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COMPETITION IN THE EXECUTION PHASE OF PUBLIC PROCUREMENT

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I. INTRODUCTION

Competition is usually regarded as an important principle during the "award" phase of a public procurement. Open and competitive processes usually require each bidder to submit a tender, thus committing itself to a certain performance level. In theory, the selecting agency's contractor choice aligns with the public interest because its selection rewards the most responsive tender.[1] Contractual conditions, as agreed by the involved parties, rep-

1. Significantly in the United States, responsiveness also includes the evaluation of the reputation of the bidders.

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resent a firm commitment and should neither be modified nor amended—at least not beyond the limits normally allowed and known to all bidders. Any violation, change,[2] or worsening of the quality during the execution phase entails undue profit for the winner. It also changes the conditions set in the award—disturbing the contractual equilibrium. Finally, changes or deviations during contract performance violate the competition principle and infringe on the rights of the losing bidders.[3]

While it is a shared view that fair and open competition requires that any bidder has the right to obtain the evaluation of its offer in accordance with the award criteria, we maintain that this right does not end with the award procedure but must be safeguarded in the execution phase as well.[4] Unsuccessful bidders should walk away from the competition knowing that not only did the winning bidder submit a better offer, but the winning bidder will execute the contract better. When this is not true, the competition principle is undermined because the awardee's lower-than-promised performance makes it *as if* the selecting agency failed to choose the best tender.

This argument is compelling, especially in Europe, where procurement regulations require procuring entities to objectively evaluate tenders[5]—and

2. Case C-454/06, pressetext Nachrichtenagentur GmbH v. Rupublik Österreich, 2008 E.C. R. I-4401, ¶ 34. An amendment to a public contract during its currency may be regarded as material when it introduces conditions that, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted. Adrian Brown, *When Do Changes to an Existing Public Contract Amount to the Award of a New Contract for the Purposes of the EU Procurement Rules? Guidance at Last in* Pressetext Nachrichtenagentur GmbH *(Case C-454/06)*, 17 PUB. PROCUREMENT L. REV. NA253, NA255 (2008).

3. Roberto Cavallo Perin & Gabriella M. Racca, *La concorrenza nell'esecuzione dei contratti pubblici*, DIRITTO AMMINISTRATIVO 325 (2010) (incorporating the issues discussed during the symposium *Consip e il sistema italiano di public procurement: concorrenza, regolazione e innovazione* (Bologna, Jun. 15, 2009)); *see also* Gabriella M. Racca, Roberto Cavallo Perin & Gian Luigi Albano, *Safeguard of Competition in the Execution Phase of Public Procurement: Framework Agreements as Flexible Competitive Tools*, Seminar on The New Public Law in a Global (Dis)Order: A Perspective from Italy, N.Y. Univ. School of Law (Sept. 19–20, 2010) [hereinafter Racca et al., *Safeguard of Competition*].

4. Gabriella M. Racca, *Collaborative Procurement and Contract Performance in the Italian Healthcare Sector: Illustration of a Common Problem in European Procurement*, 19 PUB. PROCUREMENT L. REV. 119, 130–31 (2010) [hereinafter Racca, *Collaborative Procurement*].

5. Directive 2004/18, of the European Parliament and of the Council of 31 March 2004 on the Coordination of Procedure for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts, 2004 O.J. (L134) 114, 121.

> Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. As a result, it is appropriate to allow the application of two award criteria only: "the lowest price" and "the most economically advantageous tender".
>
> To ensure compliance with the principle of equal treatment in the award of contracts, it is appropriate to lay down an obligation—established by case-law—to ensure the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender. It is therefore the responsibility of contracting authorities to indicate the criteria for the award of the contract and the relative weight given to each of those criteria in sufficient time for tenderers to be aware of them when preparing their tenders. … In order to guarantee equal treat-

often require entities to use these evaluation criteria to create a precise ranking. When the execution of the contract differs substantially from the conditions set forth in the award, the whole equilibrium of the bid rankings, set in compliance with competition and nondiscrimination principles, is undermined. The economic operators that participated in the competitive tendering have in-depth knowledge of the conditions and specifications set forth in the contract. Thus, they would be the ideal subjects to be involved in the control of the exact execution of the contract by the winning bidder. Allowing unsuccessful bidders to play an active role in contract execution could be an effective instrument way to guarantee the winning bidder's compliance with contractual conditions.

The use of more complex contractual models such as framework agreements (FAs) seems to provide a suitable environment in which public buyers may achieve greater congruence between what contractors promise and their actual performance. FAs are intended to aggregate demand for goods and services between one or more public agencies using a two-step process. In the first phase, the involved agencies competitively select a subset of all potentially interested economic operators; in the second phase, agencies award specific contracts.[6] Public agencies could use two different sets of los-

ment, the criteria for the award of the contract should enable tenders to be compared and assessed objectively. If these conditions are fulfilled, economic and qualitative criteria for the award of the contract, such as meeting environmental requirements, may enable the contracting authority to meet the needs of the public concerned, as expressed in the specifications of the contract. Under the same conditions, a contracting authority may use criteria aiming to meet social requirements, in response in particular to the needs—defined in the specifications of the contract—of particularly disadvantaged groups of people to which those receiving/using the works, supplies or services which are the object of the contract belong.

Id. For the distinction between selection and award criteria in the context of a contract award process, see Case C-532/06, Emm G. Lianakis AE v. Alexandroupolis, 2008 E.C.R. I-251; *Application and Implications of the ECJ's Decision in* Lianakis *on the Separation of Selection and Award Criteria in EC Procurement Law*, 2009 PUB. PROCUREMENT L. REV. (SPECIAL ISSUE) 103. For a general EU perspective, see Steen Treumer, *The Distinction Between Selection and Award Criteria in EC Public Procurement Law: A Rule Without Exception?*, 2009 PUB. PROCUREMENT L. REV. 103.

