transactions by public auditors**. As of July 2023, negotiations were underway between SE Prozorro and the State Audit Service of Ukraine regarding new risk indicators and their further development.

Another feature of the grounds for starting monitoring is that among them **there are no appeals of participants** or and other business entities. Nonetheless, as conveyed by the representatives of the State Audit Service of Ukraine during their engagement in the roundtable hosted by TI Ukraine, in practice, public auditors are already reviewing appeals of business entities and using the information contained therein about signs of violations to direct their attention to problematic procurement transactions. However, they are required to categorize such control activities as "self-initiated" within the electronic system.

Since the regulatory framework does provide that a business entity's appeal may trigger monitoring, it can be assumed that not all participants are aware (or consider) the option of appealing to the SFCB, or not all of them are sure that such appeal will have legal consequences. Some participants even create civil society organizations to appeal to the SFCB in a more legal way, in their opinion.

We also note that according to the system's data, the number and share of public procurement monitoring initiated **based on requests from public associations**, decreased annually.

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82 News "Updated flexible system of automatic risk indicators in Prozorro." URL: https://infobox.prozorro.org/articles/onovlena-gnuchka-sistema-avtomatichnih-indikatoriv-rizikiv-v-prozorro

83 A description of each risk Indicator can be found here: https://drive.google.com/drive/u/1/folders/1Ex3eQCQEBlUoadrkspenG9ELtbuVhTn9?ths=true

Violations identified by auditors

The central issue in the analysis of public procurement monitoring is the content of the conclusions: which violations are detected by public auditors in procurement. The complete set of violations identified by auditors can be categorized into two groups:

1. *Violations provided for in Article 164–14 of the Code of Administrative Offenses of Ukraine.* Their key difference is that if these violations are detected during monitoring and are not further eliminated by the procuring entity, administrative liability will be applied.
2. *Other violations of legislation in the field of public procurement*. Although it may not be feasible to hold the procuring entity's officials accountable administratively for these actions, public auditors do detect such violations during their monitoring efforts and compel procuring entities to rectify them in their reports. For instance, this includes violations related to failure to provide participants with 24 hours to address inconsistencies when justified).

In the context of limited resources and the availability of thousands of procurement transactions, one of the key problems of state financial monitoring is the need to focus on identifying major violations. To determine what is the focus of attention of public auditors in monitoring, we investigated the **indicators[84] of the number of[85] identified violations of various types.**

The following violations were found during monitoring sessions **commenced in 2021**:

Table 2.5. Types of detected violations in monitoring commenced in 2021

Type of violation detected by the monitoring authority	The number of monitoring sessions and the corresponding percentage in which violations were identified
Violations in the tender proposal consideration procedure	2,970 (36.74%)
Other violations	2,850 (35.31%)
Violations in tender documentation	2,620 (32.38%)
Violations in the information disclosure procedure	1,290 (15.99%)
Violations regarding non-cancellation of procurement transactions	1,170 (14.43%)
Violations in the form of documents	610 (7.55%)
Failure to provide information or documents	491 (6.08%)
Violations in the selection of the procurement procedure	390 (4.83%)
Violations in additional agreements	376 (4.66%)
Violations during the conclusion of contracts	230 (2.85%)
Violations in determining the procurement items	143 (1.77%)
Groundless rejection of tender proposals	129 (1.60%)
Exceeding the amount of tender proposal security	70 (0.87%)
Late provision or failure to provide explanations on the tender documentation content by a procuring entity	67 (0.83%)
Violation of the terms of consideration of tender proposals	65 (0.80%)
Violation of the terms of competitive dialogue, limited participation bidding, or negotiation procedure	57 (0.71%)
Failure to comply with the decision of the appeal body based on the results of consideration of a complaint	24 (0.30%)
Violation of the deadline for publication of tender documentation	20 (0.25%)
Conclusion of a contract before or without conducting procurement procedures	14 (0.17%)
Purchase of goods, works, or services before or without procurement procedures	5 (0.06%)
Entering false personal information into the electronic procurement system and failure to make updates	3 (0.04%)

As per the provided data, the second and fourth positions in terms of frequency of detection are taken by "other violations" (identified in 2,850 instances) and "violations in the tender documentation" (identified in

84 Information about the type of violation is displayed in the Prozorro electronic procurement system by types indicated by the monitoring contractor among the options provided by the system.

85 Since several violations can be detected within a single monitoring session, the total number of monitoring sessions with detected violations of a certain type is not equal to the total number of monitoring sessions initiated during the year.

2,620 instances), respectively. Additionally, "violations in the process of information disclosure" were observed in 1,290 cases.

However, such significant violations as, for example, "groundless rejection of tender proposals" and "purchase of goods, works or services before or without procurement procedures" were detected only in 129[86] and 5 cases[87] respectfully.

Among the results of 963 monitoring sessions, no violations were identified except for those categorized as "other violations."

The following violations were found during monitoring sessions **commenced in 2022**:

Table 2.6. Types of detected violations in monitoring commenced in 2022

Type of violation detected by the monitoring authority	The number of monitoring sessions and the corresponding percentage in which violations were identified
Other violations	3,400 (43.14%)
Violations in tender documentation	2,300 (29.17%)
Violations in the tender proposal consideration procedure	2,160 (27.49%)
Violations in the information disclosure procedure	1,450 (18.45%)
Violations regarding non-cancellation of procurement transactions	950 (12.07%)
Failure to provide information or documents	844 (10.72%)
Violations in the form of documents	467 (5.93%)
Violations in additional agreements	303 (3.85%)
Violations in the selection of the procurement procedure	281 (3.57%)
Violations during the conclusion of contracts	144 (1.83%)
Violation of the terms of consideration of tender proposals	122 (1.55%)
Violations in determining the procurement items	116 (1.47%)
Violation of the terms of competitive dialogue, limited participation bidding, or negotiation procedure	72 (0.91%)
Groundless rejection of tender proposals	61 (0.77%)
Late provision or failure to provide explanations on the tender documentation content by a procuring entity	27 (0.34%)
Failure to comply with the decision of the appeal body based on the results of consideration of a complaint	23 (0.29%)
Exceeding the amount of tender proposal security	11 (0.14%)
Conclusion of a contract before or without conducting procurement procedures	9 (0.11%)
Violation of the deadline for publication of tender documentation	4 (0.05%)
Purchase of goods, works, or services before or without procurement procedures	1 (0.01%)

Based on these data, in 2022, there was a certain degree of predominance of formal violations among those that were most frequently detected. Surprisingly, "Other violations" were the most frequently detected. As a result of 1,520 monitoring sessions, "other violations" were the only ones that were detected.

The following violations were detected in monitoring sessions initiated during the first half of 2023:[88]

86 It should be noted that in reality there could have been more groundless deviations identified if they were designated by monitoring officers as "violations in the tender proposal consideration procedure."

87 The detection of this violation was also hindered by the inability to carry out monitoring outside of procurement procedures (direct contracts or simplified procedures).

88 Data as of August 7, 2023.

Table 2.6. Types of detected violations in monitoring commenced in 2023 (first half-year period)

Type of violation detected by the monitoring authority	The number of monitoring sessions and the corresponding percentage in which violations were identified
Violations in tender documentation	2,200 (48.16%)
Violations in the tender proposal consideration procedure	2,110 (46.24%)
Other violations	1,610 (35.14%)
Violations in the information disclosure procedure	560 (12.25%)
Violations regarding non-cancellation of procurement transactions	363 (7.94%)
Violations in the form of documents	242 (5.30%)
Failure to provide information or documents	239 (5.23%)
Violations during the conclusion of contracts	109 (2.39%)
Violations in additional agreements	102 (2.23%)
Groundless rejection of tender proposals	80 (1.75%)
Violations in determining the procurement items	66 (1.44%)
Violations in the selection of the procurement procedure	55 (1.20%)
Violation of the terms of consideration of tender proposals	39 (0.85%)
Failure to comply with the decision of the appeal body based on the results of consideration of a complaint	15 (0.33%)
Late provision or failure to provide explanations on the tender documentation content by a procuring entity	13 (0.28%)
Exceeding the amount of tender proposal security	5 (0.11%)
Violation of the terms of competitive dialogue, limited participation bidding, or negotiation procedure	4 (0.09%)
Entering false personal information into the electronic procurement system and failure to make updates	2 (0.04%)
Violation of the deadline for publication of tender documentation	1 (0.02%)
Purchase of goods, works, or services before or without procurement procedures	1 (0.02%)

Therefore, during the monitoring efforts commenced in 2023 that led to the discovery of violations, "other violations" have shifted from the top spot in terms of detection frequency, but still retain their position within the top three. As of August 7, 2023, 1,610 violations were found (in 35.14% of monitoring cases) – slightly less than "violations in the tender documentation" – 2,200 (48.16%) and "violations in the tender proposal consideration procedure" – 2,110 (46.24%).

The list of violations that are displayed in the Prozorro system show that it **does not reflect word-to-word the list of violations under Article 164–14** of the Code of Ukraine on Administrative Offenses (hereinafter referred to as the Code). Establishing a direct correspondence between all the violations specified in the system and those outlined in the Code's article is not possible. In addition, a high share is made up of "other violations" that do not belong to the violations provided for in the Code.

To find out, **what exactly is included in the "other violations,"** let us consider a sample of monitoring sessions in which they are detected over a short, randomly selected period. For example, in procurement transactions announced from April 15, 2023 to May 15, 2023, as of June 22, 2023, 30 monitoring sessions were completed, in which "other violations" were detected. As it turned out, most often in these procurement transactions, public auditors found the following violations:

- failure to publish or late publishing of **justification of technical and qualitative characteristics of the procurement item**, the size of the budget purpose, and the expected value of the procurement item by posting it on their website in accordance with the Resolution of the Cabinet of Ministers of Ukraine No. 710 dated October 11, 2016 On the Effective Use of Public Funds – at least **12 cases**[89],
- **the product code was entered incorrectly for each individual nomenclature procurement item.** For example, "92620000–3: Sports-related services" **instead of** "92622000–7 – Sports-event organization services" – or "09130000–9 Oil and distillates: diesel fuel" instead of "09132000–3 – "Gasoline";

89 Procurement transactions with identifiers UA-2023–04–17–007439-a, UA-2023–04–26–009156-a, UA-2023–05–05–001856-a, UA-2023–05–03–003294-a, UA-2023–05–04–010004-a, UA-2023–05–03–013250-a, UA-2023–05–10–014141-a, UA-2023–05–03–012081-a, UA-2023–04–28–001137-a, UA-2023–04–28–001292-a, UA-2023–04–24–010104-a, UA-2023–05–03–007108-a

"09134200–9 – diesel fuel," which is a violation of the requirements of clause 14 of Order No. 1082 – at least **7 cases;**[90]

- **violation of the "24-hour rule"** (failure to provide the participant with 24 hours to correct shortcomings and, as a result, unjustified rejection of proposal, or vice versa, providing 24 hours instead of rejecting the proposal, or other violations – for example, the notice of elimination of shortcomings does not contain a list of identified shortcomings) – at least **5 cases;**[91]
- **violation of the deadline for conclusion of a contract** (for example, the procuring entity entered a procurement contract with the winning participant within a period exceeding 15 days (on the 20th day) from the day of a decision on the intention to conclude the contract, which violated the requirements of Resolution 1178, clause 46, paragraph 4) – at least **3 cases;**[92]
- the announcement of open bidding does not specify the place of delivery of goods in violation of the requirements of Article 21, part 2, clause 3 of the Law – at least **2 cases;**[93]
- violation of the requirements of Article 5, part 1, clause 3 of the Law – procurement principles – at least **2 cases;**[94]
- the list of changes to the tender documentation published by the Procuring entity is incomplete and there is missing information about the updated deadline for submitting bids, and the procuring entity applied a qualified electronic signature 3 days later – at least **1 case;**[95]
- violation of the rules for providing information and documents to the request during monitoring – violation of Article 8, part 5 of the Law – **1 case**[96]**.**

Therefore, within the category of "other violations," the top three most frequently recorded, continue to be primarily formal in nature (for instance, the inaccurate specification of a specific nomenclature item code). These violations have indirect implications for the efficiency, cost-effectiveness, and competitiveness of the procurement process.

Within these violations, there are some that could substantially impact the course and results of procurement transactions. Specifically, violations like the unjustified rejection or incorrect allowance for participants to correct inconsistencies in their tender proposals in breach of the "24-hour rule".

To analyze what **"violations in the tender documentation"** are detected by public auditors let's look at the conclusions in monitoring procurement transactions announced in an arbitrarily selected period – for example, April 15–30, 2023. As of June 22, 2023, 29 monitoring conclusions were published, which revealed "violations in the tender documentation." It was revealed that in the tender documentation of these procurement transactions, public auditors most frequently documented the following violations:

– ***Shortcomings related to the description of the grounds for refusing to participate in the procedure*** (and, as a result, the grounds for rejecting the tender proposal), reproduction by the procuring entity of the current version of the provisions of Article 17 of the Law and/or clause 44 of the Features (including the respective amendments) – at least 11 cases. Among them are:

  - The tender documentation does not specify the conditions for providing information and the method of confirming compliance with the grounds established by Article 17 of the Law **for certain categories of participants:** association of participants (or participants of the association), individuals – at least 3 cases;[97]
  - Establishing requirements to confirm that there are no grounds for refusal to participate **regarding the erroneous circle of persons** – at least 4 cases:[98]

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90 Procurement transactions with identifiers UA-2023–05–05–004622-a, UA-2023–05–01–011103-a, UA-2023–04–28–007452-a, UA-2023–05–05–001856-a, UA-2023–05–03–007108-a, UA-2023–04–27–008749-a, UA-2023–04–17–005627-a

91 Procurement transactions with identifiers UA-2023–04–19–010460-a, UA-2023–05–09–011431-a, UA-2023–05–03–001817-a, UA-2023–04–19–000578-a, UA-2023–04–27–007648-a

92 Procurement transactions with identifiers UA-2023–04–21–007902-a, UA-2023–04–21–007623-a, UA-2023–05–11–012649-a

93 Procurement transactions with identifiers UA-2023–04–18–006292-a, UA-2023–04–17–005627-a

94 Procurement transactions with identifiers UA-2023–04–25–010074-a, UA-2023–05–01–010368-a

95 https://prozorro.gov.ua/tender/UA-2023–05–01–008617-a

96 https://prozorro.gov.ua/tender/UA-2023–04–26–011002-a

97 Procurement transactions with identifiers UA-2023–04–27–009909-a, UA-2023–04–28–009942-a, UA-2023–04–28–007865-a

98 Procurement transactions with identifiers UA-2023–04–17–007439-a, UA-2023–04–27–008667-a, UA-2023–04–18–005176-a, UA-2023–04–27–011341-a

EXAMPLE 1:

The requirement to confirm the absence of grounds established in subclauses 3, 6, and 12, clause 44 of the Features states that **a participant's official** who is authorized by the participant to represent their interests during the procurement procedure and who signed the tender proposal, **not regarding the participant's manager** which contradicts the current version of the Features.

EXAMPLE 2:

The procuring entity specified the grounds for refusal to participate established by subclause 11, clause 44 of the Features, **only regarding the participant** but it also had to be done regarding **the ultimate beneficial owner, member, or participant (shareholder**) of a legal entity participating in the procurement procedure.

- Erroneous mention of Article 17 of the Law during the period of validity of clause44 of the Features or other non-compliance with the Features – at least 3 cases;[99]

EXAMPLE 3:

The procuring entity established a requirement that the winner to provide documents confirming the absence of grounds specified in clauses 3, 5, 6, and 12, Part 1 as well as Part 2, Article 17 of the Law – instead of requiring to confirm the absence of grounds specified in subclauses 3, 5, 6 and 12 and paragraph 14, clause 44 of Resolution No. 1178[100].

EXAMPLE 4:

The procuring entity noted: "In case of rejection of the tender proposal on the grounds specified in subclause 3, clause 41 of the Features defined by the Resolution of the Cabinet of Ministers of Ukraine No. 1178, namely: the winner did not provide documents confirming the absence of grounds in the manner established in the tender documentation according to **Article 17 of the Law, taking into account clause 44 of the Features** defined by the Resolution of the Cabinet of Ministers of Ukraine No. 1178." And it had to be: "when the winner of the procurement procedure did not provide documents confirming the absence of **grounds specified in clause 44 of the Features."**[101]

- Incorrect identification of documents required from the winner of the procurement procedure[102].

– **Lack of separate information required by applicable legislation**[103] – at least 9 cases, including:

- the tender documentation does not specify the **position of the procuring entity's official** authorized to communicate with the participants (the "authorized person" is not a position) – at least 4 cases;[104]
- the tender documentation does not specify **deadline for submission** of tender proposals – at least 3 cases;[105]
- the absence of a draft procurement contract with a mandatory indication of the procedure for amending its terms and conditions and the deadline for submitting tender proposals accordingly[106].

– Inconsistency with the **list of formal errors** approved by Order No. 710 of the Ministry of Economic Development, Trade and Agriculture of Ukraine dated April 15, 2020 – at least 2 cases;[107]

– **Failure to display amendments** in tender documentation: no amendments are shown that were made by the procuring entity as a new version of the tender documentation in addition to the original version and together with amendments to the tender documentation; there is no separate

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99 Procurement transactions with identifiers UA-2023-04-21-001664-a, UA-2023-04-26-009156-a, UA-2023-04-21-010835-a

100 https://prozorro.gov.ua/tender/UA-2023-04-26-009156-a

101 https://prozorro.gov.ua/tender/UA-2023-04-21-010835-a

102 https://prozorro.gov.ua/tender/UA-2023-04-28-009942-a

103 https://prozorro.gov.ua/tender/UA-2023-04-27-011617-a

104 Procurement transactions with identifiers UA-2023-05-01-011103-a, UA-2023-05-01-010017-a, UA-2023-05-01-009556-a, UA-2023-05-01-008617-a

105 Procurement transactions with identifiers UA-2023-04-26-011708-a, UA-2023-05-01-011425-a, UA-2023-04-18-001349-a

106 https://prozorro.gov.ua/tender/UA-2023-04-18-007652-a

107 Procurement transactions with identifiers UA-2023-04-24-010104-a, UA-2023-04-25-010074-a

published document with the list of amendments;[108]

- Not specified **method for confirming compliance with qualification criteria;**[109] there is a requirement that the participants must only submit certificates in an established form which is not considered a method of documentary confirmation;[110]
- **The grounds for rejecting the tender proposal do not correspond to** clause 41 of Resolution No. 1178 in the current version (except for the cases already mentioned above) – the procuring entity indicated as the basis for rejection that the tender proposal was set out in a different language(s) than the language(s) provided for in the tender documentation, while such a case is not the basis for rejecting a tender proposal[111].

Hence, a substantial portion of the inconsistencies identified by public auditors in the tender documentation pertains to the accurate (word-for-word) reproduction of legal norms by procuring entities, including references to clauses, parts, and articles from regulatory acts that encompass these norms. Shortcomings in this issue are identified especially often after amendments are made to regulatory acts.

Most of the violations mentioned earlier are of a formal nature and do not influence the selection of the winner (except in cases where a participant was unjustifiably disqualified due to an inaccurate reference. However, such actions are addressed by a separate administrative offense.). A significant part of violations listed above does not harm the rights and interests of participants, or the procuring entity's budget. Certain details that are either absent or inaccurately stated in the tender documentation can be found in the electronic fields on the procurement procedure's web page, such as the proposal submission deadline, reasons for disqualification, and more.

The detection of such violations at a later stage than the submission of tender proposals raises questions about possible ways to eliminate such violations at a later stage. Obviously, cancellation of procurement or termination of the contract with the winner is not a proportional measure of influence in cases where the tender documentation contained the above shortcomings, but this did not affect the results of the procurement procedure. But failure to establish any way to eliminate the violation would be contrary to the requirements of Article 8 of the Law.

In such situations, the responsibility to eliminate these violations beyond the tender proposal submission stage is often not feasible. It is worth contemplating the notion of amending Article 8 of the Law to include the provision of recommendations to the procuring entity in such instances, as an alternative to the requirement for eliminating violations.

Separately, it is worth considering cases when the shortcomings identified in the tender documentation can be considered significant and require mandatory correction at the stage of submitting tender proposals:

EXAMPLE 1:

Requirement to provide documents in paper form.

The State Audit Service of Ukraine revealed that in procurement UA-2023–04–21–009738-a, the procuring entity established a tender document **requirement** to submit documents established by Annex 3 to tender documentation **in paper form** thus violating Article 12, part 8 of the Law establishing that all information in procurement procedures is submitted in electronic form through the e-procurement system[112].

EXAMPLE 2:

Establishing an additional reason for rejecting participants related to physical verification of the availability of goods and their inspection before signing a procurement contract.

In the procurement procedure announced under identifier UA ID-2023–05–01–010368-a, the Department of the Eastern Office of the State Audit Service in Zaporizhzhia Oblast found that the procuring entity set the following requirements in the tender documentation:

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108 https://prozorro.gov.ua/tender/UA-2023–04–21–001664-a
109 https://prozorro.gov.ua/tender/UA-2023–04–21–006777-a
110 https://prozorro.gov.ua/tender/UA-2023–04–24–008606-a
111 Procurement transactions with identifiers UA-2023–04–21–007902-a, UA-2023–04–21–007623-a
112 https://prozorro.gov.ua/tender/UA-2023–04–21–009738-a

- before signing the contract, the procuring entity is granted the right to inspect the goods by their own or third-party expert organizations for compliance with technical requirements (provide a letter of guarantee);
- proposed products must be in stock. Participants are required to provide the Procuring entity with a letter of guarantee confirming their consent to the Procuring entity's inspection of the participant's proposed product and specifying the address.