6. Directive 2004/18, 2004 O.J. (L134) at 137. Directive 2004/18 provides:

Where a framework agreement is concluded with several economic operators, the latter must be at least three in number, insofar as there is [sic] a sufficient number of economic operators to satisfy the selection criteria and/or of admissible tenders which meet the award criteria. Contracts based on framework agreements concluded with several economic operators may be awarded either:

— by application of the terms laid down in the framework agreement without reopening competition, or
— where not all the terms are laid down in the framework agreement, when the parties are again in competition on the basis of the same and, if necessary, more precisely formulated terms, and, where appropriate, other terms referred to in the specifications of the framework agreement, in accordance with the following procedure:

(a) for every contract to be awarded, contracting authorities shall consult in writing the economic operators capable of performing the contract;
(b) contracting authorities shall fix a time limit which is sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject-matter of the contract and the time needed to send in tenders;

ing bidders as "watchdogs" in order to obtain a more effective contract execution:[7] those economic operators with whom the FA is concluded (some of which may be executing other contracts while performing their "watchdog" duties) and the economic operators that were not chosen for the FA.[8]

Contract execution could also be enhanced by asking end users to provide feedback in the form of customer satisfaction surveys that seek both objective and subjective evaluations of contract performance. The increasing use of information technology and electronic archives, which are already simplifying and streamlining many phases of the public procurement process, may also facilitate information gathering, aggregation, and disclosure to anyone deemed to have a stake in the efficient functioning of the procurement process (taxpayers above all).[9] Public entities would, in principle, be in a position to reduce the risk of infringement, thus better securing the principle of free competition and the quality of contractual performances, for the benefit of competition in the market as a whole and for attainment of the public interest and the improvement of the quality of life of citizens.

II. THE BENEFITS OF FAIR COMPETITION IN PUBLIC PROCUREMENT POLICIES

Government procurement has considerable economic relevance at both domestic and international levels, accounting for approximately sixteen percent of the gross domestic product in developed countries.[10] Government

(c) tenders shall be submitted in writing, and their content shall remain confidential until the stipulated time limit for reply has expired;

(d) contracting authorities shall award each contract to the tenderer who has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement.

Id.

7. U.N. Comm'n on Int'l Trade Law, *United Nations Convention Against Corruption: Implementing Procurement-Related Aspects*, at 19, U.N. Doc. A/CN.9/WG.I/WP.52 (2008), *available at* http://www.uncitral.org/pdf/english/workinggroups/wg_1/INF.2.pdf ("The main elements of an oversight regime are (…) (d) a functioning review or challenge mechanism, in that losing suppliers are good watchdogs").

8. Christopher Yukins, *A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model*, 40 Pub. Cont. L.J. 63, 73 (2010) [hereinafter Yukins, *A Versatile Prism*]; Organisation for Econ. Co-operation & Dev., Sigma Paper No. 47, Centralised Purchasing Systems in the European Union 26–29 (Jan. 17, 2011), *available at* http://www.oecd-ilibrary.org/governance/centralised-purchasing-systems-in-the-european-union_5kgkgqv703xw-en.

9. Christopher Yukins, Speech at High Level Seminar on E-Procurement, Efficiency and Integrity: Challenges and Good Practices: Electronic Procurement—Next Steps, Using Agency Theory (June 17, 2010); Yukins, *A Versatile Prism*, *supra* note 8, at 75; Christopher R. Yukins, *Addressing Conflicts of Interest in Procurement: First Steps on the World Stage*, *Following the UN Convention Against Corruption*, *in* 3rd Int'l Pub. Procurement Conference Proceedings (Aug. 28, 2008), *available at* http://www.ippa.ws/IPPC3/Proceedings/Chaper%2061.pdf.

10. *Commc'n from the Comm'n to the European Parliament, the Council, the European Econ. & Soc. Comm. & the Comm. of the Regions: Public Procurement for a Better Environment*, at 2, COM (2008) 400 Final (July 16, 2008) ("Each year European public authorities spend the equivalent of 16% of the EU Gross Domestic Product on the purchase of goods such as office equipment, building

procurement provisions also play a central role in international trade agreements.[11] While both policymakers and scholars claim that efficiency should be a primary goal of every procurement system, many World Trade Organization (WTO) members still use their purchasing power to achieve domestic policy goals such as encouraging local suppliers.[12] A closer look at national procurement markets reveals that governments often keep their domestic markets closed, without having a clear and specific coordinated policy for their public procurement strategies.[13] Only recently, due to increasingly stringent fiscal policies, governments have fully realized the urgency to deliver a growing flow of services to citizens in spite of decreasing financial resources.[14] Favoring inefficient national suppliers in public procurement and assuring them state aid is no longer sufficient to keep them in the market

components and transport vehicles; services, such as buildings maintenance, transport services, cleaning and catering services and works."). The European Commission also noted that "[p]ublic procurement can shape production and consumption trends and a significant demand from public authorities for 'greener' goods will create or enlarge markets for environmentally friendly products and services. By doing so, it will also provide incentives for companies to develop environmental technologies." *Id.*; *see also* European Comm'n, *Public Procurement Indicators 2009*, at 9 (Nov. 11, 2010), *available at* http://ec.europa.eu/internal_market/publicprocurement/docs/indicators2009_en.pdf.

11. *Government Procurement*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm (last visited Sept. 13, 2011); European Comm'n, *Green Paper on the Modernisation of EU Public Procurement Policy Towards a More Efficient European Procurement Market*, at 53–54, COM (2011) 15 final (Jan. 27, 2011), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0015:FIN:EN:PDF [hereinafter EC Modernisation Green Paper]. The European Commission requested contributions on third-party access to EU procurement markets in a survey titled *Consultation on an Initiative on Access of Third Countries to the EU's Public Procurement Market*. The consultation period runs from June 8, 2011, to August 2, 2011. Details are available at http://ec.europa.eu/internal_market/consultations/2011/access_EU_public_procurement_en.htm.

12. *Government Procurement*, *supra* note 11. For a long time public procurement has been effectively excluded from the application of the main multilateral trade rules under the General Agreement on Tariffs & Trade (GATT) and the WTO because governments wanted to pursue domestic aims, particularly to favor domestic suppliers. Over the years, GATT and WTO members have therefore been seeking ways to address the issue of government procurement in the multilateral trading system and finally the multilateral Agreement on Government Procurement (GPA) entered in force in 1996. SUE ARROWSMITH, GOVERNMENT PROCUREMENT IN THE WTO 50, 91 (2003); *see also* Robert D. Anderson & Kodji Osei-Lah, *The GPA Coverage Negotiations: Context*, *Mandate*, *Process and Prospects*, in THE WTO REGIME ON GOVERNMENT PROCUREMENT: CHALLENGE AND REFORM (Sue Arrowsmith & Robert D. Anderson eds., 2010); Ping Wang et al., *Addressing Purchasing Arrangements Between Public Sector Entities—What WTO Can Learn from EU's Experience*?, *in* THE WTO REGIME ON GOVERNMENT PROCUREMENT: CHALLENGE AND REFORM (Sue Arrowsmith & Robert D. Anderson eds., 2010). *See generally* Robert D. Anderson, *Current Developments on Public Procurement in the WTO*, 15 PUB. PROCUREMENT L. REV. NA167 (2006); Robert D. Anderson, *Renewing the WTO Agreement on Government Procurement: Progress to Date and Ongoing Negotiations*, 16 PUB. PROCUREMENT L. REV. 255 (2007).