The Department concluded that, according to clause 28 of the Features, the procuring entity forms the tender documentation in accordance with the requirements of Article 22 of Law No. 922 (considering these Features). The above requirements are not provided for by the above provisions of the legislation, which makes it impossible for them to be included in the Procuring entity's tender documentation. The right of the Procuring entity to set requirements of the tender documentation, in terms of requirements for procurement items, is restricted by the specified legal norms.

In addition, the procuring entity has provided that if the goods are not in stock or non-compliant, the tender proposal will be rejected as not meeting the terms of technical specification and other requirements for the procurement items[113].

EXAMPLE 3:

Tender documentation contains requirements for the participant to provide documents related to another procurement item.

The Department of the Northern Office of the State Audit Service in Chernihiv Oblast revealed during the monitoring of procurement procedure UA-2023–04–18–006292-a that the Procuring entity's tender documents did not meet the requirements of Article 22, part 3 of the Law because of the following: "The procuring entity provides that liquefied gas must meet the requirements of DSTU4047–2001 'Hydrocarbon liquefied fuel gases for municipal consumption.' 'Hydrocarbon liquefied fuel gases for municipal consumption' are intended for use as fuel for municipal consumption, as well as for industrial purposes in accordance with DSTU4047–2001. The requirements of this standard apply to enterprises operating on the territory of Ukraine with the following activities: production, storage, transportation, gas supply, processing, and use of liquefied gases, for their intended purpose, by other specialized enterprises.

So, the Procuring entity's tender documentation **contains requirements for the participant to provide documents related to another procurement item**. This violates Article 22, part 3 of the Law, in particular, the tender documentation may contain other information **required by laws** and which the procuring entity considers necessary to include in the tender documentation."[114]

It should be noted that the essence of the above violations can be considered as establishing discriminatory conditions, and the SFCB is not authorized to check the tender documentation for discrimination – this is the authority of the AMCU as an appeal body if there is a complaint from a business entity. However, the SFCB qualifies such violations solely as non-compliance of tender documentation with the requirements of the law, bypassing the issue of discrimination. At the same time, the identification and subsequent elimination of such violations contributes to the fact that procuring entities set more equal and transparent conditions for participation in the procurement procedure.

Based on the examined data concerning the identified violations, the following issues come to light:

1. There is a focus of the SFCB on identifying violations that do not affect procurement results, competitiveness, or saving budget funds, for example, such as specifying an incorrect product code for each individual procurement item or missing information about the position of the authorized person in the tender documentation.
2. However, some significant violations that the SFCB detects in practice and that may affect the procurement results are not provided for in Article 164–14 of the Code (for example, non-compliance with the legislation on granting 24 hours to eliminate inconsistencies and determining a participant the winner of the procurement procedure without such elimination).
3. **Violations that have the same name under the law, in practice, can be both purely formal and substantial in nature**.

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113 https://prozorro.gov.ua/tender/UA-2023–05–01–010368-a

114 https://prozorro.gov.ua/tender/UA-2023–04–18–006292-a

For example, the absence of information in the tender documentation about the deadline for submitting bids does not affect the procurement progress or results, since participants can get acquainted with this information in the announcement of the procurement procedure. However, the establishment of requirements for the provision of documents in paper form or for the inspection of facilities and meetings with representatives of the procuring entity can significantly affect competition and procurement results.

A noteworthy contrast in real-life situations, which are categorized similarly based on the Code's standards, suggests that the legislation formulates the criteria for violations either at an overly broad level (combining different actions into a single category) or without specifying the essential characteristics (for instance, a single action without indications of the associated violation consequences).

4. The list of violations in the Prozorro electronic procurement system **does not meet the list under Article 164–14 of the Code.** Consequently, in certain instances, it becomes unfeasible to directly align with the violations outlined in the Code, making it challenging to gather relevant statistics regarding the specific violations (in accordance with the Code) that were detected and whether they correspond to the elements of violations established in the Code.
5. Legal regulations concerning the content of tender documentation still require the procuring entity's personal inclusion of information that is displayed or could be displayed on the procurement page automatically, given its universal nature. For example, the grounds for refusing to participate in the procurement procedure, a description, and examples of formal errors, and contact details of the authorized person. Procuring entities could avoid making mistakes when specifying this information if it were as unified as possible and displayed automatically on the procurement page in the Prozorro system. Accordingly, SFCB would not spend resources identifying such shortcomings.

2.2. Analysis of data on monitoring results and their legal consequences

After reviewing the commencement and process of monitoring, along with the types of violations detected, our next step involves assessing the influence of monitoring on procurement transactions. This analysis will encompass the extent to which auditors' requirements for eliminating violations have been met, the subsequent course of the monitored procurement transactions, and the frequency of cases involving judicial appeal of the auditors' conclusion.

Monitoring results and obligations to eliminate violations

According to the Prozorro e-system, when public auditors initiate monitoring of a public procurement transaction, they subsequently uncovered legal violations with the following frequency:

- 88.74% of cases – (8,840 out of 9,960 initiated) in monitoring initiated in 2020;
- 77.96% of cases (8,100 out of 10,380 initiated) – in monitoring initiated in 2021;
- 66.06% of cases (7,870 out of 11,920 initiated) – in monitoring initiated in 2022;
- 70.11% of cases (4,570 out of 6,520 initiated) – in monitoring initiated in the first half of 2023 (excluding those that are still ongoing)[115].

Monitoring and detecting procurement violations would not make sense if measures were not taken in the future to eliminate these violations and, if possible, overcome their consequences. Let us consider the final stage of monitoring, actions to impact the course of the procurement process and the procuring entity.

Based on the monitoring results, SFCB officials draw and sign **conclusions** on the results of procurement procedure monitoring (hereinafter referred to as the conclusion), to be further approved by the SFCB head or deputy head. In conclusion, in addition to the details of the procurement, item, and the procuring entity, the following information may be specified:

115 Information as of August 7, 2023.

- **description of the violation(s)** of public procurement legislation identified by monitoring of the procurement procedure;[116]
- **obligation to eliminate** violation(s) of public procurement legislation[117].

The law does not specify a definitive list of methods by which public auditors can compel the procuring entity to rectify violations. That's why **Prozorro does not contain fields with such options.** To find out which way to eliminate the violation was determined by the SFCB, one needs to read the content of the conclusion based on the monitoring results in each specific case.

However, information about the elimination of violations based on the results of monitoring is reflected to a certain extent in the reports of the State Audit Service.

According to the State Audit Service's report for 2021, based on the results of procurement monitoring conducted by the State Audit Service bodies during 2021, violations were prevented, including by ***cancellations of 1,341 tenders***, in the amount of almost UAH 9.7 bln (almost UAH 10.5 bln) and ***termination of 1,421 contracts*** in the amount of more than UAH 3.2 bln (over UAH 2.9 bln)[118]. Moreover, the result was the ***reduction of the contract price*** (including per unit price) in 5 cases worth UAH 98,900.

According to the State Audit Service's report for 2022, based on the results of procurement monitoring conducted by the State Audit Service bodies, violations were prevented, including ***by cancellations of 1,311 tenders***, in the amount of almost UAH 7.9 bln and ***termination of 1,281 contracts*** in the amount of more than UAH 6.7 bln[119].

So, according to the summarized data, the main ways to eliminate (or prevent, according to the reports) violations identified by monitoring results are to cancel a procurement transaction and terminate a procurement contract. Obviously, these methods of eliminating (preventing) violations are used in cases where other methods of adjusting the procurement process are procedurally impossible.

Procuring entity response indicators to monitoring conclusions

According to the Law, procuring entities have three **options for a lawful response** to monitoring conclusions: within five business days after the state financial control body publishes the conclusion, the procuring entity shall submit the following through the e-procurement system:

- information and/or documents confirming **the elimination** of violation(s) of the public procurement legislation set out in the conclusion,
- or reasoned **objection** to the conclusion,
- or information about the reasons why it is **impossible** to eliminate detected violations.

In addition, if the procuring entity does not agree with the information provided in the conclusion, the procuring entity has the **right to appeal the conclusion** before the court within 10 working days from the date of its publication.

However, even if the procuring entity has published information and/or documents on the elimination of the violation, this is not enough for violations to be recorded in the system as eliminated. The SFCB must confirm the fact of elimination of the violation and record it in the Prozorro system within five working days after the relevant information is published by the procuring entity. Then, according to the Law, the procuring entity's official and/or the authorized person is not brought to administrative liability for violating procurement legislation for violations that were eliminated by the procuring entity in accordance with the conclusion.

Therefore, the analysis of the specific weight of monitoring sessions with eliminated violations may be complicated by the fact that procuring entities and public auditors may in practice not put a mark on the

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116 Except in cases where no violation is detected.

117 Except in situations where the procuring entity terminated the tender during the monitoring period or when the tender was recognized failed.

118 Statistical report of the State Audit Service of Ukraine for 2021. URL: https://dasu.gov.ua/ua/plugins/userPages/1985

119 Statistical report of the State Audit Service of Ukraine for 2022. URL: https://dasu.gov.ua/ua/plugins/userPages/2652

elimination of violations for various reasons: appeal of the conclusion in court, cancellation of the procurement procedure by the procuring entity, the human factor, etc.

Let's look at how procuring entities' actions to respond to monitoring conclusions are reflected in practice in the Prozorro electronic procurement system.

Out of the 8,100 monitoring sessions initiated in 2021 in 10,170 lots, during which violations were identified, the Prozorro system provides the subsequent actions taken by the procuring entity to address these violations, as follows:

Table 2.7. Information on the elimination of violations as a result of monitoring initiated in 2021.

Status of elimination of violations by the procuring entity (in general)	Number of monitoring sessions
Completely eliminated[120]	1,770 (21.90%)
Not eliminated	44 (0.54%)
Partially eliminated	8 (0.10%)

The system does not contain information about the elimination of violations based on the results of the remaining 77.5% of monitoring sessions; in physical terms, this is 6,270 monitoring sessions in 8,080 lots.

Since the lack of information about the elimination of violations can be caused by various reasons, we analyzed what happened in procurement procedures with monitoring, in which violations were detected, but for which there is no information about the situation with elimination of violations.

In 2021, a total of **6,270 such monitoring sessions were initiated in 8,080 lots**. Now, those lots have the following statuses:

Table 2.8. Status of lots where violations were detected by monitoring in 2021 and there is no mark on their elimination.

Substatus of a lot	Number of monitoring sessions
Completed. All contracts are published	5,440 (86.81%)
Completed. Lot canceled	637 (10.16%)
Completed. Unsuccessful lot	239 (3.81%)
Active lot. No published contracts	58 (0.93%)

The first line shows that even though according to the results of **5,440** monitoring sessions initiated in 2021, violations were revealed and there is no information in the system about their elimination. But in **6,970** lots that concerned these monitoring conclusions, procurement contracts were concluded – despite the presence of monitoring and detection of violations.

This suggests that 5,440 monitoring sessions in 6,970 lots were either concluded after the contract had been finalized, had no impact on the completion of the procurement procedure and contract conclusion, or contained a violation resolution method that didn't involve alterations to the procurement course. Among them, **1,199** monitoring conclusions were appealed **in court**, which is 22% of the number of conclusions in which violations were recorded, there is no information about its elimination, and a contract was concluded.

The question arises whether the procurement contracts were fulfilled based on the results of such procedures and whether procuring entities made payment under such contracts. From the above sample of cases that remained without appeal in court, the contracts were executed in **3,510 lots with 2,390 monitoring sessions** that is, in more than half of the cases.

In general, if we correlate this indicator with the number of monitoring sessions and procurement transactions in which violations were detected, it turns out that among the lots in which violations were detected by monitoring (8,100 monitoring sessions), **29.5% of monitoring findings** (2,390 monitoring sessions) **did not affect the procurement course at all,** since in **34.5% of lots** (3,510 lots out of 10,170), the procurement transaction

120 Due to the features of building the module, this line also includes 99 cases when procuring entities reported that it was impossible to eliminate a violation.

was successfully finalized, and the contract was completed, without appeal in court.

Let us analyze whether this situation changed in 2022.

Out of the **7,870** monitoring sessions initiated in 2022 in 8,470 lots, during which violations were identified, the Prozorro system provides information on the subsequent actions to eliminate these violations:

Table 2.9. Information on the elimination of violations as a result of monitoring sessions initiated in 2022.

Status of elimination of violations by the procuring entity (in general)	Number of monitoring sessions
Completely eliminated	2,010 (25.53%)
Partially eliminated	25 (0.32%)
Not eliminated	17 (0.22%)

The system does not have any information about the elimination of violations revealed by the remaining **74.3%** monitoring sessions in 2022.

In physical terms in 2022, **5,820** monitoring sessions were launched regarding **6,250** lots, and the results revealed violations with no information about the status of their elimination. Those lots now have the following status:

Table 2.10. Status of lots where violations were detected by monitoring in 2022 and there is no mark on their elimination.

Substatus of a lot	Number of monitoring sessions
Completed. All contracts are published	5,090 (87.49%)
Completed. Lot canceled	595 (10.22%)
Completed. Unsuccessful lot	97 (1.67%)
Active lot. No published contracts	78 (1.34%)

On the first line we can see that according to the results of **5,090 monitoring sessions** started in 2022 for 5,380 lots in which violations were detected, there is no information on the elimination of violations, and instead procurement contracts were concluded despite ongoing monitoring and detected violations.

This suggests that 5,090 monitoring sessions in 5,380 lots were either concluded after the contract had been finalized, had no impact on the procurement course and contract conclusion, or proposed a violation resolution method that didn't involve alterations to the procurement course. Among them, only 979 monitoring conclusions were appealed in court, which is 19.23% of the number of conclusions in which a violation was recorded, there is no information about its elimination, and a contract was concluded.

In the part that was not appealed in court (4,111 monitoring sessions) **contracts are completed** in **2,380** lots with **2,230** monitoring sessions, that is, more than half of the cases without appeal in court.

In general, if we correlate this indicator with the number of monitoring sessions and procurement transactions in which violations were detected, it turns out that among the lots in which violations were detected by monitoring, **28% of monitoring findings (2,230 out of 7,870) did not affect the procurement course at all** since in 28% of cases (2,380 lots out of 8,470), the procurement was successfully finalized, and the contract was completed, without appeal in court. Compared to 2021, this indicator decreased by 5%, but remains significant.

Consequently, we observe indicators of relatively low monitoring efficiency in procurement procedures, given that in **nearly a third of cases where violations are identified, the existence of a monitoring report does not influence the course of the procurement transaction.** This may be due to several reasons. For example, public auditors found a minor violation and ordered the procuring entity to take measures to prevent this violation in the future. Or in fact, the violation was eliminated, but the parties did not make a corresponding mark in the Prozorro system. Or the violation was discovered at the stage of execution of the contract, and the public auditors did not consider it so significant as to oblige the procuring entity to terminate the contract. But even if the procuring entity's behavior in these cases is legitimate, the question arises about the expediency of conducting more than 2,000 monitoring sessions per year, which revealed only minor violations and/or at the stage when violations cannot be eliminated.

In cases where significant violations are detected, it is necessary to ensure an effective mechanism for implementing the requirements contained in the monitoring report.

Bringing to liability for violation of procurement legislation

As noted in the previous sections of this study, the next stage based on monitoring results where procuring entities did not eliminate violations and did not appeal conclusions in court, is bringing the procuring entity's officials to administrative liability.

Since information on the number of reports and resolutions on administrative offenses is not displayed in the public analytics module, we use SFCB's annual statistical progress reports as a source of information.

According to the State Audit Service's report for **2021**, based on the results of procurement monitoring conducted by the State Audit Service bodies during 2021, violations were prevented, including by **cancellations of 1,341 tenders**, in the amount of almost UAH 9.7 bln and **termination of 1,421 contracts** in the amount of more than UAH 3.2 bln[121].

According to the State Audit Service's report for **2022**, based on the results of procurement monitoring conducted by the State Audit Service bodies during 2022, violations were prevented, including by **cancellations of 1,311 tenders**, in the amount of almost UAH 7.9 bln and **termination of 1,281 contracts** in the amount of more than UAH 6.7 bln[122].

Information on bringing the perpetrators to administrative liability in the statistical reports of the State Audit Service is contained in the context of state financial control measures for procurement in general – not just monitoring.

According to the progress report of the State Audit Service and its interregional territorial bodies for January – December 2021 (Form No. 2-dfk), the State Audit Service, its interregional territorial bodies **based on the results of monitoring and inspections of procurement transactions:**

- sent **843** administrative offense reports for violation of procurement legislation (Article 164–14 of the Code of Ukraine on Administrative Offenses) to the court;
- brought **402 individuals** to administrative liability with imposed administrative penalties (fines) for the total amount of UAH 2.07 mln;
- administrative fines were effectively imposed in the amount of UAH **1.02 mln**[123]**.**

According to the progress report of the State Audit Service and its interregional territorial bodies for January – December 2022 (Form No. 2-dfk), the State Audit Service, its interregional territorial bodies **based on the results of monitoring and inspections of procurement transactions:**

- sent **374** administrative offense reports for violation of procurement legislation (Article 164–14 of the Code of Ukraine on Administrative Offenses) to the court;
- brought **153 individuals** to administrative responsibility with imposed administrative penalties (fines) for the total amount of UAH 620,500;
- administrative fines were effectively imposed in the amount of UAH 441,730[124].

In addition, the reports of the State Audit Service contain **information about its interaction with law enforcement agencies.**

For example, in **2021,** the work in this direction had the following indicators:

- The number of procurement audit materials submitted to law enforcement agencies is 196;
- The number of information pieces sent to law enforcement agencies on procurement inspections is 217;
- The number of pre-trial investigations initiated based on the materials of procurement inspections is 47.

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121 Statistical report of the State Audit Service of Ukraine for 2021. URL: https://dasu.gov.ua/ua/plugins/userPages/1985

122 Statistical report of the State Audit Service of Ukraine for 2022. URL: https://dasu.gov.ua/ua/plugins/userPages/2652

123 Statistical report of the State Audit Service of Ukraine for 2021. URL: https://dasu.gov.ua/ua/plugins/userPages/1985

124 Statistical report of the State Audit Service of Ukraine for 2022. URL: https://dasu.gov.ua/ua/plugins/userPages/2652

The report does not contain separate statistics on similar indicators based on the results of public procurement monitoring, but 90 out of 528 procurement inspections, according to the report, were conducted after monitoring.

In **2022**:

- The number of procurement audit materials submitted to law enforcement agencies is 305;
- The number of information pieces sent to law enforcement agencies on procurement inspections is 270;
- The number of pre-trial investigations initiated based on the materials of procurement inspections is 74.

The report does not contain separate statistics on similar indicators based on the results of public procurement monitoring, but 146 out of 587 procurement inspections, according to the report, were conducted after monitoring.

Some problematic features can be seen from the above data:

1. the number of pre-trial investigations initiated is significantly lower than the number of materials and information sent to law enforcement agencies;
2. the number of fines actually paid is lower than the amount of fines imposed;
3. a significant number and scope of violations eliminated based on the results of monitoring by canceling procurement transactions and terminating contracts indicates that violations were detected at a stage when it was no longer possible to eliminate them in any other way.

When considering the issue of bringing offenders to administrative liability, it is necessary to pay special attention to **the problem of SFCB's access to personal data** of such persons to draw up an administrative offense report, as well as issue and enforce a ruling by a court, where necessary.

As mentioned in Section 1 of this study, according to information published on the website of the State Audit Service[125] and received in a letter from it, it was established that the possibility of bringing the procuring entity to liability is related to the problem of SFCB's access to personal information of individuals who committed an administrative offense. To bring a person to liability at different stages, the following personal data are required: full name, date of birth, place of residence/stay, tax identification number/passport data (for persons who do not have tax identification number).

The law provides that authorized persons, when using the Prozorro system, enter personal data, consent to their processing and update them in case of any amendments[126].

To find out whether this is enough in practice to obtain information by SFCB and why not, we contacted SE Prozorro with a request about the storage of personal data of authorized persons of procuring entities in the Prozorro system and about the access to this data by SFCB. The following was found from the response:

- From a technical standpoint, the possibility to enter the personal data of an authorized persons into the Prozorro system is realized through the following process: in the testing module, authorized persons give their consent for personal data processing, and these data are subsequently entered into the Prozorro system automatically when they apply their electronic signature. This means that the content of the data is limited to the content of the electronic signature data.
- Authorized persons of procuring entities do not have the opportunity to use the Prozorro system without entering their personal data into the system (by applying the electronic signature) and without giving consent to their processing.
- The system stores a person's unchanged personal data read by the system from the electronic signature. The electronic signature certificate information is public since it may be seen/verified on the portal of the Central Certifying Authority.
- The options of entering personal data into the system manually, changing the data stored in the system are not implemented.

SE Prozorro has not recorded applications to SFCB to retrieve personal information. The data available in the procurement procedure system is available to the state financial control bodies for information and further use.

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125 News "Evil intention or unfortunate accident, or who prevents us from exercising our powers?" URL: https://dasu.gov.ua/ua/news/775

126 Part 2, Article 11 of the Law of Ukraine On Public Procurement.

Efforts focused on enabling automated access for the SFCB to the personal data of authorized persons of the procurement procuring entities are not on the agenda. This decision is based on information from the SFCB, which indicates that the SASU would require separate permission to use personal data for each specific conclusion resulting from monitoring. This presents certain challenges for the SASU in fulfilling their responsibilities, and these issues should be addressed through legislative means rather than technical adjustments.