13. For a general discussion on fragmentation of procuring entities and the lack of specific strategies in procurement policies, see Gabriella M. Racca, *Professional Buying Organizations*, *Sustainability and Competition in Public Procurement Performance*, *in* 4TH INT'L PUB. PROCUREMENT CONFERENCE PAPERS (2010), *available at* http://www.ippa.org/IPPC4/Proceedings/18TransparencyAccountabilityinProcurement/Paper18-13.pdf.

14. EC Modernisation Green Paper, *supra* note 11, at 14.

and is too costly for public finance.[15] Needless to say, competition should be favored and strengthened to select the most efficient and innovative firms.[16] Open, transparent, and nondiscriminatory procurement becomes the best tool to achieve "value for money" when it spurs the right degree of competition among suppliers,[17] generating benefits that accrue to both domestic and foreign stakeholders.[18]

Although competition is believed to enhance economic development and a fair quality-price ratio for goods and services for consumers, European Union (EU) regulations endeavor mainly to safeguard the rights of bidders actively participating in the competitive process. This implies that the public administration has the obligation to treat all bidders fairly.[19] Competition is then regarded as a principle that defines the relations among bidders providing public goods. However, while it is commonly accepted that competition must be assured among suppliers of public goods during the award phase,[20] the idea that competition ought to be assured throughout the performance of a public contract has not yet been considered. An efficient government procurement system must endeavor to attain the highest possible value for money and must assure a fair and open competition in the selection of the

15. *See generally* Racca, *supra* note 4, at 119; Gabriella M. Racca, *Le modalità organizzative e le strutture contrattuali delle aziende sanitarie*, in OLTRE L'AZIENDALIZZAZIONE DEL SERVIZIO SANITARIO, UN PRIMO BILANCIO 274 (A. Pioggia et al. eds., 2008).

16. In the case of SMEs, see European Comm'n, *Communication to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: "Think Small First": A "Small Business Act" for Europe*, COM (2008) 394 final (June 25, 2008), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0394:FIN:en:PDF; Robert D. Anderson & William E. Kovacic, *Competition Policy and International Trade Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets*, 18 PUB. PROCUREMENT L. REV. 67, 70 (2009).

17. Sabino Cassese, *Le droit tout Puissant et unique de la société. Paradossi del diritto amministrativo*, RIV. TRIM. DIR. PUBBL. 893 (2009), *reprinted in* Sabino Cassese, IL DIRITTO AMMINISTRATIVO: STORIA E PROSPETTIVE 539 (2010). *See generally* Steven. L. Schooner et al., *Public Procurement Systems: Unpacking Stakeholder Aspirations and Expectations* (George Wash. Univ. Law Sch. Pub. Law & Legal Theory Research Paper Series, Paper No. 1133234, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1133234.

18. Sue Arrowsmith & C. Nicholas, *Regulation of Framework Agreements/Task Order Contracts —Regulating Framework Agreements Under the UNCITRAL Model Law*, *in* REFORM OF THE UNCITRAL MODEL LAW ON PROCUREMENT: PROCUREMENT REGULATION FOR THE 21ST CENTURY 95 (Sue Arrowsmith ed., 2009).

19. *See generally* CHRISTOPER H. BOVIS, EU PUBLIC PROCUREMENT LAW 72–75 (2007); Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 PUB. PROCUREMENT L. REV. 103 (2002). Schooner outlined nine objectives, or desiderata, of public procurement systems: competition, integrity, transparency, efficiency, customer satisfaction, best value, wealth distribution, risk avoidance, and uniformity. For an analysis of the "strategic" use of public procurement, see SUE ARROWSMITH & PETER KUNZLIK, SOCIAL AND ENVIRONMENTAL POLICIES IN EC PROCUREMENT LAW: NEW DIRECTIVES AND NEW DIRECTIONS 57–59 (2009); EC Modernisation Green Paper, *supra* note, at 48–53, where guidelines to design "sound" procurement procedures are outlined.

20. GIULIO NAPOLITANO & MICHELE ABRESCIA, ANALISI ECONOMICA DEL DIRITTO PUBBLICO 95 (2009).

bidders.[21] Yet, if value for money is not to remain an abstract concept, the contractor's actual performance should coincide with what was promised at the competitive stage. "Delivered" value should, in principle, coincide with promised value. Much too often, however, contract execution, especially in many European countries, is neglected or treated as a completely separate aspect of the procurement process. The relationship between contracting parties is thought of as "private business," while losing bidders are set aside and no longer play any role in the execution phase. Awarding a public contract normally gives rise to a sort of bilateral "exclusive right," whereby the public entity is "locked in" with the winning bidder.[22]

In Europe, once in place, a contractual relationship is considered "sacred," thus excluding all sorts of interferences from third parties such as losing bidders. As a matter of fact, in some countries, such as Italy and Germany, the jurisdictional competence in the award phase differs from the one in the execution phase.[23] In the United States, public contract regulation seems to be more flexible in this regard: even when a contract is signed, not only the courts but also some other authorities can step in and undo it and damages may be allocated to the original a protesting bidder.[24]

With the recent implementation of European Parliament Directive 2007/66 (remedy directive),[25] the EU aims to facilitate the correction of the award procedures before the signing of the contract. The goal is to ensure con-

21. Anderson & Kovacic, *supra* note 16; *see also* Gian Luigi Albano et al., *Preventing Collusion in Procurement*, *in* HANDBOOK OF PROCUREMENT 347 (Nicola Dimitri, Gustavo Piga & Giancarlo Spagnolo eds., 2006).

22. Anderson & Kovacic, *supra* note 16; Yukins, *A Versatile Prism:*, *supra* note 8, at 76.

23. For the Italian jurisdictional competence, see Alberto Massera & Marta Simoncini, *Basics of Public Contracts in Italy*, at 2, *in* IUS-PUBLICUM NETWORK REV., Feb. 2011, *available at* http://www.ius-publicum.com/repository/uploads/21_02_2011_14_41_Massera%20inglese.pdf; Gabriella M. Racca, *Public Contracts Annual Report 2010—Italy*, at 19–20 in IUS-PUBLICUM NETWORK REV., Nov. 2010, *available at* http://www.ius-publicum.com/repository/uploads/06_12_2010_10_17_Raccaeng.pdf. For the German jurisdictional competence, see Ulrich Stelkens, *Allemagne/Germany*, *in* DROIT COMPARÉ DES CONTRATS PUBLICS 307, 331 (Rozen Noguellou & Ulrich Stelkens eds., 2010); *Governmentwide Acquisition Contracts (GWAC)*, GEN. SERVS. ADMIN., http://www.gsa.gov/portal/content/104874 (last visited Jan. 19, 2011); Indefinite Delivery, Indefinite Quantity (IDIQ) Contracts, Gen. Servs. Admin., http://www.gsa.gov/portal/content/103926 (last visited Jan. 17, 2011); GSA Schedules, Gen. Servs. Admin., http://www.gsa.gov/portal/category/100611 (last visited Apr. 4, 2011); Steen Treumer & François Lichère (eds.), ENFORCEMENT OF EU PUBLIC PROCUREMENT RULES (2011).

24. Christopher Yukins, Open Discussion During Seminar: IDIQ "Framework" Contracts: Do They Enhance Competition? A European Perspective (Sept. 23, 2010); *see also* FAR 33.102.

25. Directive 2007/66, of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with Regard to Improving the Effectiveness of Review Procedures Concerning the Award of Public Contracts, 2007 O.J. (L335) 31; *see* Caroline Nicholas, *Remedies for Breaches of Procurement Rules and the UNCITRAL Model Law on Procurement*, 18 PUB. PROCUREMENT L. REV. NA151 (2009). For an EU Directives analysis, see Jane Golding & Paul Henty, *The New Remedies Directive of the EC: Standstill and Ineffectiveness*, 17 PUB. PROCUREMENT L. REV. 146 (2008). For an interesting French perspective, see J. Arnould, Address at Global Revolution IV International Conference on Public Procurement in Copenhagen: Ineffectiveness of Contracts Under the New Remedies Directive in the UK and in the EC (Sept. 8, 2010). For a UK law perspective, see Paul Henty, *United Kingdom: Public Procurement Remedies Directive—An Update on the Implementation Process*, 19 PUB. PROCURE-

tracts are awarded to the highest-ranked bidder and not to any bidder chosen unfairly or by faulty application of the award criteria. The procuring entity thus is not obliged to pay both the execution to the illegitimate winner and the award of damages to another bidder, which was entitled to win.[26] This is one reason why the European remedy directive mandates a standstill period of at least ten days between the award and the signing of the contract.[27] The purpose of this period is to prevent an unlawful award from becoming irreversible.[28] After the signing of the contract, any correction of infringements that occurred in the awarding procedure and/or any unlawful award becomes more difficult, and awarding damages may be the only available remedy.

III. RESPECT FOR THE COMPETITION PRINCIPLE IN THE PUBLIC PROCUREMENT PROCESS: FROM THE CHOICE TO COMMENCE A PROCUREMENT PROCEDURE TO THE END OF THE PERFORMANCE PHASE

Safeguarding competition in the award phase is a compelling requirement of any fair and transparent procurement process. Once the contract notice has set a call for tenders, any interested bidder can submit a binding offer in accordance with the requirements set forth in the contract documents (a solicitation for offers). The offer is binding for a limited time[29] and cannot be withdrawn. After applying the award criteria, the procuring entity will accept the best offer and must withdraw from negotiations with the other bidders.[30] Such withdrawal is fair only when the procuring entity's decision

ment L. Rev. NA17 (2010), and Paul Henty, *Remedies Directive Implemented into UK Law*, 19 PUB. PROCUREMENT L. REV. NA115 (2010).

26. Directive 2007/66, 2007 O.J. (L335) at 36. The Directive provides:

> Requirements for review procedures[:] 1. Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to: (a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority; (b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure; (c) award damages to persons harmed by an infringement.

Id. For a discussion of the implementation of EU directive 2007/11, see ENFORCEMENT OF EU PUBLIC PROCUREMENT RULES (Steen Treumer & Françóis Lichère eds., 2011).

27. Directive 2007/66, 2007 O.J. (L335) at 37.

28. *Id*. at 32.

29. In Italy, it is binding for 180 days. Decreto Legislativo 12 aprile 2006, n. 163, art. 11, cl. 6, in G.U. 2 maggio 2006, n. 107, *available at* http://www.camera.it/parlam/leggi/deleghe/testi/06163dl.htm) ("Codice dei contratti pubblici relativi a lavori, servizi e furniture in attuazione delle direttive 2004/17/CE e 2004/18/CE").

30. For the awarding criteria, see Directive 2004/18, of the European Parliament and of the Council of 31 March 2004 on the Coordination of Procedure for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts, 2004 O.J. (L134) 114, 148. For Italian public contract code, see D.L. n. 163/2006 arts. 81–82.

complies with the award criteria. If losing bidders find any fault or contradiction in the award, they are entitled to file a protest and ask the procuring entity to review its final decision.[31]

Although the award stage is a critical link in the procurement chain, efforts to promote competition, transparency, and objectivity; to prevent corruption; and to ensure efficient allocation of social resources ought to play a role in the entire public procurement process. Yet, after the award, the procuring entity may accept or suffer a different and worse performance.[32] This may happen as a consequence of malice and corruption;[33] that is, offering, giving, receiving, or soliciting, directly or indirectly, anything of value to influence the action of a public official during the selection procedure or the contract execution. However, poor contractor performance may also be due to poorly drafted contract requirements that leave public officials unarmed when problems arise.[34]

Recently, the United Nations Commission on International Trade Law (UNCITRAL) emphasized the relevance of problems in public procurement. UNCITRAL stressed the importance of considering the entire procurement cycle, "beyond the selection of suppliers,"[35] from the planning and budgeting prior to commencing a procurement procedure to the contract administration phase.[36] A 2008 UNCITRAL paper stated: "typically, procurement systems, at least so far as legislation and to a lesser extent procure-

31. Directive 2007/66, 2007 O.J. (L335) at 33 ("A review procedure should be available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement."). *See generally Remedies Mechanisms*, EUROPA.EU, http://europa.eu/legislation_summaries/internal_market/businesses/public_procurement/l22006b_en.htm.