SE Prozorro also believes that **a more effective way to obtain complete and reliable information about the personal data of such persons may be to contact the information management bodies** (for example, the State Migration Service) and **separate state registers** since Prozorro currently does not have the ability to provide separate functionality for collecting and storing the necessary information and guarantee its complete accuracy[127].

Therefore, the regulatory issue of inadequate oversight concerning the SFCB's access to essential databases is evident, particularly in the context of the challenges the SFCB faces in accessing the personal data of individuals they intend to hold administratively liable.

In summarizing the examination of procurement monitoring data, let us highlight the key features.

Number of monitoring sessions is growing annually and may reach 13,000 in 2023. The *coverage* of procurement transactions by monitoring reached 4% by number and 25% by expected price in 2020–2022.

Even though the SFCB in May 2023 received the authority to *monitor direct contracts* there was no significant activity in this direction in the first three months. The number of such monitoring sessions as of August 6 did not exceed 13, and violations have so far been detected only in two transactions; in both cases, the procuring entity did not publish the contract and did not reflect the grounds for its conclusion.

According to the Prozorro system, the most prevalent *trigger for commencing monitoring* is initiated by the SFCB, accounting for over 93% in 2022. Hypothesis about *problems with using risk indicators* as grounds for starting monitoring was confirmed. The problem is related not only to the non-compliance of risk indicators with the current legislation but also to several other difficulties in their use that arose before 2022.

The data regarding the quantity and categories of identified violations *support the hypothesis that substantial resources are allocated to the identification of "other" violations*, which encompass breaches not stipulated by the Code and system settings. *These violations are primarily of a formal nature* and often do not impact cost savings or the selection of the winner. For example, 35.31% of monitoring sessions initiated in 2021 revealed "other violations," while 32.38% showed violations in the tender documentation. Within the category of "other violations," the top three most frequently recorded in 2023, continue to be primarily formal in nature (for instance, the inaccurate specification of a specific nomenclature item code). These violations have indirect implications for the efficiency, cost-effectiveness, and competitiveness of the procurement process. Furthermore, it is important to note that within these violations, there are some that could substantially impact the course and results of procurement transactions, in particular, violation of the 24-hour rule with an unjustified failure to provide or erroneous provision to participants of an opportunity to correct inconsistencies in their tender proposals. This practice indicates that it is necessary to update the legislative classification of violations depending on their severity and provide for different consequences for each category, respectively.

A considerable share of the "violations in the tender documentation" pertains to the word-to-word replication of content of legislation by procuring entities. Therefore, to reduce the number of such violations and the cost of SFCB resources to detect them, it is advisable to continue and complete the development of electronic tender documentation. For example, provide that information from the legislation will be displayed in electronic fields and will not require the procuring entity's actions. The procuring entity will prepare only the part of the tender documentation that requires decisions, information, and other similar data from them.

The list of violations in the Prozorro system available for selection, does not have word-by-word list of offenses in Article 164–14 of the Code, and this also needs to be adjusted.

Regarding the method of eliminating the violation since the Law does not provide for an exhaustive list of such methods, the Prozorro system neither contains fields that would reflect such options. According to reports of the State Audit Service, in 2021, such methods included cancellation of 1,341 tenders, the termination of 1,421 contracts, and cancellation of 1,311 tenders, and termination of 1,281 contracts in 2022.

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127 Letter from SE Prozorro No. 206/01/1151/11 dated July 31, 2023. URL: https://drive.google.com/file/d/1vpCPmCVE1wu8InhSTq7pHS0AkDBFrulM/view?usp=sharing

Every year, up to 29% of monitoring sessions that detect violations do not have a mark on the elimination of violations, even though they have the status of successfully completed, with a concluded and executed contract, without a sign of appeal in court. This feature may indicate both incomplete entry of information into the system, and that these monitoring did not affect the course of the procurement, in particular since minor violations were detected at a late stage of the procedure.

At the stage of holding individuals liaable for their failure to eliminate violations, the challenge of the SFCB's access to the personal data of the perpetrators is substantiated. Authorized persons' electronic signature data stored in the Prozorro system do not contain the full amount of information required for drawing up a report, a resolution, their enforcement. There is a necessity for the SFCB to establish cooperation with the organizations and institutions responsible for maintaining verified personal data to obtain access to such information.

Other problematic features were also identified at this stage: the number of pre-trial investigations initiated is significantly lower than the number of materials and information sent to law enforcement agencies; the volume of fines entered is lower than the volume of fines imposed.

Furthermore, the monitoring process *does not adequately encompass the assessment of the expected value formation and the need for procurement*, apart from control over the procuring entity publishing a justification of the technical and qualitative specifications of a procurement item, the allocation of the budget, and the expected value of the procurement item on the procuring entity's website, in accordance with Cabinet of Ministers of Ukraine Resolution No. 710 dated October 11, 2016 (as amended).

The processes of generating expected value and procurement needs are not sufficiently covered by control. This leads to the fact that procurement transactions are often conducted at inflated prices and/or without a real objective need, especially under martial law. In fact, such transactions are becoming one of the most striking manifestations of inefficient use of budget funds.

However, the impact of monitoring in such instances is limited, as the SFCB lacks the necessary legal and technical prerequisites to evaluate whether the prices are inflated or if the need for the procurement is unjustified.

SECTION 3. Problematic issues of public procurement monitoring practice (on the example of the analysis of the application of the "24-hour rule"

As noted in the previous sections, the number of public procurement monitoring sessions that start annually has already reached 10,000. Therefore, to analyze the practice of public auditors, check whether hypotheses about problems are true, as well as identify other difficulties that arise in practice, it is necessary to choose a certain part of the practice for analysis.

Since the legal regulation of public procurement has changed significantly since October 19, 2022, the monitoring sample for analysis should have concerned procurement transactions announced on or after October 19, 2022. For the period from October 19, 2022, to April 19, 2023, according to the Prozorro system, public auditors began 5,990 monitoring sessions, which concerned 6,630 lots. If we take the conclusions of monitoring over a shorter period, their content will relate to various issues of compliance with the public procurement legislation.

Therefore, the object of analysis needs to be narrowed down by content.

As such a feature, we chose the question of how public auditors interpret the "24-hour rule." This is one of the most important tools to combat the practice of rejecting participants because of mistakes they made in documents. According to it, if the procuring entity finds shortcomings in the tender offer, the procuring entity shall report this on the procurement page and provide the participant with 24 hours to eliminate inconsistencies.

Since the rule has undergone repeated changes, the practice of its application causes discussions among procuring entities and participants. Therefore, highlighting the SFCB's approaches to this norm will be valuable for all parties to the procurement process, as well as contribute to the unification of practices. Using the example of a specific norm, we will look at which problems are identified in the practice of monitoring.

Basic principles of the "24-hour rule" in Ukrainian procurement legislation

The first version of the Law of Ukraine On Public Procurement (hereinafter referred to as the Law) did not allow correcting inconsistencies in tender proposals after the deadline for their submission. Any mistake that affected the content of the tender proposal and made it inappropriate led to rejection. This was actively used by procuring entities who wanted to limit competition by filling the text of the tender documentation with hidden requirements.

In turn, the "loopholes" that a participant could use to win with flawed documents of the bid were, in particular, the following:

- proving that the mistake is formal and does not affect the content of the bid;
- proving that the information was requested without a specific form and is available in the bid, but is contained in another document;
- proving that the procuring entity can find information missing in the bid in open state registers, with free access;
- proving that the documents requested by the procuring entity are not provided for by law and do not exist at all.

That is, at the stage of consideration of tender proposals, the procuring entity and the participant were limited in their decisions and arguments only to those documents that the participant managed to submit before the deadline for submission. It was forbidden to further upload, correct, or change documents, and an inconsistency in content meant rejection.

The option to correct mistakes in the submitted tender procedure appeared in April 2020 due to a big update of the Law of Ukraine On Public Procurement. Such a step looked truly revolutionary against the background of years that have passed without such an opportunity. Since then, the Law has required procuring entities to act more tolerantly. If, when considering the tender proposal, the procuring entity finds an inconsistency in the information/documents submitted in the tender proposal and/or the submission of which was required by the tender documentation, the procuring entity must post a relevant notification on the tender page in Prozorro. The notification shall require the participant to eliminate inconsistencies within 24 hours after the requirement was published and have the list of inconsistencies and specific tender document requirements violated by them.

To correct a mistake, the participant has the right to upload updated documents or add new ones. When 24 hours have elapsed, the procuring entity must review the participant's tender proposal, taking into account corrections and additions.

The procuring entity could post a request for the elimination of inconsistencies only once in relation to one participant, except in cases related to the implementation of the AMCU decision.

The Law clearly defined ***which parts of the proposal can be corrected:***

- qualification part (documents and information about employees, experience in executing a similar contract, material and technical base, financial viability);
- documents and information about the powers of the signatories of the participant.

Therefore, it was not allowed to correct documents of the technical part, security (bank or insurance guarantee), and other documents that are not related to the qualification and confirmation of the signatory's powers.

During the legal regime of martial law, the Cabinet of Ministers of Ukraine adopted Resolution No. 1178 dated October 12, 2022, which approved the Features of public procurement of goods, works and services for procuring entities provided for by the law of Ukraine On Public Procurement for the period when martial law is effective in Ukraine and within 90 days after its termination or cancellation (hereinafter referred to as the Features).

In particular, the government introduced a new approach to correcting errors in tender proposals in the Features; with the entry into force of the resolution, participants were given the right to correct not only the qualification part and documents on the powers of the signatory, but also other components of their proposals. The Features contain the following definition of "inconsistencies":

Inconsistency in the information and/or documents submitted by a participant of the procurement procedure as part of the tender proposal and/or following by requirement in the tender documentation means, among other things, **lack of information and/or documents in the tender proposal** if such submission is required by the tender documentation (**except in cases of the lack of** security of the tender proposal, if such security was required by the procuring entity, and/or **the lack** [*the word "lack" has been added to the new version of the Features, effective February 25, 2023 – author's note*] **of information (and/or documents) about the technical and qualitative characteristics of the procurement item**, proposed by participants in their tender proposals).

Inconsistency in procurement item information and/or documents provided by participants in compliance with the requirements of **the technical specification** are mistakes which, **when corrected do not lead to changes in procurement item** of the participant's tender proposal, i.e., product name, brand, model, etc."

The resolution did not contain any other restrictions on mistakes that can be corrected. That is, starting from October 2022, procuring entities are required to post requirements for the elimination of inconsistencies in almost most cases, in particular:

- as before – in the qualification part, as well as in documents on the powers of the signatory;
- for the first time – in documents that are not qualification or such that confirm powers (for example, a consent to the processing of personal data, price calculations, etc.);
- in securing the tender proposal (most often, a bank guarantee) – in all cases, except for the lack of security;
- in the technical part of the tender proposal – if the correction does not lead to a change in the procurement item, product name, brand, model, etc., and at the same time information or document on the technical and qualitative characteristics of the item is available in the proposal.

Thus, according to **explanations** provided by the Ministry of Economy in Letter No. 3323–04_22523–06 dated May 17, 2023, for the period of validity of martial law in Ukraine and within 90 days after its termination or cancellation, the Features **provide for an extended option to correct inconsistencies**. This allows a participant whose proposal contains those inconsistencies **to eliminate them to preserve the most cost-effective proposal** for the procuring entity.

The described innovations have generated discussions among procuring entities, participants, and the professional community. Despite the fact that the provision looks clear as such, in practice, when considering specific situations, procuring entities often had doubts about whether it was necessary to provide 24 hours to eliminate inconsistencies in a particular case. For example, has the procurement item changed if its technical characteristics are corrected? Can a bank guarantee that does not contain all the required banking details be considered as lacking? Do the documents provided in compliance with the requirements of the terms of reference include certificates that are required, but are not related to the procurement item?

The problematic aspects of this provision are most clearly reflected in the practice of procurement monitoring, in which procuring entities provided 24 hours to eliminate inconsistencies, and public auditors provided a legal assessment of this. Therefore, we analyzed the monitoring practice and summarized the results.

The practice analysis methodology applied

When studying the results of monitoring procurement transactions, we used information sources, time limits, and key requests:

- source of information – Prozorro e-procurement system;
- time limits – monitoring conclusions in procurement transactions announced from February 25, 2023, to May 18, 2023; and from May 19, 2023, to May 25, 2023;
- key requests: "40 Features," "40 of these Features," as well as "43 Features," "43 of these Features" – in the corresponding time intervals.

Thus, the subject of analysis encompasses the conclusions of the monitoring sessions conducted by the State Audit Service and its regional offices regarding the application of the "24-hour rule" in procurement transactions announced between February 25, 2023, and May 25, 2023.

On May 19, 2023, a new version of the Features came into force, in which the numbering of clauses was changed: clause 40 became clause 43, but the content of the provision did not change.

Therefore, the following **search requests** were applied for the analysis:

- "40 Features," "40 of these Features" – in the period of announcement of the procurement procedure between February 25, 2023, and May 18, 2023;
- "43 Features," "43 of these Features" – in the period of announcement of the procurement procedure between May 19, 2023, and May 25, 2023.
- In total, as of June 20, 2023, **57 conclusions** were found.

Key questions we sought to investigate:

- statistical indicators and the essence of violations of the "24-hour rule," which are most often set by public auditors when monitoring procurement procedures;
- ways to eliminate violations of the "24-hour rule" offered by public auditors to procuring entities at

different stages of procurement procedures and factors that determine the choice of a particular method of eliminating violations;
- which shortcomings and in which parts of tender proposals can be corrected according to the "24-hour rule," and which cannot, according to the versions of public auditors set out in their conclusions, as well as the factors affecting the ability to correct shortcomings in controversial situations.
- problematic issues in the application of the "24-hour rule" and elimination of its violations, ways to solve these problematic issues that can be proposed.

Type of monitoring conclusions related to the "24-hour rule" issue

The identified monitoring conclusions, which considered compliance with the "24-hour rule" can be categorized as follows:

1. Conclusions in which the auditors found that the procuring entity **should have provided** 24 hours to eliminate inconsistencies, but the procuring entity **failed to do that** contrary to clause 40 of the Features.

This category includes **23 cases** which can be divided into two subcategories:

1.1. Conclusions show that **due to the failure to provide 24 hours** to eliminate inconsistencies **the procuring entity rejected** the tender proposal of the participant (the most cost-effective), perceiving the shortcomings as incorrigible. However, public auditors assessed the inconsistencies as correctable in accordance with paragraph clause of the Features.

The number of such cases is **16.**

The most common shortcomings mentioned in such conclusions are: 9 cases of shortcomings in technical part of the proposal; 3 cases of shortcomings in qualification part; and 4 cases of shortcomings in other documents[128].

Violations are ***mostly eliminated by*** **termination of contractual obligations** with a tender winner (contract termination) – 11 cases; **prevention of detected violations in the future** happens less often – 4 cases, and there was also one case of obligation to reject the cheapest proposal since the procuring entity had that procedural option at that time.

As you can see, there is **a difference in the approaches** of public auditors on **how should the procuring entity eliminate a** "24-hour rule" violation after rejecting the participant's tender proposal without the opportunity to eliminate the shortcomings of the tender proposal.

On the one hand, 11 cases of the procuring entity's obligation to terminate the contract with an unreasonably determined winner, whose proposal is more expensive, look justified because the procuring entity rejected the cheapest tender proposal, missing the stage of eliminating inconsistencies. Therefore, there was no reason to proceed to the consideration of the next proposal and determine it as winning. Here we have a missed opportunity to accept the cheapest proposal.

On the other hand, 24 hours were not provided, therefore it is not known whether the rejected participant will be able to correct the shortcomings in their proposal, especially if they were significant and in large numbers.

To illustrate the difference in approaches to the method of eliminating violations in this subcategory, it is worth providing examples from monitoring practice.

EXAMPLE 1:

The Northern Office of the State Audit Service established in the conclusion of monitoring UA-M-2023–04–24–000087[129] that the following shortcomings became the ground to reject the cheapest tender proposal submitted by Ukrainian Construction Company LLC:

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128 The number of cases of correction or non-correction of shortcomings in a certain part of the proposal may not coincide with the number of monitoring conclusions, since one conclusion may establish the fact of correction or non-correction of shortcomings simultaneously in different parts of the proposal.

129 Monitoring UA-M-2023–04–24–000087 in procurement UA-2023–03–27–004826-a (Northern Office of the State Audit Service)

- **the contractual price did not include the calculated inflation rate** C=1.028 (the total construction period is considered), to the total costs associated with inflationary processes during work, which is non-compliance with the conditions of the technical specification and other requirements to the procurement item;
- **the submitted.imd file for UAH 9,592,613.32 did not correspond to the contractual price submitted by the participant, i.e., UAH 9,543,990.40** which was a non-compliance with the terms of the technical specification and other requirements to the procurement item of the tender documentation.

The public auditors concluded: *"The procuring entity rejected the tender proposal of Ukrainian Construction Company LLC as not meeting the conditions of the technical specification in terms of correcting mistakes that do not lead to a change in the procurement item. Thus, the Procuring entity* ***failed to request to eliminate inconsistencies in the electronic procurement system thus violating clause 40 of the Features."***

It should be noted that the price offer of the rejected participant was UAH 9,543,990.40, VAT included, and the next price offer of a winning participant was UAH 10,831,352.98 VAT included, i.e., higher by **UAH 1,287,362.58.**

Despite this, recognizing that the inconsistency in the rejected tender proposal was corrigible, the Northern Office of the State Audit Service **obliged** the procuring entity only to "implement measures aimed at **prevention of established violations in the future** in particular, by bringing violators to liability."

A similar situation occurred in two other procurement transactions:

- based on the conclusion of monitoring UA-M-2023–04–24–000065[130], the procuring entity unlawfully failed to provide the participant New Technologies LLC with the ability to correct an inconsistency in the contract price that was determined to be dynamic instead of fixed. By rejecting the tender proposal of this participant, the procuring entity concluded a contract with the next participant, whose price was **higher by UAH 1,2995.48**.
- based on the conclusion of monitoring UA-M-2023–05–02–000005[131], the procuring entity unlawfully failed to provide the participant SK NEVA+ LLC with the ability to correct an inconsistency in the contract price that was determined to be fixed instead of dynamic. By rejecting the tender proposal of this participant, the procuring entity concluded a contract with the next participant, whose price was **higher by UAH 2,563,805.89**.

In both cases, the state financial control body did not require the procuring entity to cancel the decision to reject the participant's tender proposal or terminate the contract with the unreasonably determined winner. Although, for example, in the case of New Technologies LLC, the auditors' conclusion was published 5 days after the conclusion of the contract. Consequently, the state financial control body had the opportunity to influence the course of procurement and prevent overspending of budget funds in this case.

EXAMPLE 2:

The Department of the Eastern Office of the State Audit Service in Zaporizhzhia Oblast established in its conclusion in monitoring UA-M-2023–05–18–000006[132] that the reason for rejecting the cheapest proposal was the participant using a resource element estimation norm KP18–20–4 "Removal of asphalt-concrete road surfaces through the utilization of cold milling machinery, targeting discrete areas of up to 10 square meters, featuring a milling apparatus with a width of 500 millimeters and a milling depth of 50 millimeters," which, according to the Procuring entity, *"does not meet the technical requirements of the tender documentation, and also leads to an overestimation of direct costs, which in turn increases the cost of services."*

Public auditors motivated the possibility of correcting the inconsistency contained in the rejected proposal by the fact that it "does not relate to the lack of information (and/or documents) on the technical and qualitative characteristics of the procurement item" and does not affect the technical and qualitative characteristics of current repairs, does not lead to changes in the procurement item.

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130 Monitoring UA-M-2023–04–24–000065 in procurement UA-2023–04–06–010067-a (Northern Office of the State Audit Service)

131 Monitoring UA-M-2023–05–02–000005 in procurement UA-2023–03–28–011541-a (Northern Office of the State Audit Service)

132 Monitoring UA-M-2023–05–18–000006 in procurement UA-2023–03–24–000544-a (Department of the Eastern Office of the State Audit Service in Zaporizhzhia Oblast)

Recognizing the failure to provide 24 hours to correct the error as unlawful, the public auditors determined **a method to eliminate the violation by termination of contractual relations**, considering the provisions of the contract, the Law of Ukraine On Public Procurement, the Civil Code of Ukraine, and the Economic Code of Ukraine.

In this case, the difference between the winning and rejected proposal was **UAH 917,857,** and the monitoring report was published 1.5 months after the conclusion of the contract.

A similar way to eliminate the violation was determined by the Department of the Southern Office of the State Audit Service in Mykolaiv Oblast based on the results of monitoring UA-M-2023–04–18–000073[133]. During this monitoring, public auditors found that the procuring entity rejected the most cost-effective proposal due to failure to provide *"a certified copy of the VAT (or single tax) payer certificate of registration or a copy of an excerpt from the Register of a Value-Added Taxpayers."*

The method of eliminating the violation is also the termination of obligations under the contract concluded with another participant, with the corresponding consequences of contract invalidation.

The difference between the winning and the rejected proposal was UAH 163,836 which was significant given the expected cost of UAH 1 mln, and no other violations were found.

As we can see, **approaches to determining the method of elimination of** similar violations[134] (failure to provide 24 hours to correct shortcomings with rejection of a more favorable proposal) vary from case to case, regardless of the amount of lost savings, and in fact without depending on the stage of the procurement procedure. The practice of responding to these violations needs to be unified.