32. Perin & Racca, *supra* note 3, at 325; Racca et al., *Safeguard of Competition*, *supra* note 3.

33. *See* Yukins, *A Versatile Prism*, *supra* note 8, at 70; Roberto Hernandez Garcia, *Introduction: The Global Challenges of International Public Procurement*, *in* INTERNATIONAL PUBLIC PROCUREMENT: A GUIDE TO BEST PRACTICE 13 (Roberto Hernandez Garcia ed., 2009); Teresa Maria Arnáiz, *EU Directives as Anticorruption Measures: Excluding Corruption-Convicted Tenderers from Public Procurement Contracts*, *in* INTERNATIONAL HANDBOOK OF PUBLIC PROCUREMENT 106 (Khi V. Thai ed., 2008); Emmanuelle Auriol, *Corruption in Procurement and Public Purchase*, 24 INT. J. INDUS. ORG. 867 (2006); TRANSPARENCY INT'L, HANDBOOK FOR CURBING CORRUPTION IN PUBLIC PROCUREMENT 18–19 (2006), *available at* www.transparency.org/content/download/12496/120034; ORGANISATION FOR ECON. CO-OPERATION & DEV., FIGHTING CORRUPTION AND PROMOTING INTEGRITY IN PUBLIC PROCUREMENT (2005).

34. In Italy both the theory and practice of public contracts have traditionally overlooked the relevance of contract management. The regulation of Italian Public Contract Codes has introduced a specific "procurement execution director" in charge of the management and monitoring of the execution of goods and services procurement only recently. *See* Decreto Presidente della Repubblica 5 ottobre 2010, n. 207 arts. 299, 300 & 301. For the aspects related to the contract execution, see EC Modernisation Green Paper, *supra* note 11, at 24.

35. U.N. COMM'N ON INT'L TRADE LAW, *supra* note 7, at 14.

36. The UNCITRAL Model Law, similar to many procurement regimes, notes that its provisions address the "*procedures to be used by procuring entities in selecting the supplier or contractor with whom to enter into a given procurement contract*." Its Guide to Enactment states that the Model Law does not address the terms of contract for a procurement, the contract performance, or implementation phase, including resolution of contract disputes, and by implication, the procurement planning phase. U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS, CONSTRUCTION AND SERVICES WITH GUIDE TO ENACTMENT ¶ 10, 12

ment regulation are concerned, focus on the second phase, the selection process that leads to the award of a procurement contract to a supplier."[37] As recently noted by Transparency International and others, the other two phases are "increasingly exposed to corruption"[38] and are neither duly addressed nor sufficiently monitored.

While there are no reliable studies showing how much public resources are wasted due to inappropriate contract management and enforcement,[39] we can nonetheless maintain that contract management-related problems are more likely to arise when the contract-awarding public authority's goals do not coincide with the contract-using authority's goals. This may occur when public procurement is centralized, at least to some extent, through a central purchasing body[40] that awards framework agreements on behalf of other public authorities.[41] Such a separation of roles may generate low contract management efforts due to the recipient entity's imperfect knowledge of contractual clauses (i.e., penalties and termination of the contract).[42] Moreover, as a consequence of this problem, the much debated phenomenon of "abnormally low bids" may occur because of bidders' "rational" choice of recovering their additional "investment" (i.e., lower markups) at the bidding stage by delivering lower-than-promised performance levels.[43]

(1994), *available at* http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf.

37. U.N. COMM'N ON INT'L TRADE LAW, *supra* note 7, at 15.

38. TRANSPARENCY INT'L, *supra* note 8, at 20; *see also* Yukins, *A Versatile Prism*, *supra* note 8, at 83 & n.88; U.N. Office on Drugs & Crime, *United Nations Convention Against Corruption*, art. 9 (2), provides that a procurement system must ensure adequate internal control and risk management. Article 9(2) states: "2. Each State Party shall, in accordance with the fundamental principles of its legal system, take appropriate measures to promote transparency and accountability in the management of public finances. Such measures shall encompass, *inter alia*: … (d) Effective and efficient systems of risk management and internal control. …" The regulation of nonselection phases of procurement may thus be addressed within the general governance system in a State party: for these reasons, it is vital that they are integrated into the procurement system itself.

39. For more information about the waste caused by incompetence in the *awarding phase*, see generally Oriana Bandiera, Andrea Prat & Tommaso Valletti, *Active and Passive Waste in Government Spending: Evidence from a Policy Experiment*, 99 AM. ECON. REV. 1278 (2009).

40. Coordination of Procedure for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts, 2004 O.J. (L134) 114, 127 (defining central purchasing body), 131 (allowing member states to use central purchasing bodies).

41. See Christopher R. Yukins, A*re IDIQs Inefficient? Sharing Lessons with European Framework Contracting*, 37 PUB. CONT. L.J. 545, 554 (2008) [hereinafter Yukins, *Are IDIQs Inefficient?*]; Ohad Soudry, *A Principal-Agent Analysis of Accountability in Public Procurement*, in ADVANCING PUBLIC PROCUREMENT: PRACTICES, INNOVATION AND KNOWLEDGE-SHARING 432, 441–42 (Gustavo Piga & Khi V. Thai eds., PrAcademics Press 2007), *available at* http://www.ippa.ws/IPPC2/BOOK/Chapter_19.pdf.

42. Racca, *Collaborative Procurement*, *supra* note 4, at 131; Gabriella M. Racca, *La professionalità nei contratti pubblici della sanità: centrali di committenza e accordi quadro*, Foro amministrativo—C.d.S. 1727 (2010).

43. *See generally* Gian Luigi Albano & Berardino Cesi, *Past Performance Evaluation in Repeated Procurement: A Simple Model of Handicapping*, *in* 3RD INT'L PUB. PROCUREMENT CONFERENCE PROCEEDINGS (Aug. 2008).

Rigorous oversight of contract implementation is therefore of paramount importance. In the following section, we advocate for using losing bidders as "good watchdogs" to implement a functioning review or challenge mechanism.[44] Losing bidders ought to be reassured that they lost because the selected contractor not only submitted the best proposal, but will in fact deliver the best value-for-money *performance*. Were this not the case, the main goal of the competitive mechanism would be undermined, thus distorting competition for the market of public contracts. Only fair behavior at the execution stage, namely the overall compliance with contract conditions set at the awarding stage, ensures a real and effective competition in the entire cycle of public procurement.

A. *The Role of Losing Bidders After the Contract Is Signed*

In Europe, public procurement regulations set fairly strict and *objective* criteria regarding the award of public contracts. Competing bids must be evaluated by assigning publicly announced points[45] to both technical and financial criteria and subcriteria.[46] Despite the fact that tenders have to be evaluated objectively, or perhaps because of that, competition is frequently fierce and ruthless. Bidders tend to scrutinize each other and, most importantly, the procuring entity's application of the objective awarding criteria. Unsuccessful bidders can file a claim[47] regarding the procuring entity's evaluation of another bidder's offer—even on the basis of small differences in the points assigned to an award criterion. Small point differentials can be a dispositive factor in the award of the contract; thus, even small changes can overturn a contract award. According to the European regulations, the rankings can be modified in favor of the protesting bidder(s).[48]

44. U.N. COMM'N ON INT'L TRADE LAW, *supra* note 7, at 19.

45. Directive 2004/18, of the European Parliament and of the Council of 31 March 2004 on the Coordination of Procedure for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts, 2004 O.J. (L134) 114, 133–34 (technical specifications),148 (awarding criteria, providing that "when the award is made to the most economically advantageous tender from the point of view of the contracting authority, various criteria linked to the subject-matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost effectiveness, after sales service and technical assistance, delivery date and delivery period or period of completion"). The most recurrent scales are Sh = [0,100] and St = [0,1000]. For instance, if the adopted scale is Sh and quality has a weight of sixty percent, then up to sixty points are awarded to a tender's technical specifications while up to forty points are awarded to the price. It is worth mentioning though that public procurement regulation in the United States moved away from a numerical comparison of tenders.

46. Directive 2004/18, 2004 O.J. (L134) at 148; *see* Case 6/05, Medipac-Kazantzidis AE v. Venizeleio-Pananeio, 2007 E.C.R. I-04557, ¶ 54.

47. Barbara Marchetti, *Il sistema di risoluzione delle bid disputes nel modello federale statunitense di public procurement*, RIV. TRIM. DIR. PUB. 963 (2009).

48. *See generally* Directive 2007/66, of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with Regard to Improving the Effectiveness of Review Procedures Concerning the Award of Public Contracts, 2007 O.J. (L335) 31, 33.

The procuring entity's ability to correctly and fairly evaluate tenders is crucial to ensuring that the most competitive bid wins the award. However, the more closely tenders are ranked at the evaluation stage, the more crucial the role of contract execution oversight. If, for instance, the highest-ranked tender was only slightly above the second-highest tender, then a lower-than-promised performance could—*ex post*—render the "winning" tender second best. Therefore, in a lower-than-promised performance scenario, the "winning" contractor's execution stage opportunism should automatically be viewed as a lower-quality tender. This is why, in Italy, some contracts stipulate that the second-highest bidder has the right to replace the winner in the event of contract termination or serious infringement.[49]

Since losing bidders have a "right to fairness and competition" throughout the *whole* cycle of the procurement process—even in the execution phase—they are entitled to provide evidence regarding infractions during the selection process and could also be active in monitoring compliance during the execution phase.[50] Relying on nonwinning bidders to monitor winners' performance is essential. In fact, unsuccessful bidders have an in-depth knowledge of the contract's subject matter and possess the requisite professional skills to monitor the winner's performance. Using unsuccessful bidders to monitor compliance also may lessen the performing contractor's temptation to cut corners at the expense of the procuring entity.[51]

This monitoring task could be assigned to specific losing bidders by the procuring entity itself as defined in the contract documents and could be linked to their right to substitute for the winner in case of contract termination. This contractual provision should be carefully defined in order to prevent colluding strategies that would resemble those that arise in a second-lowest-bid competitive mechanism.[52] It would be necessary, for instance, to

49. Decreto Legislativo 12 aprile 2006, n. 163, art. 140, in G.U. 2 maggio 2006, n. 107 (providing that, in case of bankruptcy or breach of contract, the contracting authority can replace the original contractor at the same conditions with the subsequent bidder in the ranking, and in no case below the fifth-ranked one); *see also* L. Fertitta, *La figura del secondo classificato nell'aggiudicazione degli appalti pubblici*, Rivista Trimestrale Degli Appalti 431, 442 (2005); V. Palmieri, *Scorrimento della graduatoria e tutela della concorrenza nell'esecuzione degli appalti pubblici*, Foro amministrativo—C.d.S. 868 (2008).

50. The losing bidders' "active" role at the execution stage is logically consistent with a provision in the Italian Code of Public Contracts whereby, in case of serious infringement, contracting authorities can replace the selected contractor by "scrolling down" the initial ranking of bidders.

51. Napolitano & Abrescia, *supra* note 20, at 95. The authors, however, seem to consider almost exclusively the role of informational asymmetries on the subject matter of the procurement contract. *See id.*

52. A second-lowest bid is the buying equivalent of a Vickrey auction. Assuming, for the sake of simplicity, that the procuring entity is interested in the financial dimension(s) only, the second-lowest-bid mechanism awards the contract to the lowest bidder that will receive an amount of money equal to the second-lowest bid. When the number of bidders is small, say only two, there exists a strong incentive to collude. One bidder will submit a very low price, while the second will submit a very high one. The former will get the contract at potentially extremely favorable conditions and split the "collusive" payoff with the loser.

provide that the next highest bidder must accept the same conditions as those in the terminated contract.[53]

B. *The Consequences of "Material Amendments" Outside of the Scope of the Contract During the Execution Phase: The Extension of European Competence over the Execution Phase*

A losing bidder's right to fair competition during the selection phase could be violated in the case of any unforeseeable change in the contract conditions during the execution phase. This theory is supported by the Court of Justice, which maintained that material amendments ("cardinal changes") are modifications outside of the scope of the awarded contract that bidders could not have reasonably anticipated at the time of the original award and might have led to participation by a different set of bidders and, possibly, to a different winning bidder.[54] Consequently, in Europe, material amendments—that are equivalent to an illegal direct award of a public contract—are now considered ineffective with the aim "to restore competition and to create new business opportunities for those economic operators which have been deprived illegally of their opportunity to compete."[55] For example, other bidders are often precluded from competing for material amendments such as contract extensions even though the value of the extension might be comparable to the original contract award. Regulatory limits to public contract extensions exist to prevent such limitations to competition. Extensions, in fact, if not foreseen in the initial contract notice, effect the same competition violation as if the award of a contract were made without prior publication of a contract notice at all.[56]

Since unsuccessful bidders harmed by an unlawful contract award can seek legal redress, they should also be able to seek legal relief if they can present evidence that the contract execution deviated from the award specifications.[57] Even when the award procedure has been carried out with strict adherence to the principles of fairness and transparency, the contractor's noncompliance with contractual clauses thwarts the competitive selection

53. European Commission, note 2007/2309/C, Jan. 30, 2008 (containing observations on art. 140, Legislative Decree n. 163 of Apr. 12, 2006).