1.2. **The following group of the conclusions we identified** where the public auditors found that **after failure to provide 24 hours** to eliminate inconsistencies **procuring entities chose the same participants as winners** despite shortcomings in their tender proposals. This means that there were inconsistencies in the participant's tender proposal that, in the opinion of public auditors, were subject to correction under the "24-hour rule." Nonetheless, the procuring entity, without a comprehensive legal evaluation or possibly overlooking those inconsistencies, designated the participant as the winner, skipping the corrections step.

The number of such cases is **7.**

Shortcomings that most often appear in such conclusions: 5 cases of shortcomings of the qualification part; 2 cases of shortcomings of the technical part of the proposal.

Ways to eliminate violations: if a procuring entity "overlooked" the shortcomings in a ***qualification*** part, they primarily may be eliminated by "taking measures to prevent such violations in the future" (4 cases). However, there are also isolated cases when auditors demand to terminate the contract (1 case). If the winner's proposal has technical shortcomings, then, depending on the stage, the auditors consider it possible to eliminate such a violation by canceling the decision to determine the winner (1 case) or terminating the contract (1 case, but there were other violations in the procedure, which made it difficult to establish a causal relationship between a particular violation and the method of its elimination).

In this group of conclusions, attention is also drawn to **contradictory practice regarding determining the method in which the procuring entity should eliminate** violations. First, we are talking about the shortcomings of the qualification part of the tender proposal.

In most cases, when the procuring entity "did not notice" the shortcoming of qualification part of the tender proposal and selected the participant as the winner, public auditors react with restraint and oblige "to take measures to prevent similar violations in the future."

EXAMPLE 3:

In practice, procuring entities are only required to **"implement measures to eliminate the identified violations by preventing them in the future"** (or similar wording, sometimes specifying the explanatory

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133 Monitoring UA-M-2023–04–18–000073 in procurement UA-2023–03–27–009171-a (Department of the Southern Office of the State Audit Service in Mykolaiv Oblast)

134 For the purpose of relevant comparison, examples were selected for illustration, in which the violation of the "24-hour rule" was the only or the most significant one.

work and economic training)**, if they did not notice the following shortcomings in the qualification part of proposals and selected the winners:**

- the certificate of availability of a measuring laboratory does not contain a list of capacities;[135]
- failure to provide a scanned order on appointment (acceptance) and/or transfer (if any) to position or a scanned employment contract or a scanned civil law employment contract of an employee specified in the certificate;[136]
- the registration certificate for bulldozer owned by Dominant Construction Company LLC was submitted but the lease agreement confirming the right to the temporary use of the bulldozer by the participant was not included in the tender proposal;[137]
- the certificate does not have information about the grounds for using the labor of the employees mentioned in it, as provided for in the certificate form (Form 2) in Appendix No. 1 to the Procuring entity's tender documentation[138] etc.

In the procurement procedure under the identifier UA-2023–04–25–010466-a for routine repairs of Piddubnoho Street in Nikopol, Dnipropetrovsk Oblast, the failure of the participant to provide a copy of the certificate of registration of the special CARNEHL tipper semi-trailer became fatal for the possibility of executing the contract. The Eastern Office of the State Audit Service came to the following conclusions based on monitoring UA-M-2023–05–15–000068:[139]

"Individual Entrepreneur I. Ye. Nikitiuk mentioned in the Certificate No. 15 dated April 27, 2023 a ***special semi-trailer CARNEHL*** *leased from AP-Mahistral LLC." However, that vehicle is not mentioned in* ***the submitted Contract No. 2101/23 dated 21.04.2023 as part of the tender proposal.*** *Moreover,* ***the copy of registration certificate*** *for a special Renault truck tractor was not submitted.*

However, in violation of clause 40 of the Features, the Procuring entity failed to post a notification with a request to eliminate such inconsistencies in the electronic procurement system within a period that cannot be less than two business days before the deadline for consideration of tender proposals. According to Article 31, part 1, clause 1, paragraph 2 of Law No. 922, the tender proposal from Individual Entrepreneur Nikitiuk had to be rejected. However, the Procuring entity concluded a contract worth UAH 3,792.60 with Individual Entrepreneur Nikitiuk.

It should be noted that the public auditors did not find any other violations in the procurement procedure. The participant was the only one who applied. There were six other confirmed units of road equipment in addition to non-confirmed semi-trailer CARNEHL. At the time of publication of the auditors' conclusion, the contract had already been concluded for almost a month.

Despite the above, the Eastern Office of the State Audit Service obliged the procuring entity to eliminate the violation by **termination of contractual obligations** and signing the additional agreement in compliance with the provisions of the Economic Code of Ukraine and the Civil Code of Ukraine.

As we can see, the offices of the State Audit Services make different decisions on what procuring entities should do in case of shortcomings in the qualification part of the winner's proposal and the procuring entity failed to provide 24 hours to eliminate them. Practice on this issue requires unification.

Another problem related to inconsistencies in the tender proposals of the winners is **complexity of bringing a procuring entity to administrative liability** if such a procuring entity accepted the inappropriate proposal and did not eliminate the violation in the manner established in the conclusion. This problem is related to amendments in the procurement legislation.

As per Article 8, part 11 of the Law of Ukraine On Public Procurement, if a procuring entity fails to eliminate the violation outlined in the conclusion that resulted in non-compliance with the legal requirements stipulated by this law and if no appeal to the court is made regarding the conclusion, the state financial control body, after the specified time limit for court appeals mentioned in part ten of this article has passed, *takes action to initiate administrative proceedings for breaches of public procurement regulations*.

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135 Monitoring UA-M-2023–05–19–000019 in procurement UA-2023–04–27–007648-a (State Audit Service)

136 Monitoring UA-M-2023–05–19–000019 in procurement UA-2023–04–27–007648-a (State Audit Service)

137 Monitoring UA-M-2023–03–28–000116 in procurement UA-2023–03–07–002322-a (Department of the Western Office of the State Audit Service in Rivne Oblast)

138 Monitoring UA-M-2023–05–09–000033 in procurement UA-2023–03–28–008755-a (Western Office of the State Audit Service)

139 Monitoring UA-M-2023–05–15–000068 in procurement UA-2023–04–25–010466-a (Eastern Office of the State Audit Service)

The list of violations under the procurement legislation that could result in administrative sanctions is specified in Articles 164–14 of the Code of Administrative Offenses of Ukraine (hereinafter referred to as the Code). Before the "24-hour rule" appeared in the legislation, selecting an bid with inconsistencies was simply qualified as "non-rejection of tender proposals that were subject to rejection in accordance with the Law" (Article 164–14, part 3 of the Code).

Nonetheless, the introduction of the "24-hour rule," particularly when extended to other elements of the proposal beyond just the qualification and signatory documents, has added complexity to the assessment of such cases. If the winner's tender proposal contained inconsistencies that could be corrected within 24 hours, that tender proposal was not subject to rejection. Instead, it was necessary to eliminate inconsistencies in it in accordance with the procedure provided for in the "24-hour rule" as amended at the time of the announcement of the procurement. In other words, it becomes incorrect for such cases to claim that the procuring entity did not reject the tender proposal that was subject to rejection. Instead, the procuring entity failed to take proper measures to ensure that the participant corrected the shortcomings of the proposal, and to finally determine whether it is subject to rejection.

That is, if procuring entities fail to eliminate violations in procurement transactions where public auditors found "defective" winners, then the possibility of holding such a procuring entity liable for "non-rejection of tender proposals that were subject to rejection in accordance with the Law" is questionable.

In the practice of monitoring auditors usually qualify such violations not under Article 164–14 of the Code, but as "other violation" (there is such an option in Prozorro). For example, the following actions of procuring entities who chose winners without giving the participants the opportunity to correct such shortcomings were qualified as "other violation":

- CE certificate in English, without translation;[140]
- the technical characteristics reflected in the quality certificate and in the submitted certificate contain inconsistencies in the length, cubic capacity of air, and configuration of tents to be procured;[141]
- shortcomings of the qualification part that we mentioned above.

An exception was again the procedure for procurement of routine road repairs along Piddubnyi Street in Nikopol, Dnipropetrovsk Oblast, announced under identifier UA-2023–04–25–010466-a. The procuring entity did not notice a missing copy of the registration certificate for CARNEHL semi-trailer in the winner's proposal. The description of found violations mentions "non-rejection" even though the shortcoming was subject to elimination[142].

Since Article 164–14 of the Code does not provide for such a violation as "failure to address the requirement to eliminate inconsistencies in cases provided for by the Law," public auditors are forced to classify such cases as "other violations." This does not allow the procuring entity to be held liable under Article 164–14 of the Code in the future if the violation is not eliminated. There are isolated cases of qualification of a violation as "non-rejection," but such conclusions have risks of judicial appeal.

2. The next category of conclusions is the opposite of the first category, i.e., conclusions that establish that the procuring entity **should not have provided 24 hours** to eliminate inconsistencies, but the procuring entity gave time **in violation** of clause 40 of the Features.

There were **18** such conclusions fidentified.

This category of conclusions is also divided into two subcategories:

2.1. Monitoring conclusions where auditors found that procuring entities had to **reject tender proposals instead of providing 24 hours** to eliminate inconsistencies in them. In other words, we are talking about cases when, in the opinion of the auditors, the inconsistency could not be eliminated in accordance with clause 40 of the Features, and the procuring entity did not have to provide 24 hours to eliminate them.

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140 Monitoring UA-M-2023–04–11–000067 in procurement UA-2023–03–15–002388-a (Department of the Southern Office of the State Audit Service in Mykolaiiv Oblast)

141 Monitoring UA-M-2023–05–30–000037 in procurement UA-2023–03–30–002705-a (Department of the Western Office of the State Audit Service in Zakarpattia Oblast)

142 Monitoring UA-M-2023–05–15–000068 in procurement UA-2023–04–25–010466-a (Eastern Office of the State Audit Service)

The number of such cases is **16.**

The most often **shortcomings** in that type of conclusions are **100% technical part** of the tender proposal.

Methods of elimination of violations: **termination of contractual obligations or contracts in 9 cases**; no elimination method since procuring entities eliminated the violation themselves – 4 cases; rejection of tender proposal in 1 case; measures to prevent similar violations in the future – 2 cases (procuring entities rejected participants' tender proposals which had to be rejected but after participant's failure to eliminate shortcomings).

In this subcategory of cases, the choice of how to eliminate violations is more homogeneous. There are a number of examples where the erroneous provision of 24 hours to correct the technical part led to the procuring entity's obligation to terminate the contract and/or terminate the obligations under it. This was an erroneous correction of shortcomings, which consisted mainly in the lack of documents of the technical part of the proposal. Namely:

- failure to provide originals or certified copies of documents on the quality of raw materials and components (certificate of quality and/or conformity and/or technical data sheet, etc.);[143]
- failure to provide documentary evidence that the participant was entitled to use intellectual property (goods and service marks) in the documents used to obtain petroleum products (coupons);[144]
- failure to provide manufacturer's certificate of conformity or certificate of quality, or the declaration of conformity, or the conclusion of the state sanitary and epidemiological service for the product, or other document required by laws;[145]
- failure to provide letters of guarantee from the manufacturer (authorized representative, representative office, branch of the manufacturer, if their relevant powers cover the territory of Ukraine) confirming the right to deliver the goods in the required quantity and within the time limits determined by the tender documentation and the participant's proposal, regarding the items <...>;[146]
- failure to provide test report for compliance of the crushed stone-sand mixture with a fraction of 0.05–70 mm (C5) with the DSTU requirements;[147]
- failure to provide a letter of guarantee from the manufacturer (if a participant is not a manufacturer of the goods) or manufacturer's official representative, distributor, or dealer in Ukraine (the representation must be confirmed by the respective manufacturer's letter, power of attorney, authorization, etc.) confirming that the participant can deliver the proposed goods of required quantity, quality, and time limits specified by tender documentation and the participant's proposal;[148]
- the tender proposal contains goods quality documents not for "Nefras S2 80/120 solvent gasoline, top grade TU38.401–67–108–92 as mentioned in the tender proposal and tender specification of AVIA OIL LLC but for Orlesol E70/120 solvent;[149]
- failure to provide documentation regarding the technical and qualitative characteristics of the suggested products which hinder the ability to determine whether this product aligns with the medical and technical criteria required for the procurement item[150].

This subcategory also includes the conclusion of monitoring the procedure of procuring reinforced concrete products[151], in which the Procuring entity allowed the participant to replace the provided technical data sheet for reinforced concrete product "Reinforced Concrete Hatch" since its *geometric size of the inner diameter is 600 mm, which* ***does not meet the technical characteristics of the procurement item*** *as specified by the procuring entity in Annex 2 to the tender documentation, which provides that the inner diameter of the reinforced concrete hatch should be 660 mm.*"

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143 Monitoring UA-M-2023–04–11–000013 in procurement UA-2023–03–21–010839-a (State Audit Service)

144 Monitoring UA-M-2023–04–11–000092 in procurement UA-2023–03–17–011301-a (North-Eastern Office of the State Audit Service)

145 Monitoring UA-M-2023–03–27–000019 in procurement UA-2023–03–06–003526-a (Department of the Northern Office of the State Audit Service in Cherkasy Oblast)

146 Monitoring UA-M-2023–04–10–000071 in procurement UA-2023–03–13–011869-a (Department of the Northern Office of the State Audit Service in Cherkasy Oblast)

147 Monitoring UA-M-2023–05–29–000096 in procurement UA-2023–04–19–000578-a (Department of the Northern Office of the State Audit Service in Cherkasy Oblast)

148 Monitoring UA-M-2023–05–19–000033 in procurement UA-2023–04–10–010394-a (State Audit Service)

149 Monitoring UA-M-2023–05–30–000084 in procurement UA-2023–03–29–008368-a (Department of the Western Office of the State Audit Service in Zakarpattia Oblast)

150 Monitoring UA-M-2023–03–28–000002 in procurement UA-2023–03–01–011805-a (Department of the Northern-Eastern Office of the State Audit Service in Sumy Oblast)

151 Monitoring UA-M-2023–04–24–000135 in procurement UA-2023–04–03–006233-a (Department of the Northern-Eastern Office of the State Audit Service in Sumy Oblast)

The Department of the North-Eastern Office of the State Audit Service in Sumy Oblast concluded that by posting a request to eliminate inconsistencies, the procuring entity violated clause 40 of the Features. The fact that the participant provided a reinforced concrete product technical data sheet for "Reinforced Concrete Hatch" with an internal diameter of 600 mm is interpreted as the participant's failure to provide the relevant document on 660 mm Reinforced Concrete Hatch. And the requirement to eliminate inconsistencies in that part was interpreted as a requirement to provide a document that was not included in the proposal.

The Department of the North-Eastern Office of the State Audit Service in Sumy Oblast obliged the procuring entity to take measures to terminate the tender contract, observing the provisions of the Economic Code of Ukraine and the Civil Code of Ukraine, despite the absence of other violations[152].

In this case, the question arises what exactly should be considered the absence of a document in the tender proposal. Specifically, it raises the question of whether providing a document with shortcomings can be considered equivalent to not providing a document without shortcomings as mandated by the terms of the tender documentation. And if so, how is it possible to correct inconsistencies in the tender proposal documents in those cases?

Going back to the analysis of the conclusions of the procurement monitoring, in which the procuring entity, instead of rejecting the tender proposal, provided 24 hours to eliminate the shortcomings, it is groundlessly impossible to ignore the **matter of expediency** of prohibitions to correct shortcomings in certain cases.

Therefore, upon examining the mentioned list of shortcomings that participants corrected, it is conceivable that their submission of these documents in the order of addressing shortcomings (rather than as part of the initial tender proposal) did not impact their capacity to fulfill the procurement contract. For example, in cases where participants subsequently submitted documents confirming their entitlement to use intellectual property rights for fuel coupons or received letters from manufacturers confirming the possibility of goods delivery, they were still able to provide these documents and meet their procurement contract obligations.

The question also arises whether it is appropriate to terminate a contract as a way to eliminate violations of the procurement procedure in such cases. On the one hand, the ban on correcting shortcomings in the missing documents of the technical part of the tender bid encourages participants to provide a full package of documents immediately when participating in the tender. On the other hand, the termination of the contract because the participant confirmed the right to use the logo on gasoline coupons "belatedly" does not look quite proportional.

2.2. The second subcategory of conclusions among those where the procuring entity unreasonably provided 24 hours to eliminate inconsistencies is the opposite: in these cases, instead of providing 24 hours to eliminate inconsistencies, the procuring entity **had to choose the winner immediately when considering the proposal, without such a request**.

There are only 2 such conclusions.

Shortcomings which were included in such conclusions do not relate to either the qualification or technical part of the proposal. In one of them, it was established that the procuring entity requested information about the subcontractor in the procurement of goods[153], and in the other the procuring entity sent a request to eliminate inconsistencies in information that, in the opinion of the auditors, did not require to be provided as part of the proposal[154].

In both cases, procuring entities were required to take measures aimed at **preventing such violations in the future**, in particular by bringing to responsibility those persons who committed the violation.

3. Conclusions that establish that the procuring entity made **other violations of the "24-hour rule" that are not related to assigning certain errors to those that can be corrected.**

There were **16 such conclusions found.** The public auditors found, among others, the following violations:

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152 Monitoring UA-M-2023-04-24-000135 in procurement UA-2023-04-03-006233-a (Department of the Northern-Eastern Office of the State Audit Service in Sumy Oblast)

153 Monitoring UA-M-2023-04-27-000021 in procurement UA-2023-03-03-002210-a (North-Eastern Office of the State Audit Service)

154 Monitoring UA-M-2023-05-08-000071 in procurement UA-2023-03-27-010328-a (North-Eastern Office of the State Audit Service)

1) 9 cases ([155]) of incorrect reflection of the 24-hour rule in the tender documentation, and among the sample that was examined, this can be considered a violation that was often detected. The frequency of that violation may indicate that procuring entities do not have time to adapt to amendments in public procurement legislation, and therefore announce procurement procedures on conditions that no longer comply with the current regulations, including the "24-hour rule."
2) the participant failed to correct inconsistencies as requested but was selected as the winner of the procurement procedure – 3 cases ([156]).
3) in 1–2 cases, procurement transactions were identified in which monitoring revealed violations of the deadline for publishing the requirement[157], non-compliance with the requirement to eliminate the inconsistency[158], and re-published requirements to eliminate inconsistencies[159].

In the evaluation of these violations by public auditors, there are instances where excessive formalism is apparent. Furthermore, measures to remedy violations are not always proportionate to the significance of those violations.

EXAMPLE:

The following violation was detected in procurement of liquefied petroleum gas, gasoline, and diesel fuel in coupons announced under identifier UA ID-2023–03–13–006754-a[160].

"The consideration of tender proposals revealed that the Procuring entity, in violation of clause 40 of the Features **posted notification** in the electronic procurement system with a request to eliminate established inconsistencies during the consideration of tender proposals **breaching the deadline for posting such a notification**, namely, **within a period that is less than two business days** before the deadline for consideration of tender proposals.

That is, on April 11, 2023 (on the 4th business day of the tender proposals consideration period) the Procuring entity posted a notification for GARANT OIL GROUP LLC in the e-procurement system with a request to eliminate inconsistencies established during the tender proposal consideration, in particular regarding the provision of financial statements for 2021, ***while there were less than two business days left before the end of the tender proposal consideration period, which was until April 12, 2023 (the 5th business day of the tender proposal consideration period)."***

Note that the publication of the requirement to eliminate inconsistencies with a day delay was **the only violation** identified by the auditors in this monitoring. The procurement contract **has already been concluded** when the monitoring started. The price offer of the participant GARANT OIL GROUP LLC was UAH 298,000, VAT included, and the expected cost was UAH 345,000.

Despite all the above, the Department of the Eastern Office of the State Audit Service in Kirovohrad Oblast ordered the procuring entity to "take measures to eliminate the established violations of the requirements of clause 40 of the Features by **termination of contractual obligations,** including the corresponding consequences of the contract invalidation."

In our opinion, such a response to violations of this type is disproportionate. The procuring entity reported on the procurement procedure page about cappealing the conclusion in court.

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155 MonitoringUA-M-2023–04–05–000050 in procurement UA-2023–03–09–010936-a (Department of the Western Office of the State Audit Service in Chernivtsi Oblast), UA-M-2023–05–03–000062 in procurement UA-2023–03–13–007982-a (Department of the Western Office of the State Audit Service in Chernivtsi Oblast), UA-M-2023–05–23–000017 in procurement UA-2023–03–14–005607-a (Department of the Western Office of the State Audit Service in Ternopil Oblast), UA-M-2023–04–05–000049 in procurement UA-2023–02–28–004718-a (Department of the Western Office of the State Audit Service in Chernivtsi Oblast), UA-M-2023–03–22–000037 in procurement UA-2023–02–27–007863-a (Southern Office of the State Audit Service), UA-M-2023–03–06–000030 in procurement UA-2023–03–06–004681-a (Eastern Office of the State Audit Service), UA-M-2023–03–14–000004 in procurement UA-2023–03–13–007596-a (Eastern Office of the State Audit Service), UA-M-2023–04–04–000104 in procurement UA-2023–03–08–004363-a (Southern Office of the State Audit Service), UA-M-2023–04–04–000103 in procurement UA-2023–03–06–006837-a (Southern Office of the State Audit Service)

156 Monitoring UA-M-2023–04–10–000003 in procurement UA-2023–03–02–011054-a (State Audit Service), UA-M-2023–04–10–000005 in procurement UA-2023–03–02–011758-a (State Audit Service), UA-M-2023–05–08–000146 in procurement / UA-2023–04–12–010853-a (Department of the Northern Office of the State Audit Service in Zhytomyr Oblast)

157 Monitoring UA-M-2023–04–11–000102 in procurement UA-2023–03–28–003545-a (Southern Office of the State Audit Service), UA-M-2023–05–03–000011 in procurement UA-2023–03–13–006754-a (Department of the Eastern Office of the State Audit Service in Kirovohrad Oblast)

158 Monitoring UA-M-2023–04–18–000039 in procurement UA-2023–03–10–002596-a (North-Eastern Office of the State Audit Service)

159 Monitoring UA-M-2023–04–10–000025 in procurement UA-2023–03–15–001011-a (State Audit Service)

160 Monitoring UA-M-2023–05–03–000011 in procurement UA-2023–03–13–006754-a (Department of the Eastern Office of the State Audit Service in Kirovohrad Oblast)

Thus, the main issue that is considered by auditors when checking the procurement procedure for compliance with the 24-hour rule is whether the procuring entity had the right and was obliged to provide 24 hours to eliminate inconsistencies of a certain type (in a certain part of the proposal). This issue was considered in 41 cases. The key controversial issue in the 24-hour practice is whether the procuring entity has grounds to provide a participant with the opportunity to correct the technical part of the proposal.