54. Case C-454/06, pressetext Nachrichtenagentur GmbH v. Rupublik Österreich, 2008 E.C.R. I-04401, ¶ 34–35; Case C-160/08, EU Comm'n v. Fed. Republic of Ger., 2010 E.C.R. I-03713, ¶ 99; Case C-91/08, Wall AG v. Stadt Frankfurt am Main, 2010 E.C.R. I-02815, ¶ 38, 43.

55. Directive 2007/66, of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with Regard to Improving the Effectiveness of Review Procedures Concerning the Award of Public Contracts, 2007 O.J. (L335) 31, 33.

56. *See id.* "Illegal direct award of contracts" is the "most serious breach of Community law in the field of public procurement." The extension of the scope of the contract above limits allowed has been regarded as being material. *See generally pressetext Nachrichtenagentur GmbH*, 2008 E.C.R. I-4401; *EU Comm'n*, 2010 E.C.R. I-03713, ¶ 99; *Wall AG*, 2010 E.C.R. I-02815, ¶ 38, 43.

57. M. Trybus, *Public Contracts in European Union Internal Market Law*, in DROIT COMPARÉ DES CONTRATS PUBLICS, *supra* note 23, at 312.

process and may result in a "distorted" bid ranking. It then becomes compelling to emphasize the impact of opportunism in contract execution on competition at the award stage and, consequently, the role that losing bidders might play at the execution stage compared to their power to file claims and protests during the award procedure.

Losing bidders have a "right to fairness and competition" under mandatory European and national rules. More egregious competition and fairness violations can render a contract ineffective.[58]

Material amendments, outside the scope of the contract, preclude other bidders from taking part in competitions for the award of a new, different contract. In accordance with the recent remedies directive,[59] this is one of the scenarios that can lead to the ineffectiveness of a contract.

The European principle of a "sacred" contract, whereby, after signing, the contract becomes an exclusive matter solely between the involved parties and national regulation, is now overcome by the new provision of the European Court of Justice concerning "material amendments."[60] "Material amendments" during the execution phase are considered ineffective if they are additions to the original contract (extensions) or if they take the form of a worse-than-promised performance.[61] Applying the competition principle in the award phase is not enough. It must be safeguarded until the end of the

58. Directive 2007/66, 2007 O.J. (L335) at 38–39. Directive 2007/66 provides:

Ineffectiveness: 1. Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting authority or that its ineffectiveness is the result of a decision of such a review body in any of the following cases: (a) if the contracting authority has awarded a contract without prior publication of a contract notice in the Official Journal of the European Union without this being permissible in accordance with Directive 2004/18/EC; (b) in case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) of this Directive, if this infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies where such an infringement is combined with an infringement of Directive 2004/18/EC, if that infringement has affected the chances of the tenderer applying for a review to obtain the contract; (c) in the cases referred to in the second subparagraph of Article 2b(c) of this Directive, if Member States have invoked the derogation from the standstill period for contracts based on a framework agreement and a dynamic purchasing system.

Id. For the Italian system, see the Code of Administrative Procedure. Decreto Legislativo 2 luglio 2010, n. 104 art. 121.

59. D.L. 104/2010 (It.).

60. *pressetext Nachrichtenagentur GmbH*, 2008 E.C.R. I-4401, ¶ 35 (holding that an amendment to the initial contract may be regarded as being material when it extends the scope of the contract considerably to encompass services not initially covered). This latter interpretation is confirmed in the provisions that impose restrictions on the extent to which contracting authorities may use the negotiated procedure for awarding services in addition to those covered by an initial contract. An amendment may also be regarded as being material when it changes the economic balance of the contract in favor of the contractor in a manner that was not provided for in the terms of the initial contract. The same principle is established in other cases. *Fed. Republic of Ger*., 2010 E.C.R. I-03713, ¶ 99, and *Wall AG*, 2010 E.C.R. I-02815, ¶ 37; *see* Racca et al., *Safeguard of Competition*, *supra* note 3.

61. *pressetext Nachrichtenagentur*, 2008 E.C.R. I-4401, ¶ 36–37.

performance phase so that "promised quality" (as identified in the competitive award) coincides with "delivered quality."[62]

IV. FRAMEWORK AGREEMENTS AS TOOLS TO IMPROVE COMPETITION DURING THE EXECUTION OF A PUBLIC CONTRACT

So far, we have maintained that losing bidders in any competitive procurement tendering procedure have a stake in assuming that the contract will be executed according to the conditions determined at the award stage. While monitoring the procuring entity's contract management efforts, losing bidders may play a crucial role in supporting the procuring entity's efforts to gather information about the contractor's actual performance.

The main goal of the current section is to highlight the existence of framework agreements (FAs), a class of purchasing arrangements, although regulated differently in Europe and the United States, that provide a suitable legal framework to implement the broad idea of competition in the execution phase. FAs consist mainly of anticipated arrangements for the delivery of goods and services over a certain period of time. According to both international practices and regulation, three broad definitions of FAs can be identified:

- The European Union, in the 2004/18/CE Directive, defines FAs as "agreement[s] between one or more contracting authorities and one or more economic operators, … to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantit[ies] envisaged."[63]
- The United States' procurement regulations provide for three different types of FAs: (1) government-wide acquisition contracts, (2) indefinite-delivery/indefinite-quantity contracts, and (3) multiple award schedules that include multiple standing contracts with subsequent competition for task or delivery orders.[64]
- UNCITRAL defines FAs as a transaction to secure the supply of a product or service over a period of time. UNCITRAL identifies three different types of FAs: (1) periodic/recurrent purchase arrangement, (2) periodic requirements arrangement, and (3) periodic supply vehicles.[65]

62. Some of the main concerns related to contract execution are raised also in the recent EC Modernisation Green Paper, *supra* note 11, at 24–27.