Other violations that are not related to the procuring entity's right to provide 24 hours to eliminate inconsistencies were considered in 16 cases.

Procedural aspects, such as compliance with the deadlines for posting a notification of elimination of inconsistencies, compliance of the tender documentation with the updated version of the Features, are also the subject of consideration, but much less often.

The most noteworthy challenge in the examined practice is the issue of selecting the appropriate method for eliminating a violation, considering its severity and the procurement stage, the controversial nature of approaches to eliminate identical violations, and a lack of alignment between violations of the "24-hour rule" and those explicitly outlined in Article 164–14 of the Code.

The practice of legal evaluation by the auditors of the possibility to correct inconsistencies in different parts of the tender bid

Let us consider in greater detail in what parts of the bid the auditors consider it acceptable to correct inconsistencies, and in which ones they do not, and why.

We remind you that each tender bid has several parts in terms of its content:

- qualification part (documents that confirm the participant's compliance with the eligibility criteria established by the procuring entity – availability of the resources and technologies, employees, experience in performing a similar contract, financial capacity);
- technical part (documents that confirm compliance of the procurement item with the technical, qualitative, and quantitative characteristics established by the procuring entity);
- documents confirming the authority of the signatory of the tender bid and contract (appointment order, power of attorney, protocol, etc.);
- documents confirming the absence of grounds for rejection from participating in the procurement procedure (with the development of electronic fields of the system, this part is reduced to a minimum);
- guarantee of the tender bid if required by the procuring entity in the tender documentation (usually, it is a bank guarantee with supporting documents – a license, support of authority of the bank worker, in rare cases, with supporting letters from the bank);
- other documents as part of the tender bid – such as consent for processing of personal data, the charter, the price offer and relevant calculations, consent to the terms of the procurement agreement and everything else that was not included in the previous parts (if such documents are not provided, the procuring entity usually recognizes the participant ineligible under Art. 22, part 3, paragraph 1 of the Law).

In this section, we will consider the practice of auditor monitoring in procurement of the review period in terms of correcting inconsistencies in various parts of the tender offer: what shortcomings can be fixed, which ones cannot, and why.

1. Qualification part

The qualification part of the tender bid is the easiest to correct in terms of the "24-hour rule." The possibility to correct inconsistencies in it was introduced back in April 2020; there are no exceptions, and therefore the practice is uniform: correcting documents and information in the qualification part is allowed. Monitoring conclusions on this issue are relatively few (7 cases), as procuring entities also have a full understanding of this provision.

Examples of shortcomings that can be eliminated, based on the practice of public auditors, can be the following:

- failure to provide information and supporting documents regarding the availability of licensed software or regarding the execution of a similar contract[161].

161 Monitoring UA-M-2023-04-18-000023 in tender UA-2023-03-31-006813-a (Southern office of the State Audit Service)

- lack of original feedback letters to similar contracts, which should contain information about the ID and date of the concluded contract, the quality of the delivered goods, the timely fulfillment of the supplier's obligations, the absence of shortcomings, the full name, position, and work phone number of the person who signed the feedback letter;[162]
- failure to submit documents confirming ownership of Opel Vivaro and Citroën Berlingo cars[163].

In all three cases, the procuring entity rejected the bids of the participants without giving them the opportunity to fix the indicated deficiencies. In such cases, even in the absence of other violations, procuring entities are obliged to eliminate the violation by terminating the obligations under the agreement signed with another participant whose offer was accepted after the rejection of the previous one.

The following were also recognized as inconsistencies that could and should be fixed:

- lack of a list of capabilities in the certificate of availability of a measuring laboratory;[164]
- the absence of a lease agreement confirming ownership of a bulldozer on the terms of temporary use with a vehicle registration certificate;[165]
- lack of information regarding the basis of employment of workers declared in the certificate, as provided for in the form;[166]
- lack of a copy of the vehicle registration certificate[167].

The way to eliminate the violation, if the participant with such shortcomings in the tender bid was recognized as the winner, is to prevent similar violations in the future (except in certain cases[168]). That is, in fact, the implementation of control powers in this case takes the form of recommendations, explanatory work, which is designed to improve the purchasing activity of the procuring entity.

Summing up, it can be stated that the law and practice allow and require 24 hours to eliminate shortcomings in:

- information and documents **about the availability of employees with the participant** (grounds for the use of labor, appointment orders, employment contracts, employment records, personal medical records, etc.);
- information and documents **about the availability of the material and technical base and technologies** (documents about the availability of vehicles, premises, the grounds for their use, the availability of licensed software, measuring laboratories and their capacity, etc.);
- information and documents **about experience in the execution of a similar contract** (copies of contracts, annexes and additional agreements to them, feedback letters from counterparties, expense invoices, certificates of acceptance);
- information and documents **about the participant's financial capacity**, which is confirmed by financial statements.

2. **Technical part**

In contrast to the qualification part of the proposal, when it comes to the technical part, it is most difficult to make the right decision regarding the possibility of fixing errors. The issue is that the possibility to eliminate inconsistencies in the technical part was only introduced in October 2022, the provision underwent amendments, and therefore there is no unified approach to its application among procuring entities.

The question of whether the procuring entity had the right to provide 24 hours to correct information and documents about the procurement item became the subject of legal evaluation in **27 monitoring instances of procurement procedures** that were announced during the research period. This is more than in the qualification part and other documents combined.

This is probably due to different interpretations of the "24-hour rule" for the technical part of the tender bid. According to clause 43 of the Features, **inconsistency** in the information and/or documents submitted by

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162 Monitoring UA-M-2023-04-05-000044 in tender UA-2023-03-14-008063-a (Directorate of the Eastern Office of the State Audit Service in Kirovohrad Oblast)

163 Monitoring UA-M-2023-05-05-000041 in tender UA-2023-03-30-008424-a (State Audit Service)

164 Monitoring UA-M-2023-05-19-000019 in tender UA-2023-04-27-007648-a (State Audit Service)

165 Monitoring UA-M-2023-03-28-000116 in tender UA-2023-03-07-002322-a (Directorate of the Western Office of the State Audit Service in Rivne Oblast)

166 Monitoring UA-M-2023-05-09-000033 in tender UA-2023-03-28-008755-a (Western office of the State Audit Service)

167 Monitoring UA-M-2023-05-15-000068 in tender UA-2023-04-25-010466-a (Eastern office of the State Audit Service)

168 Monitoring UA-M-2023-05-15-000068 in tender UA-2023-04-25-010466-a (Eastern office of the State Audit Service)

the participant of the procurement procedure as part of the tender bid and/or the submission of which is required by the tender documentation, includes the absence of information and/or documents in the tender bid, the submission of which is required by the tender documentation (**except** in cases of lack of security for the tender bid, if such security was required by the procuring entity, **and/or lack of information (and/or documents) about the technical and quality characteristics of the procurement item** offered by the participant of the procedure in their tender bid). **Inconsistencies in the information and/or documents provided by the participant of the procurement procedure to meet the requirements of the technical specification for the procurement item** are considered errors, the correction of which **does not lead to a change in the procurement item** proposed by the participant as part of their tender bid, the name of the product, brand, model etc.

Based on the content of the provision, it is **impossible** to eliminate inconsistencies in the technical part of the proposal **if it leads to a change** in the proposed procurement item, as well as if there is **no information (and/or document)** about the technical and qualitative characteristics of the procurement item.

This leads to questions arising in the practical application of the provision:

- what is considered the change of the procurement item (in particular, whether correcting the characteristics of the procurement item is considered "changing" it);
- which documents belong to the documents on the technical and quality characteristics of the procurement item, and which ones do not (for example, the quality certificate for the paint used for painting services, the manufacturer's letters about the technical support of the product, etc.);
- what is considered the absence of a document on technical and quality characteristics (in particular, if the proposal contains a document with incorrect characteristics, does this mean the absence of a document with the necessary characteristics?).

Let us consider approaches to the consideration of typical components of the technical part.

2.1. Quality and conformity documents: quality certificates, quality passports, certificates of conformity, test reports.

According to monitoring practice, public auditors recognize correcting inconsistencies in these documents legal if **this does not lead to a change in the procurement item.**

EXAMPLE 1:

Directorate of the Eastern Office of the State Audit Service in Kirovohrad Oblast monitored the procurement procedure for services of restoration or painting of new road markings announced under ID UA-2023-03-31-007233-a[169]. The public auditors established that the reason for rejecting the cheapest bid was that *"**the certificate of conformity for paint** <...> provided by the participant **was canceled**, and therefore the participant **did not provide any valid document to confirm the quality of the materials**, thus failing to comply with the requirements of Appendix 3 'Technical, qualitative and quantitative characteristics of the procurement item,' clause 3, subclause 3.1 of the tender documentation."*

The auditors came to the conclusion that the procuring entity should have given 24 hours to correct this shortcoming: *since the correction of the specified **inconsistency** (error) in the certificate of conformity for the paint for applying horizontal road markings provided by the participant Foxroad LLC, which certifies the conformity of the paint with the requirements of regulatory documents, **would not lead to changes in the procurement item**, **the procuring entity must place a notice** in the electronic procurement system **with a requirement to eliminate the specified inconsistency** within a period that cannot be less than two working days before the end of the tender bid consideration period. Instead, the procuring entity **unlawfully rejected** the tender bid of the participant Foxroad LLC as not meeting the terms of the technical specification and other requirements regarding the procurement item of the tender documentation on the basis of the Features, clause 41, subclause 2."*

At the same time, the prohibition to correct the *absence* of a document on technical and qualitative characteristics of the procurement item was not applied.

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169 Monitoring UA-M-2023-05-03-000010 in tender UA-2023-03-31-007233-a (Directorate of the Eastern Office of the State Audit Service in Kirovohrad Oblast)

EXAMPLE 2:

Directorate of the Western Office of the State Audit Service in Zakarpattia Oblast monitored the procurement procedure for tents announced under ID UA-2023–03–30–002705-a[170]. The public auditors found that the tender bid of the winner of the procedure "*included* ***documents containing inconsistencies regarding the technical characteristics of the procurement item****: tent USB-56 (lot-2). Certificate <...> contains information that the document corroborating the quality and compliance of the procurement item is the* ***quality certificate.*** *However, the* ***technical characteristics reflected in the quality certificate*** *<...> and in the submitted certificate <...>,* ***contain an inconsistency in length, air volume, missing subframes*** *– 12 pieces, missing hanging insulation walls of 10.2 m – 2 pieces, etc. for the tents purchased by the procuring entity."*

The auditors thus found that in this case, the procuring entity should have sent a requirement to the participant to fix the violation. The auditors' conclusion does not contain a detailed argumentation.

In another procurement transaction, the Directorate of the Southern Office of the State Audit Service in Mykolaiv oblast pointed out[171] that the procuring entity should have provided 24 hours to fix the provided certificate provided in English (file Сертифікат і PL.pdf) without translation.

Thus, there is a practice according to which certificates with incorrect technical characteristics, indicators of cancellation, written in a language other than Ukrainian are subject to correction. However, the practice contains a number of contradictory cases, when correcting the technical part of the proposal in the part of certificates **was not considered permissible**.

First of all, this concerns the **complete absence of a document** in the tender bid, namely:

- quality certificates and/or certificates of conformity and/or declaration of conformity or other documents stipulated by the current legislation have not been provided;[172]
- originals or certified copies of documents on the quality of raw materials and components (certificate of quality and/or compliance and/or technical passport, etc.) have not been provided;[173]
- a certificate of conformity or a certificate/passport of quality from the manufacturer, or a declaration of conformity, or a conclusion of the state sanitary-epidemiological service for the product, or another document provided for by law was absent from the tender bid;[174]
- documents confirming compliance of the products with the technical and quality characteristics of the subject of purchase were not provided, namely: technical passport for lithol and brake fluid;[175]
- the procuring entity posted a message with a request to eliminate inconsistencies regarding the protocol of compliance tests of a stone sand mixture fr. 0.05–70 mm (C5) with the requirements of the official technical requirements, which was missing from the tender bid;[176]
- quality certificate from the manufacturer with a translation, operating book were not provided[177].

However, the very **concept of the absence of a document** is sometimes interpreted quite broadly by public auditors.

EXAMPLE 3:

Directorate of the Northeastern Office of the State Audit Service in Sumy oblast found that the document was absent in the following situation. In the procurement procedure for reinforced concrete products[178] "in the tender bid of participant GRAND INDUSTRIAL GROUP LLC **passport** for reinforced concrete product 'reinforced concrete hatch' dated October 27, 2020 **has been provided** with a

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170 Monitoring UA-M-2023–05–30–000037 in tender UA-2023–03–30–002705-a (Directorate of the Western Office of the State Audit Service in Zakarpattia Oblast)

171 Monitoring UA-M-2023–04–11–000067 in tender UA-2023–03–15–002388-a (Directorate of the Southern Office of the State Audit Service in Mykolaiv oblast)

172 Monitoring UA-M-2023–03–28–000107 in tender UA-2023–03–06–010221-a (Directorate of the Western Office of the State Audit Service in Rivne Oblast)

173 Monitoring UA-M-2023–04–11–000013 in tenderUA-2023–03–21–010839-a (State Audit Service)

174 Monitoring UA-M-2023–03–27–000019 in tender UA-2023–03–06–003526-a (Directorate of the Northern office of the State Audit Service in Cherkasy oblast)

175 Monitoring UA-M-2023–04–10–000078 in tender UA-2023–03–17–002547-a (Southern office of the State Audit Service)

176 Monitoring UA-M-2023–05–29–000096 in tender UA-2023–04–19–000578-a (Directorate of the Northern office of the State Audit Service in Cherkasy oblast)

177 Monitoring UA-M-2023–04–18–000025 in tender UA-2023–03–28–010001-a (Southern office of the State Audit Service)

178 Monitoring UA-M-2023–04–24–000135 in tender UA-2023–04–03–006233-a (Directorate of the Northeastern Office of the State Audit Service in Sumy Oblast)

geometric size of the internal diameter of 600 mm, which **does not correspond to the technical characteristics of the procurement item** identified by the procuring entity in Appendix 2 to tender documentation, which stipulates that the internal diameter of the hatch should be 660 mm.

GRAND INDUSTRIAL GROUP LLC HAS NOT PROVIDED **documents about the quality /conformity of a reinforced concrete hatch with the internal diameter of 660 mm** within the tender bid."

That is, the auditors interpreted the provision of a product passport with the wrong characteristics as failure to provide a passport with the required characteristics, i.e., as the absence of the document.

EXAMPLE 4:

Treading the line between the absence of a document and a likely change of the procurement item while correcting the error is the situation where "the tender bid of participant AVIA OIL LLC contains documents **on the product quality not for 'solvent gasoline NEFRAS-S2–80/120, higher grade TU38.401–67–108–92'** as indicated in the tender bid and the tender specification of AVIA OIL LLC, **but for Orlesol E70/120 solvent."**[179]

The Directorate of the Western Office of the State Audit Service in Rivne Oblast concluded that documents in this situation could not be fixed.

Therefore, the practice of legal evaluation of the correction of deficiencies in documents on the quality and conformity of goods is sometimes contradictory. In particular, this refers to the possibility of replacing a document containing incorrect characteristics of the item. In some cases[180], the correction is considered admissible, while in others[181], it is regarded as a correction of a missing document.

2.2. Contract price, price offer, calculations

We consider this group of cases among the documents within the technical part of the tender offer, since if the offer is rejected due to shortcomings of price-related documents, procuring entities usually refer precisely to inconsistency with the requirements of the technical specification.

In most cases, public auditors recognize that it is possible to correct shortcomings in the price part of the proposal. This primarily concerns the following disadvantages:

- the contract price was defined as dynamic instead of fixed[182] – and vice versa, fixed instead of dynamic;[183]
- failure to include funds for certain expenditures in the contract value, including: funds to cover additional costs associated with inflationary processes, funds intended to compensate for the increase in the cost of labor and material and technical resources caused by inflation, which may occur during construction;[184]
- failure to provide supporting calculations for wages and inflation costs as part of the tender offer;[185]
- application of incorrect estimation standards[186] or coefficients;[187]
- **cost estimate documentation** does not comply with the requirements of the terms of reference[188].

The main argument supporting the idea that the price part can and should be corrected – even if the requirements to the contract price are set forth in the technical specification – is that its change **does not lead to a change** in the procurement item (at least in the cases under consideration).

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179 Monitoring UA-M-2023–05–30–000084 in tender UA-2023–03–29–008368-a (Directorate of the Western Office of the State Audit Service in Rivne Oblast)

180 Monitoring UA-M-2023–05–30–000037 in tender UA-2023–03–30–002705-a (Directorate of the Western Office of the State Audit Service in Zakarpattia Oblast)

181 Monitoring UA-M-2023–04–24–000135 in tender UA-2023–04–03–006233-a (Directorate of the Northeastern Office of the State Audit Service in Sumy Oblast)

182 Monitoring UA-M-2023–04–24–000065 in tenderUA-2023–04–06–010067-a (Northern Office of the State Audit Service)

183 Monitoring UA-M-2023–05–02–000005 in tenderUA-2023–03–28–011541-a (Northern Office of the State Audit Service)

184 Monitoring UA-M-2023–04–24–000065 in tenderUA-2023–04–06–010067-a (Northern Office of the State Audit Service)

185 Monitoring UA-M-2023–04–24–000065 in tenderUA-2023–04–06–010067-a (Northern Office of the State Audit Service)

186 Monitoring UA-M-2023–05–18–000006 in tender UA-2023–03–24–000544-a (Directorate of the Eastern Office of the State Audit Service in Zaporizhzhia Oblast)

187 Monitoring UA-M-2023–04–24–000087 in tenderUA-2023–03–27–004826-a (Northern Office of the State Audit Service)

188 Monitoring UA-M-2023–04–11–000031 in tenderUA-2023–03–06–007995-a (Northern Office of the State Audit Service)

EXAMPLE 1:

In the monitoring report UA-M-2023–05–18–000006, the Directorate of the Eastern Office of the State Audit Service in Zaporizhzhia Oblast found that the procuring entity did not give the participant the opportunity to correct the following deficiency: "The participant uses the resource element estimate norm KR18–20–4 'Removal of asphalt concrete road surfaces with the help of machines for cold milling of asphalt and concrete surfaces in isolated places with an area of up to 10 m2 with a milling width of 500 mm and a milling depth of 50 mm," which does not meet the technical requirements in the tender documentation and also leads to an overestimation of the direct costs, which in turn increases the cost of providing the services."

Arguing the possibility of correcting this shortcoming, the public auditors provided the following position: *"the specified inconsistency* ***does not refer to the absence of information*** *(and/or documents) about the technical and quality characteristics of the procurement item.* ***The non-application of the lowering coefficient refers to the price component of the tender bid and does not affect the technical and quality characteristics of the ongoing repair*** *of intra-block roads in the residential microdistricts of the city; the correction of erroneously specified prices and the non-application of the coefficients* ***does not lead to a change in the procurement item*** *proposed by the participant of the procurement procedure."*[189]

Similar conclusions were reached by the Northern Office of the State Audit Service based on the results of monitoring UA-M-2023–04–24–000087. In this tender, the participant's bid was rejected due to the fact that, firstly, they provided "***a contract price that does not include the estimated inflation factor*** *K=1.028 (taking into account the total construction period) to the total costs that are associated with inflationary processes during the execution of works, which constitutes non-compliance with the terms of the technical specification and other requirements for the procurement item";* secondly, "***an imd file worth UAH 9,543,990.40*** *was provided, which constitutes non-compliance with the terms of the technical specification and other requirements for the procurement item in the tender documentation."*[190]

Recognizing the rejection of the bid in this case as illegal, the auditors recognized these errors as not leading to a change in the procurement item.

Only one negative decision regarding the correction of the price part was found[191]. It was a case when the participant did not provide the contract price and the cost estimate at all. In this case, they were required in the tender documentation as documents to confirm compliance of the participant's tender bid with technical, qualitative, quantitative and other requirements for the procurement item.

To sum up, legal assessment of the possibility of fixing the price part of the tender bid can be considered relatively consistent (in most cases making corrections is allowed), but certain contentious issues can be identified:

- whether the contract price constitutes a document about the technical and qualitative characteristics of the procurement item (or it depends on the location of the requirement to provide the contract price in the tender documentation);
- whether there are separate documents providing calculations of the contract price (e.g., whether it's possible to quality failure to provide corroborating calculations for wages and inflation costs within the tender bid[192] as the absence of a document).

2.3. Authorization documents, licenses, contracts with third parties, documents from the manufacturer

In the technical specifications of procurement procedures, procuring entities often require documents that do not directly relate to the procurement item but contain information about the prerequisites for the provision of services or performance of works by the participant (permits, licenses), confirm the accreditation of the participant from the manufacturer or the official distributor and the possibility of delivery, contain information about certain aspects (stages) of work performance (waste removal contract), confirm the right to use intellectual property objects during the provision of services or performance of work (license), etc.

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189 Monitoring UA-M-2023–05–18–000006 in tender UA-2023–03–24–000544-a (Directorate of the Eastern Office of the State Audit Service in Zaporizhzhia Oblast)

190 Monitoring UA-M-2023–04–24–000087 in tenderUA-2023–03–27–004826-a (Northern Office of the State Audit Service)

191 Monitoring UA-M-2023–04–03–000055 in tender UA-2023–03–18–000340-a (Directorate of the Western Office of the State Audit Service in Zakarpattia Oblast)

192 Monitoring UA-M-2023–04–24–000065 in tenderUA-2023–04–06–010067-a (Northern Office of the State Audit Service)

In the monitoring practice, several cases were identified when the subject of consideration was the provision of 24 hours to correct inconsistencies in this part.

The only positive conclusion regarding the possibility of correcting shortcomings in such documents was the conclusion of the monitoring by the Northern Office of the State Audit Service in the procurement procedure for the capital repair of a school with the replacement of the roof covering[193]. In this procedure, the procuring entity rejected the participant's tender bid on the following grounds:

- ***the waste transportation contract*** does not meet the requirements of the tender documentation;
- ***there is no license*** for carrying out business activities for the provision of fire-fighting services and the performance of fire-fighting works;
- cost estimate documentation does not comply with the requirements of the terms of reference set forth by the procuring entity.

The Northern Office of the State Audit Service came to the conclusion that the correction of these inconsistencies **would not lead to a change in the procurement item proposed by the participant in the procurement procedure** as part of their tender offer, nor would it change the product name, brand, model. And therefore, by not providing 24 hours to correct the inconsistency, the procuring entity violated clause 40 of the Features. Currently, this conclusion is being contested in court.

In other cases, public auditors took the opposite position. In the procedure for the purchase of asphalt concrete mixture[194], the procuring entity turned to the participant with the demand to ***provide permission*** from the authorized body for draining, cleaning tanks, containers etc. from oil products, which was absent from the participant's tender bid.

The Directorate of the Northern Office of the State Audit Service in Cherkasy Oblast considered the fact that the procuring entity had given 24 hours to submit the missing document on the technical and quality characteristics of the procurement item to be a violation of Clause 40 of the Features.

Thus, the possibility to upload the missing documents actually depends on whether the document belongs to the documents "on technical and qualitative characteristics of the procurement item."

Public auditors came to the conclusion **that it was impossible to correct such inconsistencies as**:

- lack of documentary confirmation that the participant is entitled to use objects of intellectual property rights (trademarks for goods and services) that appear on documents that are a means of obtaining oil products (coupons);[195]
- the absence of warranty letters from the manufacturer (authorized representative, office, representative of the manufacturer if their respective authority covers the territory of Ukraine) confirming the ability to supply the goods in the necessary quantity within the period specified by the tender documentation and the participant's offer for the positions <...>[196],[197]
- no documents about the technical and qualitative characteristics of the procurement item provided[198],[199]

The decisive factor was precisely the lack of documents and their classification as documents "about the technical and qualitative characteristics of the procurement item."

2.4. Letters of the participant in an arbitrary form, consents, guarantee letters

The practice turned out to be more favorable to the correction of documents created by the participant individually for the participation in a specific procurement procedure. In most cases, government auditors

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193 Monitoring UA-M-2023–04–11–000031 in tenderUA-2023–03–06–007995-a (Northern Office of the State Audit Service)

194 Monitoring UA-M-2023–05–29–000101 in tender UA-2023–05–03–001817-a (Directorate of the Northern office of the State Audit Service in Cherkasy oblast)

195 Monitoring UA-M-2023–04–11–000092 in procurement UA-2023–03–17–011301-a (Northeastern Office of the State Audit Service)

196 Monitoring UA-M-2023–04–10–000071 in tender UA-2023–03–13–011869-a (Directorate of the Northern office of the State Audit Service in Cherkasy oblast)

197 Monitoring UA-M-2023–05–19–000033 in tender UA-2023–04–10–010394-a (State Audit Service)

198 Monitoring UA-M-2023–04–10–000066 in tender UA-2023–03–24–010186-a (Directorate of the Northern office of the State Audit Service in Cherkasy oblast)

199 Monitoring UA-M-2023–03–28–000002 in tender UA-2023–03–01–011805-a (Directorate of the Northeastern Office of the State Audit Service in Sumy Oblast)

considered it legal to correct inconsistencies in such documents, and sometimes even add them to the bid within 24 hours.

For example, in the procedure for the procurement of services for the development of land management projects[200], the participant did not provide a **letter of consent (in an arbitrary form) with the requirements for the procurement item** in accordance with Appendix 3 to the tender documentation of the completed draft contract.

Explaining the need to provide 24 hours to eliminate this shortcoming, the Southern Office of the State Audit Service stated the following in its conclusion of monitoring UA-M-2023–04–18–000023: *"while preparing the aforementioned letter of consent, the procuring entity did not provide participants with an opportunity to make any changes to the description of the procurement item, its technical and qualitative characteristics. Thus,* ***the letter of consent cannot in any way lead to a change in the procurement item proposed to the participants in the procurement procedure within the tender proposal, the name of the product, brand, model, etc."***

Moreover, the public auditors found that Appendix 3 (technical specification) was duplicated in the draft contract that the participant provided in a signed form as part of the tender bid. Further, the participant stated their agreement with all conditions of the tender documentation in the file with the tender proposal. "In view of the above, Juristek Group LLC effectively agreed to the requirements for the procurement item in accordance with the Appendix," the conclusion states.

Analyzing this conclusion, we can observe that the line between inconsistencies which **can be fixed** and formal errors which **do not require correcting** are sometimes vague in practice, which is another issue with the application of the "24-hour rule."

The following two examples can illustrate the contradiction in the views on the possibility of correcting the shortcomings in the documents of the technical part prepared by the participant.

EXAMPLE 1:

In a procurement procedure for construction materials[201], a participant made a number of errors:

- failed to provide a document confirming that the offered product is not a product originating from Russia / Republic of Belarus;
- failed to provide a **warranty letter confirming the delivery of the goods** in accordance with the technical characteristics specified in Appendix No. 3 (with all indicators specified)[202].

The procuring entity believed that they had no right to give the participant an opportunity to correct the inconsistencies, as they related to the requirements of the technical specification.

The State Audit Service found that the participant's proposal contained a guarantee letter confirming the delivery of the goods in accordance with the technical specifications, but no information was indicated in the "compliance (YES/NO)" column. Such information – if this deficiency is corrected – does not lead to a change in the procurement item in the opinion of the auditors and falls under the inconsistencies specified in Clause 40 of the Features[203].

Regarding the possibility of additionally providing the rest of the letters that were missing in the tender bid of the participant, the monitoring conclusion did not contain a separate position and arguments but only covered the letter mentioned above. Eventually, the auditors recognized the rejection of the bid as groundless and noted that the procuring entity should have provided 24 hours to correct the inconsistencies.

EXAMPLE 2:

The opposite conclusion was reached by the Directorate of the Northern office of the State Audit Service in Cherkasy Oblast after monitoring a fuel procurement procedure[204]. In this tender, the

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200 Monitoring UA-M-2023–04–18–000023 in tender UA-2023–03–31–006813-a (Southern office of the State Audit Service)

201 Monitoring UA-M-2023–05–05–000041 in tender UA-2023–03–30–008424-a (State Audit Service)

202 Monitoring UA-M-2023–05–05–000041 in tender UA-2023–03–30–008424-a (State Audit Service)

203 Monitoring UA-M-2023–05–05–000041 in tender UA-2023–03–30–008424-a (State Audit Service)

204 Monitoring UA-M-2023–03–27–000025 in tender UA-2023–03–09–005248-a (Directorate of the Northern Office of the State Audit Service in Cherkasy oblast)

winner did not provide a **letter of warranty** indicating that, in order to confirm information about the necessary technical, qualitative and quantitative characteristics of the procurement item, the participant, upon delivery of the goods, submits copies of certificates of conformity and/or quality passports with the definition of technical and qualitative characteristics of the offered product, taking into account seasonality.

The procuring entity placed a notice with a request to provide this letter; however, the public auditors recognized this request illegal, since this letter as a document "about the technical and qualitative characteristics of the procurement item" was missing – which cannot be corrected.

3. **Other documents of the tender bid**

As mentioned earlier, in open bidding, procuring entities tend to demand that participants submit documents as part of the tender bid which do not belong either to the qualification, or the technical, or any other clearly defined part of the offer content, for example, consent to the processing of personal data, the charter, consent to the terms of the draft procurement agreement, documents on the participant's tax status, and so on.

The updated version of the 24-hour rule allowed fixing shortcomings in such documents, including their absence. Therefore, the practice of procurement monitoring by auditors on this issue is uniform – auditors take the position that the elimination of inconsistencies is completely legal and necessary when the participant has committed, in particular the following mistakes:

- failed to provide a certified copy of the certificate of registration as a value-added tax payer (or of the payment of the single tax) or a copy of an extract from the register of VAT payers;[205]
- failed to provide letters of warranty and certificates in an arbitrary form about: compliance with the provisions of the current legislation of Ukraine in their activity; regarding the contact details of the participating company; regarding acceptance of essential terms of the contract; regarding agreement with all conditions of the tender documentation; regarding the reliability of the provided information; regarding agreement with all conditions of the tender documentation;[206]
- failed to provide information (certificate) regarding the value of the company's net assets as of the date of the last approved financial statement preceding the date of the tender announcement;[207]
- failed to fulfill the requirement of clause 4.13 of Appendix 2 to the tender documentation, **not specifying the monthly volumes of delivery/shipment of asphalt concrete**, during the entire period of performance of works (provision of services). Failed to fulfill the requirements of clause 4.13 of the specified appendix in terms of **providing a guarantee letter on the uninterrupted supply of asphalt concrete not from a manufacturer**[208].

The last case is particularly interesting in terms of **distinguishing which documents are considered to be documents on the technical and qualitative characteristics of the procurement item, and which ones are not**, and on which factors it may depend.

Arguing the need to give the participant 24 hours to correct errors, the Northeastern Office of the State Audit Service noted, in particular, the following: *"Since the requirements of the tender documentation **specified in the Protocol of rejection** of TOV EURODORBUD-PLUS are not related to technical and qualitative characteristics and are placed by the procuring entity in section 4 'Other documents' of Appendix 2 to the tender documentation, the procuring entity, under clause 40 of the Features, had to give the participant 24 hours to correct the information regarding compliance with these requirements."*[209]

Thus, when it is a question of whether a document should be classified as a document on the technical and qualitative characteristics of the procurement item, even the placement of the requirement in the tender documentation may be relevant.

To sum up, it appears that the practice of public procurement monitoring in regard to the 24-hour rule contains the following problematic issues:

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205 Monitoring UA-M-2023-04-18-000073 in tender UA-2023-03-27-009171-a (Directorate of the Southern Office of the State Audit Service in Mykolaiv oblast)

206 Monitoring UA-M-2023-03-28-000115 in tender UA-2023-03-07-002925-a (State Audit Service)

207 Monitoring UA-M-2023-04-24-000113 in tender UA-2023-03-22-009018-a (Southern office of the State Audit Service)

208 Monitoring UA-M-2023-05-08-000069 in procurement UA-2023-04-18-007652-a (Northeastern Office of the State Audit Service)

209 Monitoring UA-M-2023-05-08-000069 in procurement UA-2023-04-18-007652-a (Northeastern Office of the State Audit Service)

1) Since the legislation does not provide for specific ways to eliminate violations that must be noted by public auditors, they are forced to determine such methods on their own. These methods are not always proportional to the significance of the violation. Sometimes, public auditors demand to terminate the contract after discovering a minor violation committed during the procedure.
2) Different offices and administrations may have different approaches to the interpretation of the same issues – for example, to the issue of correcting the technical part of the tender bid.
3) As a result of changes in the procurement legislation, some of the violations of Article 164–14 of the Code are not fully consistent with it, in particular, "failure to reject a tender bid that was subject to rejection" (since, according to the updated legislation, in most cases, the procuring entity should rather provide 24 hours to fix the error than reject the bid immediately). On the other hand, Article 164–14 of the Code does not contain the content of the violation committed by the procuring entity while awarding the contract to the participant with inconsistencies in the tender without allowing them 24 hours to eliminate the violation.

SECTION 4. Analysis of judicial practice on appealing conclusions on the results of public procurement monitoring

4.1. Quantitative indicators of judicial appeal of conclusions on monitoring results

As noted in the previous sections, the procuring entity has the right to appeal the monitoring report to the court within 10 working days from the date of its publication. That is recorded in the Prozorro system within the next working day after the conclusion is appealed in court. Furthermore, procuring entities notify the Prozorro system about the initiation of a case and its corresponding reference number within one business day of receiving this information[210].

When selecting the judicial practices to be studied, it should be considered that, as of October 19, 2022, the provisions governing public procurement of goods, works, and services for procuring entities, as defined by the Law of Ukraine On Public Procurement, came into effect for the duration of martial law in Ukraine, and continued for 90 days following its termination or cancellation (hereinafter referred to as "the Features"). The Features have significantly changed the procurement practice by introducing open bidding with the Features.

Court decisions on appealing the monitoring conclusions in procurement transactions conducted prior to the implementation of the Features may have, in part, become less relevant for the study due to a change in the procedure. Therefore, we consider it appropriate to study the judicial practice of appealing conclusions based on the results of monitoring open tenders with the Features and other procurement transactions announced on or after October 19, 2022.

Frequency of judicial appeals

According to the Public Analytics module of BI Prozorro, public auditors conducted monitoring for 6,020 out of 6,660 lots that were announced during the first half year of the Features, i.e., those announced from October 19, 2022, to April 19, 2023. According to the results of these monitoring, as of July 24, 2023, inclusive, 5,860 conclusions were published in 6,490 lots[211].

Among them, procuring entities reported in the Prozorro system about **judicial appeal of 437 monitoring conclusions**, which is 7.45% of the published conclusions[212].

Out of the 6,490 lots that were announced for monitoring between October 19, 2022, and April 19, 2023, **violations were identified in 4,410** lots (68.37%), and this information is documented in **4,010** monitoring reports[213].

210 Part 10, Article 8 of the Law of Ukraine On Public Procurement.
211 Data as of July 24, 2023.
212 Data as of August 21, 2023.
213 Data as of July 24, 2023.

Among them, the mark of appeal has **435 monitoring conclusions**[214]**.** If we examine the ratio of judicial appeals to the number of conclusions regarding violations in procurement transactions announced during the first six months of the application of the Features, it amounts to **10.85%. This frequency represents the instances where procuring entities disagree with identified violations and/or obligations to rectify them and subsequently initiate a court challenge, reporting it in the Prozorro system.**

It is important to highlight that the existing legislation and technical features of the Prozorro system do not comprehensively depict the progression of legal proceedings on the procurement page within the system. Exceptions are information about the fact of appeal, the case number specified by the procuring entity, and options for the procuring entity to add documents and a description of the reasons for appeal. However, there is currently no synchronization of the Prozorro system with the Unified State Register of Court Decisions, and therefore data on judicial appeal on the purchase page is limited.

Hence, for the analysis of the judicial practice regarding the appeals of monitoring conclusions, one needs to study data from the Judicial Power website and information sourced from the Unified State Register of Court Decisions. This involves establishing a connection between the case number and the procurement procedure number in each specific case. Regarding procurement, procuring entities specify the case number for ongoing court proceedings. However, the system lacks an automated feature for selecting and displaying a list of these case numbers.

With this in mind, we selected judicial practice directly in the Unified State Register of Court Decisions. According to Article 19 of the Code of Administrative Procedure of Ukraine, cases concerning appeals against decisions of a subject of power fall within the jurisdiction of administrative courts.

The quantity of court judgments and the distribution of wins between the parties involved

As of July 24, 2023, 58 court judgments taken in the form of a decision or resolution (i.e. decisions on the merits of the case) have been identified in the administrative jurisdiction since October 19, 2022, which simultaneously contain key requests: "1,178 procurement transactions of the monitoring report."

Of these, 54 judgments in 48 cases are relevant, that is, issued **in cases of appeal against the conclusion of public procurement monitoring on the merits of the case.**

In the first instance courts, the distribution of wins among the parties in cases stands as follows:

- **Fifteen judgments** ruled in favor of the State Audit Service, its branches, and departments. In these cases, the procuring entities' claims to have the conclusions declared illegal and revoked were dismissed.
- **Thirty-three** judgments were made in favor of procuring entities. According to them, claims were allowed partially or in full, and conclusions were declared illegal and revoked.

That means in **68.8%** of the cases, the first instance courts ruled in favor of procuring entities, deeming the claim for the monitoring report's illegality and its revocation as valid. Only **31.2%** of the monitoring conclusions were reviewed in court in the first instance and remained in force.

In the appellate instance from the sample studied, the courts reviewed 6 judgments of the first instance courts. Based on the results of the appeal, 5 judgments made in favor of procuring entities were left unchanged. One judgment made in favor of the procuring entity was overturned and a new judgment was made in favor of the SFCB, which refused to allow the procuring entity's claim.

So, in the appellate instance, the ratio of success of procuring entities and SFCB (strictly within the study sample) was 5 judgments to 1[215].

To arrive at definitive conclusions regarding the distribution of wins among the parties involved in appeals of monitoring conclusions, a more extended time frame is essential. This period encompasses the entire cycle,

214 Data as of August 21, 2023.

215 Data as of July 24, 2023.

starting from the procurement announcement, moving through the monitoring phase, and concluding with the judicial appeal and the final decision on the case.

In addition, please note that the mark of judicial appeal in the study sample as of July 24, 2023, had **410** monitoring conclusions in the Prozorro system. The difference between the number of these conclusions and the number of decisions available in the Unified State Register of Court Decisions may be due to several reasons:

- primarily, this is because the judicial appeal process is time-consuming, and a significant portion of cases related to appeals of conclusions in procurement transactions from October 2022 to April 2023 may still be in the midst of judicial deliberation;
- during martial law, some court decisions may not be reflected in the Unified State Register of Court Decisions;
- there is a risk that procuring entities will abuse their procedural rights to challenge the monitoring findings in court. For example, procuring entities can inform the Prozorro system about the appeal of the conclusion and even file a statement of claim, but not comply with the requirements of the Code of Administrative Procedure and not eliminate the shortcomings of the statement of claim in time or take actions that contribute to delaying the trial.

Thus, on average **every tenth monitoring conclusion** where the violation was recorded, **is challenged** in court by procuring entities. The **probability of successful appeal** of a conclusion in court, based on a sample of judgments made from October 19, 2022, to July 24, 2023, regarding conclusions on procurement transactions made for the first half of the year of operation of the Features, **was about 70%**. As of August 21, 2023, 437 conclusions in such procurement transactions have a mark of judicial appeal, but there is no synchronization with court registers and databases, so only part of the information about the case entered by procuring entities is displayed on the procurement page.

4.2. Reasons for canceling conclusions about monitoring results and identified problems

To identify the main reasons why courts recognize as illegal and cancel conclusions based on the results of public procurement monitoring, we will analyze the content of **33 decisions** issued by the first instance court in favor of procuring entities.

It is essential to emphasize which violations were most frequently identified by public auditors in procurement procedures and what methods for rectifying these violations were determined in the conclusions that procuring entities successfully contested later.

Violations that the procuring entity denied when appealing the conclusions

According to the results of monitoring, one or several violations were recorded in each appealed report at the same time.

The most prevalent violation observed in the contested conclusions is the **failure of the procuring entity to reject the winning tender bid** in procurement procedures that, according to public auditors, should have been rejected. Such a violation was recorded by public auditors in **26** conclusions out of 33.

According to the public auditors, procuring entities in those procurement transactions concluded contracts with winners contrary to the relevant subclause of clause 41 of the Features and Article 31 of the Law[216].

216 Such violations were recorded in procurement procedures with numbers UA-2023-01-18-011606-a, UA-2022-10-28-009880-a, UA-2022-12-07-020293-a, UA-2022-12-13-013423-a, UA-2022-12-24-001991-a, UA-2021-08-27-013052-a, UA-2022-12-27-019159-a, UA-2022-12-28-005736-a, UA-2022-12-26-019042-a, UA-2022-12-26-019227-a, UA-2022-12-27-012351-a, UA-2023-01-23-016334-a, UA-2022-11-25-005599-a, and others.

Sometimes, according to public auditors, the unjustified determination of the winner was also accompanied by the unjustified granting of 24 hours (at least 2 cases).

Furthermore, in **9** cases, **non-compliance with the requirements of tender documentation** and the current legislation was documented.

Additionally, in isolated instances, illegal modifications to the procurement contract were noted (3 cases). These violations included the absence of a code in the annual plan according to ECBT (Economic Codes of the Budget Taxes) for budget funds, failure to provide requested information to public auditors, and neglecting to specify the product code determined in accordance with the Unified Procurement Dictionary, which best corresponds to the name of each nomenclature item.

Obligations to eliminate the violations established in the appealed conclusions

The methods for eliminating the violations in the conclusions that were effectively challenged by the procuring entities included:

- **termination of obligations** under the contract[217], in particular with the application of the corresponding consequences of the contract invalidity/nullity[218] as well as termination of obligations under the contract in compliance with the provisions of the Economic Code of Ukraine and the Civil Code of Ukraine[219], application of the corresponding consequences of contract invalidity/nullity and **20 cases** of termination through the conclusion of an additional agreement;[220]
- **termination of the contract**[221] in particular, in compliance with the provisions of the Economic Code of Ukraine and the Civil Code of Ukraine[222], by entering into an additional agreement[223], termination of a contract (termination of obligations) under the concluded contract in compliance with Article 188 of the Economic Code of Ukraine and Article 651 of the Civil Code of Ukraine[224] – **7 cases;**
- measures aimed at preventing the established violation in the future[225], in particular by bringing to responsibility of persons who have committed violations[226],[227] under the requirements of Article 23. Part 1 of the Law when drawing up tender documentation[228] – **4 cases;**
- **1 case** of cancellation of the tender winner decision and rejection of the tender bid;[229]
- **1 case** of publication of the annex to the Contract as amended by the additional agreement, as well as bringing to responsibility of persons who committed violations;[230]

Therefore, the most common way to eliminate violations in conclusions that have been successfully challenged by procuring entities is **termination of contractual obligations** (with or without the consequences of invalidity/nullity of the contract) **and termination of the contract**. It was these conclusions that were most often challenged. It should be noted that such a selection of conclusions does not give grounds to assert that these methods are the most common in general (outside the selection of conclusions that have been subjected to judicial appeal).

Considering the combination of common violations and their resolutions, it can be deduced that the **primary aim of judicial appeals** against monitoring conclusions is to **preserve the contract entered into by the**

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217 Decision of Dnipropetrovsk District Administrative Court dated June 09, 2023, in case No. 160/5762/23

218 Cases Nos 460/883/23, 320/3755/23, 420/3472/23, 420/2125/23, 420/2123/23, 420/2131/23, 420/2128/23, 420/2126/23, 240/4080/23, 200/1133/23, 420/6812/23, 420/2940/23, 320/5848/23, 420/7200/23, 140/6457/23

219 Case No. 160/2537/23 and Case No. 620/2855/23

220 Decision of Dnipropetrovsk District Administrative Court dated April 26, 2023, in case No. 160/3145/23

221 Case No. 380/5329/23, Case No. 620/5597/23

222 Case No. 360/322/23, Case No. 160/3833/23

223 Decision of Dnipropetrovsk District Administrative Court dated May 5, 2023, in case No. 160/3310/23

224 Case No. 260/1417/23, Case No. 260/2246/23

225 Decision of the Vinnytsia District Administrative Court dated February 23, 2023, in case No. 120/11027/22

226 Decision of Odesa District Administrative Court dated April 07, 2023, in case 420/2861/23.

227 Decision of Rivne District Administrative Court dated March 16, 2023 in case No. 460/49777/22

228 Decision of Donetsk District Administrative Court dated June 26, 2023, in case No. 200/2148/23

229 Decision of Zaporizhzhia District Administrative Court dated April 07, 2023, No. 280/812/23,

230 Decision of Kyiv District Administrative Court dated June 02, 2023, in case No. 320/4788/23

procuring entity with the procurement procedure's winner, which has already commenced implementation in some instances.

Common grounds for deeming conclusions as unlawful and subsequently overturning them

Courts consider monitoring conclusions as acts of individual action.

Within the meaning of Article 2 of the Code of Administrative Procedure in cases concerning appeals against decisions made by public authorities, administrative courts check whether they have been taken lawfully, **in line with the purpose of authority**, reasonably, that is **with all the circumstances considered**, relevant for making a decision, impartially, in good faith, judiciously, while respecting the principle of equality before the law, preventing all forms of discrimination, **proportionally**, in particular **with the necessary balance between any adverse consequences for the rights, freedoms, and interests of the individual and the goals aimed at achieving this decision (action)**, taking into account the person's right to participate in the decision-making process, in a timely manner, that is, within a reasonable time.

That is, formal compliance with the law does not guarantee that the conclusion will stand up to the court's review for proportionality, timeliness, and consideration of all the circumstances of the case. The courts are critical of most of the conclusions in this part:

- *the problem of proportionality* occurs when, due to a minor violation, the procuring entity is obliged to terminate the contract or contractual obligations;
- *the problem of a legitimate goal* is covered in court decisions when the violation identified by the auditors did not affect the efficiency of using budget funds, but the conclusion, nevertheless, obliges the procuring entity to take exceptional measures;
- *the problem of considering all the circumstances that matter*, occurs mainly in cases where, according to the conclusion of public auditors, the winner's proposal did not meet the requirements of the tender and should have been rejected. But the conclusion is based on the content of that proposal, while in fact, the participant met the criteria, although they made mistakes in the proposal documents failing to adhere to the method of documenting that compliance.

If we summarize the reasons why there was a successful judicial appeal against the conclusions based on the results of monitoring, it becomes obvious that the courts recognize as illegal and cancel the conclusions for the following main reasons:

1. **The court's perspective is that the absence of a violation** as determined by the public auditors in the conclusion renders the conclusion non-compliant with the validity criterion. Most often, it comes down to the court's interpretation of specific provisions of the procurement legislation that, in the opinion of public auditors, the procuring entity violated during the procurement procedure. Since most often the recording of a violation regarding non-rejection of the winner's tender proposal is appealed, the subject of consideration is the compliance of the winner's tender bid with the requirements of the tender documentation.
2. **Detected** violation did not lead to negative consequences, did not affect the efficiency of using budget funds, did not go beyond formal errors, and so on.
3. **The way of elimination** was disproportionate or contrary to the authority of the SFCB. Since most often the way to eliminate the violation in the contested conclusions is the termination of contractual obligations or contract termination, courts assess the validity, proportionality, certainty, legitimate purpose, and consequences of choosing that particular method of eliminating the violation by the SFCB.

Often, court judgments combine all the above reasons to cancel the monitoring conclusions.

Why did the courts find the conclusions unfounded?

Upon reviewing court rulings that found monitoring conclusions unfounded and violations absent, we can indicate the following key points:

1) Analyzing the proposals of the winners and denying the grounds for their rejection, the courts noted, in particular, the following:

Regarding the technical part

- if a participant made minor errors in the formatting of the tender bid that do not impact the content of the bid, do not undermine the technical capabilities or competitiveness of the participant, then such shortcomings can be considered formal. For example, if the participant failed to comment on each technical specification of the product offered in the specified format, as required by the tender documentation);[231]
- correction of inconsistencies by providing a corrected certificate of conformity did not lead to a change in the procurement item, or product name, brand, model, etc., proposed by the tender participant as part of the tender bid;[232]
- only one sentence of the manufacturer's declaration is set out in English and has no translation into Ukrainian, and other documents (labels) were provided additionally at the participant's discretion;[233]
- although participants were obligated to confirm their compliance with the annex requirements, the tender documentation does not specify a mandate for submitting documents that must adhere to the annex in both form and content;[234]
- the tender documentation does not contain clear requirements for providing photos for each packaging size or each terms of reference item or tender proposal. Meeting the requirements of the procuring entity's notification (uploading product photos) does not lead to changes in a procurement item, product name, brand, model, etc.;[235]
- it is acceptable to provide a letter of explanation about the inability to provide test reports and the obligation to provide them when delivering products[236].

Regarding other documents

- Substituting a license with a declaration of economic activity is **allowable** when the participant has specified in the declaration that they possess a license for the construction of objects falling under the categories of medium (CC2) and significant (CC3) consequence class. Furthermore, the term "work permit" encompasses a license, declaration, or any other document as stipulated by law for conducting economic activities. The court notes that **"declaration on economic activities, which is an alternative to a license in wartime conditions"**;[237]
- **inconsistencies in local estimates can be corrected** since the data in the local estimates do not affect the quality of construction work on the facility, and all the works specified in the local estimates overlap, and these types of works can be checked in other documents submitted in the tender documentation. In addition, inconsistencies in local estimates and their elimination did not lead to a change in the procurement item;[238]
- violation in the winner's tender proposal regarding the failure to specify the CEO's phone number **was defined as a formal (minor) error**, and the availability of service support is confirmed for the entire product group (according to information on the manufacturer's website, the proposed product belongs to the group);[239]
- the court agrees with the statement of the SFCB about the improper execution of the tender proposal by the participant, which consisted in the failure to provide a lease agreement confirming the legal grounds for using the gas station at <..> by the participant, absence of the gas station partner in the guarantee letter at <...>, incorrect address of the partner gas station <...>. However, **those mistakes did not lead to the conclusion of a contract with a participant whose tender proposal does not meet the requirements set out in the tender documentation;**[240]
- even if the participant's proposal **does not have appendices (pages) to the permit for emissions of pollutants into the atmospheric air to stationary sources**, and the lease agreement is concluded for a warehouse, and not for "medical waste management facilities," the participant is granted a license to conduct hazardous waste management operations. This proves that the licensee has all the necessary permits and other documentation. The issue of maintaining

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231 Resolution of the Eighth Administrative Court of Appeal dated June 8, 2023, in case No. 460/883/23

232 Same source

233 Decision of Dnipropetrovsk District Administrative Court dated June 09, 2023, in case No. 160/5762/23

234 Decision of Rivne District Administrative Court dated March 16, 2023, in case No. 460/49777/22

235 Decision of Zakarpattia District Administrative Court dated May 19, 2023, in case No. 260/2246/23

236 Decision of Chernihiv District Administrative Court dated July 04, 2023, in case No. 620/5597/23

237 Decision of Odesa District Administrative Court dated April 24, 2023, in case 420/3472/23

238 Decision of Zakarpattia District Administrative Court dated June 21, 2023, in case No. 260/1417/23

239 Decision of Luhansk District Administrative Court dated June 6, 2023, in case No. 360/322/23

240 Decision of Zhytomyr District Administrative Court dated June 7, 2023, in case No. 240/4080/23

the License Register is controlled by the relevant state authorities and does not concern the procurement procedure. There is no information about the invalidity of the permit without appendices, and the information contained in the appendices (conditions set out in the permit and permitted emission amounts) does not relate to the procurement procedure;[241]
- it is allowed to sign a proposal with an Advanced Electronic Signature when it is required to sign with a Qualified Electronic Signature[242].

Regarding the qualification part

- indication by the previous procuring entity of **a different contract price than in the available information about the previous procurement does not in any way indicate a discrepancy in the information** and/or documents submitted by the participant in the tender proposal, and may not have negative consequences in the form of rejection[243] (the contract price of similar contract in the response and payment data was different);
- **is acceptable to confirm experience in concluding similar cleaning services contracts for space areas required by the procuring entity by showing several contracts where the total space area corresponds to** procuring entity requirements;[244]
- *providing a most recent medical record of the cook with a most recent checkup date instead of a new one does not affect the availability of* personal medical record with the checkup date valid at the time of submission of the tender proposal. In addition, despite the plural wording of the tender documentation requirement ("cooks"), the tender documentation did not have any requirements for the number (one is enough). In addition, the SFCB did not consider the explanatory documents provided by the procuring entity;[245]
- the heating system overhaul and installation of individual heating points contract in six (6) children's educational institutions and a training and rehabilitation center meets the requirement to provide a similar contract for "major repairs or reconstruction of a building/premises." The participant also provided a letter of recommendation thus confirming the experience in construction and installation in buildings that are in operation, and such an enterprise is recommended for cooperation[246].

Regarding the correction of inconsistencies

- uploading documents to eliminate inconsistencies **later than 24 hours is allowed** if there were interruptions on the website during part of the 24-hour period, and the participant sent the documents by email and uploaded them into the system a few days later[247].

2) **considering the shortcomings of the tender documentation and pointing out the absence of violations, the courts motivated this, in particular, by the following:**

- **The procuring entity is responsible for determining the list of required characteristics** therefore, in the absence of an exhaustive legally established list of such characteristics, there is no reason to claim that the plaintiff does not provide descriptions of all the necessary characteristics of the procured goods[248]. (The SFCB considered that the tender documentation does not contain a description of all the necessary characteristics of the goods, works or services procured, including their technical, functional, and qualitative characteristics, which is a violation of Article 23, part 1 of the Law).
- The functioning of state registers and databases that are administered by the state has been discontinued. Therefore, the procuring entity lawfully established the requirements for the winner of the procurement procedure to provide documentary confirmation of the absence of grounds established by Article 17, part 1, clauses 1,2,7,8, and 9 of the Law, except for Article 17, part 1, clause 13 of the Law, as provided for in clause 44 of the Features[249].
- **Although the procuring entity did not comply with the requirements of the Features, there is**

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241 Decision of Zaporizhzhia District Administrative Court dated April 7, 2023, No. 280/812/23
242 Decision of Odesa District Administrative Court dated May 23, 2023, in case 420/6812/23
243 Decision of Dnipropetrovsk District Administrative Court dated June 14, 2023, in case No. 160/2537/23
244 Decision of Kyiv District Administrative Court dated May 25, 2023, in case No. 320/3755/23
245 Case No. 420/2125/23, № 420/2131/23, 420/2133/23, 420/2861/23, and 420/2128/23
246 Decision of Lviv District Administrative Court dated May 22, 2023, in case No. 380/5329/23
247 Decision of Dnipropetrovsk District Administrative Court dated May 5, 2023, in case No. 160/3310/23
248 Decision of Donetsk District Administrative Court dated June 26, 2023, in case No. 200/2148/23
249 Resolution of the Eighth Administrative Court of Appeal dated June 8, 2023, in case No. 460/883/23

no violation, since the provisions of the Law of Ukraine are higher than the Resolution of the Cabinet of Ministers of Ukraine, and therefore the provisions of the Law shall prevail. The highest legal force of the Law also means that all subordinate legal acts are adopted on the basis of laws and should not contradict them in their content. The subordination of such acts to laws is enshrined in the provisions of the Constitution of Ukraine[250].

- A certificate in any form is also a document. ***It is the procuring entity who has the authority to develop*** *tender documentation in line with legal requirements, with the specific conditions of procurement and, in particular, the qualification criteria in accordance with Article 16 of the said Law, as well as the method of their confirmation*[251].
- Information about the email address of the authorized person was contained in the announcement of open bidding with special features. Consequently, the specified violation committed by the plaintiff did not result in complications for the participants in contacting the authorized person[252].
- Neither Article 22 of the Law, nor any provision of Features require that a procuring entity must refer to clause 47 and 48 of Features in their tender documentation[253].
- The requirements of the Law do not contain a mandatory norm that examples of formal (minor) mistakes in tender documentation must fully comply with (duplicate) the requirements of the list of formal mistakes approved by Order No. 710 of the Ministry of Economic Development, Trade and Agriculture of Ukraine dated 15.04.2020[254].

3) **The absence of other violations was justified by the courts, inter alia, as follows:**

- The monitoring process does not encompass the assessment of the annual plan, as it falls outside the jurisdiction of the SFCB. Verifying compliance of the procurement with the annual plan is the responsibility of the Treasury, which includes specifying the economic classification code for budget expenditures (for budget funds). This aspect lies beyond the purview of this specific audit and the authority of the SFCB.)[255]
- The procuring entity, in alignment with the Unified Procurement Vocabulary, selects the code that best matches the name of the item within the procurement nomenclature[256].
- **Regarding amendments to the contract terms:** the procuring entity mentioned in the tender documentation that the terms of the contract specified in it are not final and exhaustive and can be supplemented and adjusted at the contract finalization, and all future procurement participants were warned about this in advance. The amended clauses [on warranty periods] are set out in "more detail" than in the draft contract to the tender documentation, and do not change the essential terms of the contract[257].

As you can see, sometimes the courts approach the issue of compliance of the participant in a comprehensive manner and go beyond the content of their tender bid during consideration. This approach is not entirely traditional for procurement practices. The stance of the courts concerning the presence or absence of other violations is also not consistently foreseeable.

Why did the courts find ways to eliminate violations inadequate?

As noted above, the most common ways to eliminate violations in the conclusions that procuring entities successfully appealed were either termination of obligations under the contract (in particular, with the application of the consequences of invalidity/nullity) – 20 cases out of 33, or termination of the contract – 7 cases out of 33.

250 Decision of Dnipropetrovsk District Administrative Court dated April 26, 2023, in case No. 160/3145/23
251 Decision of Zakarpattia District Administrative Court dated May 19, 2023, in case No. 260/2246/23
252 Decision of Zhytomyr District Administrative Court dated June 7, 2023, in case No. 240/4080/23
253 Decision of Odesa District Administrative Court dated May 23, 2023, in case 420/6812/23
254 Decision of Odesa District Administrative Court dated May 23, 2023, in case 420/6812/23
255 Resolution of the Eighth Administrative Court of Appeal dated June 8, 2023, in case No. 460/883/23
256 Decision of Zakarpattia District Administrative Court dated May 19, 2023, in case No. 260/2246/23
257 Decision of Dnipropetrovsk District Administrative Court dated April 26, 2023, in case No. 160/3145/23

However, for the most part, the courts negatively assessed these methods. In some cases[258], even agreeing that the procuring entity committed a violation, the courts recognized the conclusion as illegal in terms of the method of its elimination.

Courts' assessment of termination of obligations as a way to eliminate the violation

Most courts in the study sample assess this method of eliminating violations as inappropriate, since:

- The appealed conclusion ***does not specify the identification of violations that,*** as per the provisions of Article 43 of the Law***, could potentially render the*** contract ***null and void.***
- Considering that the directive from the overseeing authority to eliminate identified legal violations must provide unambiguous, explicit, and comprehensible instructions that the regulated entity is obligated to follow, failure to adhere to these instructions leads to ***legal uncertainty***, which is deemed unacceptable.
- Elimination of shortcomings identified during procurement monitoring in the design of tender documentation in the method proposed in the contested conclusion ***may lead to a violation of the rights and interests of the winner*** which is disproportionate in relation to the identified shortcomings.
- The conclusion on the outcome of monitoring the procurement ***does not pertain to the inefficiency, illegality, or misappropriation of budget funds*** in general. This does not align with the SFCB's requirement to terminate contractual obligations, including implementing the corresponding consequences of contract nullity, following the results of a public procurement contract.
- At the time of publication of the conclusion on the monitoring results ***the procurement contract has been completed***, as evidenced by the acts of delivery and acceptance of completed construction works, and the procuring entity paid for those works, as evidenced by payment orders.
- Financial control authority ***had the right to monitor each procurement stage*** by analyzing information about it using an electronic procurement system. The SFCB ***failed to exercise the right of timely procurement control*** until the parties fully fulfilled the contract. In turn, legal provisions ***do not provide for the elimination of identified violations of the procurement procedure after full implementation*** of the procurement contract by the parties.
- Violation committed by the plaintiff ***did not lead to any negative consequences*** for the procurement procedure, in particular, it did not violate the rights of any persons or any public interest and did not lead to the plaintiff receiving any illegal benefits or advantages[259].
- Neither the Law On Basic Principles nor any other regulatory act establishes the right of financial control bodies to demand termination of obligations (contracts). Noting in the conclusion that there is a need to take measures to eliminate the identified violations in accordance with the procedure established by law, in particular by terminating obligations under the contract in compliance with the provisions of the Economic Code of Ukraine and the Civil Code of Ukraine, the defendant did not determine the way to eliminate the violations found during monitoring.
- The Supreme Court, in particular in resolutions of June 11, 2020, in case No. 160/6502/19, of August 12, 2020, in case No. 160/11304/19, of January 21, 2021, in case No. 400/4458/19, of January 28, 2021, in case No. 160/12925/19, expressed the legal position that the plaintiff's motivation to independently determine on the basis of uncertain norms, which measures must be taken to eliminate the identified violations may lead to a new possible violation of the current legislation by the plaintiff. The ability to eliminate identified violations directly depends on a clear definition by the subject of the power of a specific measure (behavior option), which must be taken by the procuring entity's authorized person to eliminate the violation[260].

On the contrary, some courts contend[261] that the possibility of eliminating the violation by terminating contractual obligations, which includes applying the appropriate consequences of the contract's invalidity, serves the purpose of reinstating the parties' relationship to its initial condition. They state: "in case of non-compliance by the participant of the procurement procedure with all the qualification requirements specified in the procuring entity's tender documentation, the latter shall, according to the Law of Ukraine On Public Procurement, reject a participant's tender proposal and cancel the procurement, thus preventing any further contracts. ***Consequently, if the requirements of the Law of Ukraine On Public Procurement were met, the relationship between the tender winner and the procuring entity would not have arisen at all and the contract would not have been concluded.***

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258 Decision of Volyn District Administrative Court dated June 7, 2023, in case No. 140/6457/23

259 Decision of Chernihiv District Administrative Court dated June 08, 2023, in case No. 620/2855/23

260 Decision of Odesa District Administrative Court dated May 23, 2023, in case 420/6812/23

261 Decision of Kyiv District Administrative Court dated June 2, 2023, in case No. 320/5848/23

*<...>**Thus, the conclusion of contracts is the final stage of the procurement procedure, so failure to reject the participant's procurement if there are grounds for this and, as a result, the conclusion of the contract is the basis for declaring the contract invalid and applying the corresponding consequences of this.***

From the content of the conclusion, it is evident that the defendant precisely outlined the actions the plaintiff needed to undertake and specified the method for rectifying the violations identified during monitoring, indicating a high level of clarity and certainty.

In other words, the requirements specified in the disputed procurement procedure monitoring conclusion by terminating obligations under the contract, including applying the corresponding consequences of the invalidity/nullity of the contract, are legally justified.

Conclusions similar in content and binding under Article 13 of the Law of Ukraine On Judiciary and the Status of Judges were also expressed by the Supreme Court in cases No. 420/693/21, No. 200/100092/20, No. 280/8475/20, and No. 260/2993/21.

Taking into account the above, the court considers groundless the plaintiff's arguments about the illegality of the method determined by the defendant to eliminate the violation identified by the plaintiff during monitoring."

Therefore, in legal practice, there are judgments where courts evaluate the same method of eliminating a violation differently.

Cases of negative assessment by the courts of termination of the contract as a way to eliminate the violation

There are cases when the courts do not agree with the validity and expediency of termination of the contract as a way to eliminate the violation. When justifying their decision to deem contract termination as an inadequate method for rectifying the violation, the courts cited the following factors:

- In accordance with the current legislation, a business contract, including a procurement contract, can be terminated only by agreement of the parties or in court. Simultaneously, the legislation ***does not authorize*** financial control bodies to obligate business entities to terminate a business agreement;[262]
- The SFCB solely recorded the identified violations in the introductory section of the appealed conclusion and required the plaintiff to address these violations by terminating the contract. However, ***it did not specify a precise legal procedure for contract termination***, indicating a lack of clarity and certainty. This may lead to the plaintiff having to independently deduce the actions to be taken to address the identified violations based on ambiguous regulations, ***potentially resulting in new violations of the current legislation by the plaintiff***.
- Addressing the shortcomings identified in the procurement monitoring through the approach outlined in the appealed conclusion could potentially ***result in an imbalance that violates the rights and interests of the winning party***, and this imbalance is disproportionate to the identified shortcomings.
- ***Interference of the state financial control body in public procurement is justified only if the detected violation has a negative impact on the budget*** (excessive spending of budget funds). However, the appealed conclusion on the results of procurement monitoring does not contain evidence and information about inefficient, illegal, inappropriate use of budget funds, which is inconsistent with the defendant's request to terminate the contract, in particular, the application of the corresponding consequences of the invalidity/nullity of the contract in accordance with the law.
- The response measure, in the form of the plaintiff's obligation to rectify the violation by terminating the contract, is an exclusive option. This may only be applied if the ***discovered violations create a real threat of corruption and abuse***[263]***.***

262 Decision of Zakarpattia District Administrative Court dated May 19, 2023, in case No. 260/2246/23

263 Decision of Chernihiv District Administrative Court dated July 04, 2023, in case No. 620/5597/23

In the Supreme Court of Ukraine's practice, there is a noticeable **trend of considering contract termination as an appropriate method for eliminating violations** in cases of public procurement transactions conducted with violations. For example, the Supreme Court noted in its resolution dated February 9, 2023, in case No. 520/6848/21:

"...The contract conclusion is the concluding phase of the procurement procedure; thus, entering into a contract in violation of the public procurement procedure forms the grounds for terminating that contract...

From the content of the conclusion, it is evident that the defendant precisely outlined the actions the plaintiff needed to undertake and specified the method for rectifying the violations identified during monitoring, indicating a high level of clarity and certainty.

In other words, the requirements specified in the disputed procurement procedure monitoring conclusion by terminating the contract were binding and enforceable.

Similar conclusions were also expressed by the Supreme Court in judgments of October 26, 2022 (case No. 420/693/21), of November 10, 2022 (case No. 200/10092/20), of January 24, 2023 (case No. 280/8475/20), of January 31, 2023 (case No. 260/2993/21), and the panel of judges of the Supreme Court sees no grounds for derogation from such a legal position."

It is important to mention that in this instance, the SFCB not only mandated the procuring entity to initiate measures for contract termination but also presented three potential courses of action in the conclusion: publishing information and/or documents that confirm the elimination of the identified legislative violations in the public procurement process as outlined in the conclusion, providing reasoned objections to the conclusion, or offering explanations for the inability to eliminate the identified violations.

Based on the materials of judicial practice, some of the reasons for canceling conclusions can be eliminated if amendments are made to the legislation and the processes based on monitoring results are more clearly regulated, namely:

- **provide clear ways to eliminate violations** to which SFCB have the authority to encourage the procuring entity;
- set forth the key legal **correlations** that determine which violations at different stages of the procurement procedure correspond to specific methods for eliminating those violations.

If the legislation regulates the actions of the parties and their consequences in more detail, this will reduce the risks of overturning the conclusions by courts.

Conclusions and recommendations

In this study, we reviewed the regulatory framework for monitoring public procurement, statistical indicators of their implementation, current monitoring practice and judicial practice on appealing conclusions based on their results. Consequently, the hypotheses concerning issues inherent in monitoring public procurement transactions were confirmed. **Here are the main ones**:

- shifting the focus of control to identifying formal violations that did not harm the procurement budget and/or competitiveness;
- non-compliance with the updated legislation and inability to use automatic risk indicators;
- disproportionality of ways to eliminate violations determined by public auditors, the majority and consequences of violations committed;
- legislative requirements for monitoring to ensure compliance with all procurement laws without exception, without specifying the grounds for selective or prioritized monitoring;
- lack of clearly established ways to eliminate violations that public auditors can encourage procuring entities to do;
- availability of options for legitimate behavior of procuring entities, which do not formally release them from liability;
- problems with access of public auditors to verified personal data of violators;
- insufficient settlement of the parties' actions at the trial stage and lack of synchronization of the judicial system's data with the Prozorro system;
- inconsistency of the SFCB's practice in assessing similar procurement situations, in particular in correcting inconsistencies in tender proposals;
- non-compliance of the list of administrative offenses with amendments in the procurement legislation;
- high level of success of judicial appeal of conclusions based on the results of procurement monitoring and inconsistency of judicial practice itself;
- insufficient use of monitoring as a tool for identifying major violations that have signs of crimes, with the subsequent commencement of criminal proceedings on the basis of information revealed during monitoring and bringing the perpetrators to justice.

Based on the existing problems, it is advisable to form recommendations on how to improve state financial control in the form of monitoring procurement transactions in Ukraine.

1. **Revising and classifying the types of procurement legislation violations.**

   Reconsider the list of administrative offenses in the field of public procurement and **classify them according to the degree of severity of the violation**. References to the categories of violations defined by this classification can be used in legal structures built with this distinction in mind.

When examining the list of administrative offenses, it is essential to align it with the prevailing legislation of Ukraine, specifically considering the nuances of procurement that apply during martial law.

When identifying the most substantial violations, it is important to bear in mind the principles of public procurement as outlined in Article 5 of the Law. Foremost among these are fair competition among participants; achieving maximum savings, efficiency, and proportionality; ensuring openness and transparency at every stage of procurement; treating all participants equally and without discrimination; impartial and unbiased determination of winners in a procurement procedure/simplified procurement; prevention of corruption and abuse.

The following signs ***may be the criteria for severity of violation:***

– whether the violation caused or there is a real threat that it will cause ***damage to the procuring entity's budget***, in particular, whether the most cost-effective proposal was lost as a result of the violation;

– whether there is a violation or a genuine risk of violating the ***rights and legitimate interests of participants*** (or potential participants) in the procurement procedure, and whether this has affected the ***competitiveness*** of the procurement transaction in any way;
– whether there was a b***reach of the accuracy*** of information provided to procurement participants regarding the conditions or there was a violation of the ***transparency principle*** in the procurement process.

Additional signs of the severity of the violation may be the repetition of the same violation during the year.

The most major violations that significantly affected the course and results of procurement transactions may be the following:

1) **procuring entity's evasion from conducting a competitive procurement procedure** if there are legal grounds for conducting it (procurement of goods, works, and services before/without conducting procurement procedures);
2) rejection of the tender bid on grounds not provided for by law or not in accordance with the requirements of the law, including failure to provide the participant with 24 hours to correct inconsistencies in the tender bid, if there are grounds for this (**groundless rejection**);
3) **the selection or acceptance** of a winning participant in situations where there are reasons to reject the tender bid or reasons to request the elimination of inconsistencies (excluding cases where the participant has already addressed such inconsistencies in compliance with the procedure defined by the Law);
4) **failure to comply with the decision of the Anti-Monopoly Committee of Ukraine** as an appeal body based on the results of consideration of complaints of subjects of appeal, the submission of which is provided for by Law;
5) **the breach of the procedure for determining the expected value of the procurement item**, as ratified by the Cabinet of Ministers of Ukraine (assuming that the government is granted the mandate to endorse such a procedure and exercises this mandate), shall be considered a violation. This violation is applicable if, as a result of such non-compliance, or if there is a genuine risk of financial detriment to the budget, and/or if the anticipated value and/or contract price arising from a non-competitive procurement does not align with the market price level (percentage differences are to be determined);
6) a conclusion of a **procurement contract with a winning participant with terms that do not align** with the stipulations in the tender documentation and/or the tender bid of the winning participant in the procurement procedure;
7) violation of the terms and procedure for concluding a contract for the above-threshold cost of procured goods, works, and services without using an electronic procurement system established by law;
8) **making amendments to the essential terms of the procurement contract** in cases not provided for by law, including unjustified increases in the contract price by concluding additional agreements.

Such violations, if detected, require adjustment of the procurement process and/or its results and consequences.

Furthermore, **non-compliance with the legal requirements of the tender documentation** can be regarded as a major violation, but only if such non-compliance renders participation in the procurement procedure unfeasible and/or includes universally discriminatory conditions. It should be noted that the current legislation does not give the SFCB the authority to monitor procurement procedures for discriminatory conditions. Nevertheless, it is plausible to assess the **SFCB's capacity to examine the tender documentation for the presence of conditions that:**

- are independently acknowledged by the appellate body as both illegal and discriminatory, irrespective of the nature of the appeal. For instance, these could include demands for supplying product samples before concluding a procurement contract, requests for documents in paper form, and prerequisites for the procuring entity to visit the production site or for participants to inspect the construction project. This list of such conditions must be legally defined;
- these conditions have previously been identified as discriminatory through an appeal against the procurement of the same procuring entity (whether it is the same procurement transaction, a comparable procurement item, or any item procured by the same procuring entity – the exact boundaries for comparing conditions may vary).

Another major violation that requires intervention and prevention of procurement at any stage is **announcement of a new tender if there is an incomplete procurement transaction for the same item for the same**

price (or with minor differences that could have been adjusted in the initial procurement procedure without declaring a new one). The essence of the violation is that the procuring entity, having started the procurement procedure, does not complete it without legal grounds. For example, through the participation of third-party participants, challenging the terms or decisions of the procuring entity. Formally, the procuring entity executes the decision of the appeal body, if any, and further inaction falls only under the violation of the deadline for consideration of proposals. But in fact, the procuring entity leaves the procurement and announces a new one, as a result of which participants are forced to take part in it again, already knowing each other's approximate price level and documents, and suffer losses. The announcement of another procurement transaction instead of the one that, for subjective reasons, "did not suit" the procuring entity, should not be permited, since it allows avoiding competition.

Violation of the terms of consideration of the tender procedure for more than a month, may highly likely indicate an intention to exit the procurement. This means that it can be considered a major violation.

Violation of the deadline for publication of tender documentation may be considered as a major violation if, as a result, the full current version of the tender documentation was available for reading for less than 50% of the minimum deadline for submission of tender proposals provided for by the Law.

Violations can be recognized as less significant, if they did not affect the saving, competitiveness, or transparency of procurement transactions, did not harm the rights and legitimate interests of participants, are the following:

1) violation of the procedure for determining the procurement item
2) late provision or failure to provide explanations on the tender documentation content by a procuring entity;
3) failure to publish or violate the deadline for publishing information about procurement transactions;
4) failure to provide information and documents in cases stipulated by law;
5) the tender documentation is not drawn up in accordance with the requirements of the law (except in cases where the violation led to negative consequences: restriction of competition, etc.).

2. **Delineating the consequences of detecting violations of different categories at different stages of procurement and identifying clear ways to eliminate violations.**

   At the legislative level, establish distinct consequences for committing and detecting major and minor violations, which would influence the subsequent course of procurement based on when these violations are discovered at different stages of the procurement process.

In particular, if a violation is detected at the stage where it can be corrected without canceling the procurement and without terminating the procurement agreement, the procuring entity must correct the violation in an accessible way provided for by the Law (for example, make changes to the tender documentation, make information public, cancel the decision to reject, etc.).

If a violation is detected at the stage of the procurement procedure, when it cannot be corrected in the manner provided for by the Law, except by canceling the procurement or terminating the contract, the category of violation is taken into account:

- ***if the violation is included in the list of major violations***, then the SFCB obliges the procuring entity to cancel the procurement procedure or terminate the contract. If the violation is related to the content of the procurement contract, the SFCB obliges the procuring entity to initiate appropriate amendments to the procurement contract to coordinate it with the current legislation. To ensure that the SFCB's mandate to terminate contracts aligns with the contract's terms and prevailing legislation, it is imperative to stipulate in the Law that the procurement contract draft must invariably include a provision requiring the parties to terminate the contract if such an obligation is determined in the conclusion from the monitoring results.
- ***if the violation is not included in the list of major violations***, the SFCB may recommend the procuring entity to prevent violations in its further procurement activities. Such a recommendation is not an obligation to eliminate the violation in the procurement in which it was detected.

Apart from precisely delineating the methods for eliminating violations that the SFCB can mandate the procuring entity to pursue, it is recommended to integrate the selection of these methods into the Prozorro system. This would entail isolating these options as distinct fields and introducing the capability to search and filter conclusions where a specific method for rectifying violations has been prescribed.

3. **Legally define and implement the priorities of procurement selection for mandatory and/or priority monitoring in risk indicators.**

Considering the SFCB resource constraints and the substantial volume of procurement transactions, it is imperative to revise and specify the risk indicators in the regulatory framework, integrate them into the Prozorro electronic procurement system, and elimiante any technical deficiencies, if present.

Additionally, it is worth considering the introduction of the following regulations:

- set the minimum share of monitoring that should be initiated by each office or Department of the State Audit Service on the basis of the activating of risk indicators;
- establish mandatory procurement procedures for monitoring based on the criterion of high expected cost.

4. **Introduce a norm according to which, if signs of major violations are detected, the procurement procedure and the execution of the contract are suspended for the period of monitoring (suspension of the execution of the contract does not apply to meeting critical needs of the procuring entity).**

Since the legally defined duration of monitoring the procurement procedure is 15 working days, which is even less than the time limit for appealing the procurement procedure to the relevant commission of the Anti-Monopoly Committee of Ukraine, we consider it appropriate to introduce a suspension of the procurement procedure in the event of the start of monitoring, but only if monitoring is initiated on the grounds of major violations.

Furthermore, as a precaution against potential abuses by the SFCB, a restriction could be established where monitoring with procedure suspension can be carried out for a single procurement transaction only once.

The condition to suspend the procedure will help avoid cases when the procuring entity manages to change the stage of the procurement procedure during monitoring and make it impossible to correct the violation in a timely manner. For example, after a groundless rejection of a tender bid, the procuring entity enters into a contract with another participant; and although the SFCB will have the right to demand the termination of such a contract, this method of eliminating the violation will not help to preserve the most cost-effective bid, since in the event of termination of the contract, the procuring entity will have to conduct the procurement procedure again. However, if the procurement procedure is suspended, the violation can be promptly identified, enabling its "natural" elimination.

Suspension of the contract will allow avoiding the disposal of budget funds under contracts concluded as a result of procurement procedures with major violations, in particular at inflated prices.

5. **Limit the focus of monitoring to a list of major violations.**

Given the limited resources of the SFCB, we consider it appropriate to legally limit the subject of analysis when monitoring the procurement procedure to the list of major violations that were provided above. To do this, it is necessary to legally define monitoring as a partial analysis of the procurement for compliance with the procurement legislation within the list of major violations and information received by the SFCB from other bodies/persons about harming the budget, competition, and transparency of the procurement procedure.

In order to ensure that public auditors focus on identifying these violations, the following tools may be used:

- ***prohibit the SFCB from detecting violations that are not included in the list of major violations during monitoring of procurement procedures***. An exception to this prohibition may be cases when, as a result of committing a violation outside the list, the procuring entity's budget or the rights and legitimate interests of participants were damaged. In particular, the SFCB could start analyzing for violations outside the list of major violations if it received a relevant report on a violation and information about the above-mentioned damage.
- implement a ***monetary bonus system*** for SFCB officials, with the bonus amount contingent on the sum of funds saved or recovered for the budget as a result of monitoring.

6. **Establish a reporting system for business entities, which can serve as the foundation for initiating monitoring procedures**.

Currently, information from business entities is not officially included in the grounds for starting monitoring. Nevertheless, there are certainly points of convergence between the state's interests and the interests of business entities.

Participants in procurement procedures and other business entities (market participants) can have, identify, and provide valuable information in the system about signs of violations of procurement legislation, including those that directly violate state interests. For example, a market participant in certain high-tech equipment can identify and provide public auditors with information about signs of procuring entity evasion from conducting an open bidding procedure in its market. Such evasion can occur, in particular, by dividing a procurement item into parts and hiding them under different CPV codes. Or, for example, during a competition, a business entity may be interested in bringing to justice those responsible for procurement transactions at significantly inflated prices. The state is also interested in bringing these individuals to justice.

The primary concern regarding this concept is the apprehension that, instead of filing a complaint with the Anti-Monopoly Committee of Ukraine, which entails the payment of an administrative fee, participants may opt to approach the State Audit Service, which is cost-free. However, in our view, the likelihood of such a risk is minimal if the scope of appeals is restricted to information regarding violations that were not, and could not have been, the subject of a complaint by the appealing party to the Anti-Monopoly Committee of Ukraine.

7. **Regulate in the legislation the issue of ensuring access of the SFCB to the necessary databases and personal data.**

Since SFCB report the need for access to a number of databases, information systems, and state registers, it is advisable to consider each source of information. In the context of aligning with the concept of identifying major violations, it is imperative to address in legislation the matter of providing the SFCB with access to genuinely essential sources of information. This includes setting forth the responsibilities of information source owners to offer automated access and outlining the process for granting such access.

Moreover, to empower the SFCB to enforce administrative accountability against wrongdoers, it is imperative to definitively address the matter of access to ***personal data***. There are two possible ways to do this:

- Clearly stipulate that the SFCB has the authority to issue a lawful request for personal data without requiring consent for their processing in order to hold individuals accountable for administrative offenses (with the refusal to provide such data being a punishable offense under Article 351–1 of the Criminal Code of Ukraine).
- Alternatively, address the matter of collaboration with the State Migration Service and the State Enterprise Prozorro concerning the automated retrieval of personal data for individuals for whom the SFCB has valid grounds to hold administratively liable or submit the report to the court.

8. **Eliminate gaps in the legal regulation of options for the procuring entity's legitimate response to the conclusion of monitoring and their consequences.**

Currently, the provisions of the law provide for several options for legitimate behavior of the procuring entity in order to respond to the conclusion of monitoring. Some of them do not relieve the procuring entity from liability (notifying them about the inability to eliminate violations, objecting to the conclusion). Therefore, it is advisable to reconsider these options and the consequences that should occur if the procuring entity chooses them.

- It is advisable to eliminate the choice of notifying the procuring entity that eliminating the violations is impossible from the available response options. Indeed, if our proposed concept is put into effect, public auditors will have the responsibility to rectify violations only in cases where it is feasible to do so. The method of elimination will correspond to the nature of the violation and the procurement stage.
- The alternative of submitting valid objections should be further finalized, specifying the sequence and timeframe within which the SFCB should handle objections, assess them, and outline the conditions for relieving the procuring entity from liability if the SFCB annuls its conclusion after reviewing the objections.

9. **Regulate further actions of the procuring entity and the SFCB after a court appeal, as well as introduce the reflection of information about the court case in Prozorro.**

There is a need to establish a framework for subsequent actions of the parties in situations where the procuring entity submitted an administrative claim, but the court declined to initiate proceedings or dismissed the claim, define specific timeframes for the reinstatement of the deadline to fulfill the obligations outlined in the conclusion.

In addition, it is advisable to introduce synchronization of the Prozorro electronic procurement system with the Judicial Power website (in terms of information about the stage of consideration of a court case) and the

Unified State Register of Court Decisions. This would minimize the need for parties to enter information about court cases themselves and reduce the risk of abuse.

10. **Ensure monitoring of procurement transactions in terms of forming the need and expected cost of the procurement item.**

To control the effectiveness of spending public funds, it is necessary to include the issue of forming the need and expected cost of the procurement item in the focus of control. The direction for further research may be to create an effective monitoring mechanism in this matter. Prerequisites may include the following steps:

- update the rules for forming the expected procurement price and direct contract price;
- establish the obligation of procuring entities to publish information and documents confirming the legality of pricing in the Prozorro system;
- enhance the capacity of the SFCB to evaluate whether the cost formation process was adhered to, and whether there was price inflation for items, especially with the engagement of requisite experts, resources, databases, etc.;
- create an exclusive list of EPS codes, for which procuring entities are exempt from the obligation to substantiate the necessity (applicable to basic goods and services), while for other codes, especially during a state of martial law, envisage the requirement to provide a justification for the procurement necessity;
- provide for the possibility of monitoring procurement transactions by SFCB in terms of unjustified needs and non-compliance with the pricing mechanism, in particular at the request of civil society organizations in the Prozorro system.

These steps will inevitably spark discussions and necessitate a well-balanced approach. However, in the context of martial law and for the sake of efficient allocation of funds for Ukraine's recovery, timely and effective control in these areas is a social need.