63. Directive 2004/18, of the European Parliament and of the Council of 31 March 2004 on the Coordination of Procedure for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts, 2004 O.J. (L134) 114, 127. Paragraph 5 of article 1 and article 32 of the Directive are devoted to framework agreements. *See id.*

64. *See Governmentwide Acquisition Contracts (GWACs)*, U.S. GEN. SERVS. ADMIN., http://www.gsa.gov/portal/content/104874 (last visited Sept. 14, 2011); *Indefinite Delivery, Indefinite Quantity (IDIQ) Contracts*, U.S. GEN. SERVS. ADMIN., http://www.gsa.gov/portal/content/103926 (last visited Sept. 14, 2011); *GSA Schedules*, U.S. GEN. SERVS. ADMIN., http://www.gsa.gov/portal/category/100611 (last visited Sept. 14, 2011).

65. *See* U.N. COMM'N ON INT'L TRADE LAW, *Possible Revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services—Drafting Materials for the Use of Framework Agree-*

Although slightly different, the three FA regimes share two characteristics: the aggregation of demand for goods and services to be delivered/provided at different points in time and the adoption of a two-stage procurement process.[66] These features depict a competitive environment that may result in enhanced contract management by procuring authorities.

A. *The Benefits of Flexibility and the Importance of Competition at the Second Stage*

The main goal of incomplete FAs is to streamline the process for repeated purchases by combining a large amount of the overall required effort in the first selection round, while leaving some space for customization and further competition at the second stage, when the actual procurement needs arise and the specific requirements (quantities, delivery conditions, specific tasks to be undertaken, requested customizations, etc.) become better known. Some argue that appropriate FA design could reconcile the trade-off between demand aggregation and process efficiency on the one hand and customization, flexibility, and allocative efficiency[67] on the other.[68] FAs may become an effective tool for a central purchasing agency wishing to define the basic qualitative features and the financial conditions for contracts to be awarded by different and heterogeneous contracting authorities. This is the case, for instance, with (1) the General Services Administration (GSA) schedules in the United States (accessible to all U.S. federal government agencies) and (2) the framework agreements concluded by the Office of Government Commerce (OGC) Buying Solutions in the United Kingdom, Hansel in Finland, and Consip in Italy.[69]

If the contracting authority's needs and/or preferences are somehow unknown or heterogeneous with respect to relevant aspects of the contracts to be awarded, it is optimal use of a second-round selection to define these

ments and Dynamic Purchasing Systems in Public Procurement, ¶ 5, U.N. Doc. A/CN.9/WG.I/WP.52 (Mar. 13, 2007), *available at* http://daccess-ods.un.org/TMP/1413438.html.

66. An interesting analysis of differences and common traits between the adoption of framework arrangements in Europe and in the United States is provided in Yukins, *Are IDIQs Inefficient?*, *supra* note 41, at 560–62.

67. In the case of procurement contracts, allocative efficiency simply requires the project to be undertaken by the most efficient firm, that is, the one producing at the lowest cost.

68. The trade-off between competition and efficiency in incomplete FAs is analyzed more formally by Gian Luigi Albano & Marco Sparro, *A Simple Model of Framework Agreements: Competition & Efficiency*, 8 J. PUB. PROCUREMENT 356, 358 (2008) (capturing the most relevant qualitative features of an FA by using a stylized two-stage (strategic) model with horizontal differentiation).

69. *SeeFramework Agreements*, HANSEL, http://www.hansel.fi/en/activities/frameworkagreements (last visited Sept. 14, 2011); *Summary of Framework Agreements*, BUYING SOLUTIONS, http://www.buyingsolutions.gov.uk/frameworks/list.html; ACQUISTINRETE DELLA PUBBLICA AMMINISTRAZIONE, TI TROVI IN FRAMEWORK AGREEMENTS, https://www.acquistinretepa.it/opencms/opencms/menu_livello_I/header/Inglese/TOOLS/framework_agreement.html. *See generally* ORGANISATION FOR ECON. CO-OPERATION & DEV., *supra* note 8; *GSA Schedules*, *supra* note 64

aspects.[70] As soon as the specific need arises—meaning that uncertainty about the exact requirements is reduced—the competition is reopened and the operators selected in the first round are invited to submit new tenders, further clarifying the conditions set forth at the first stage in detail.[71] Thus, unlike a frame contract, the two-stage procurement process consists of two distinct rounds of competition.[72]

It seems intuitive that the more heterogeneous the demand stemming from several public agencies/contracting authorities, the less precise the conditions set in the master contract. Consequently, the second round of competition is instrumental to (1) choose the economic operator that is able to provide the best quality-to-price ratio for a specified set of conditions and (2) avoid selecting a supplier whose goods and/or services might be only loosely related to the set of conditions stated in the master contract.

B. *Enhancing Competition at the Execution Stage*

Demand aggregation through FAs may both reduce transaction costs and provide an appropriate environment to enhance contract enforcement. This effect is greater the lower the number of contracting authorities awarding specific contracts within the same FA. When only one contracting authority uses an FA, the pool of selected economic operators at the first stage may have strong incentives to reinforce that contracting authority's contract management efforts.

First, when specific contracts are similar to each other—that is, the degree of incompleteness of the master contract is low—then each single economic operator can use its own know-how to assess other firm's performance. Second, when the number of specific contracts for a given FA is high or, alternatively, the value of each potential contract is high,[73] then nonselected economic operators have a real incentive to police performance. However, the repeated nature of interactions within a given FA may trigger collusive behavior since bidders can coordinate by agreeing to a "low-effort strategy" when monitoring each other.[74] This implies that the contractor today becomes the supervisor tomorrow, so bidders can split the market over time. Thus, when the risk of collusion among economic operators in a given FA is

70. Yukins, *Are IDIQs Inefficient?*, *supra* note , at 560 (analyzing the comments of Steve Kelman, then head of the Office of Federal Procurement Policy, who encouraged avoiding a second round of competition).

71. Directive 2004/18, of the European Parliament and of the Council of 31 March 2004 on the Coordination of Procedure for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts, 2004 O.J. (L134) 114, 137. In the Italian public contract code, see Decreto Legislativo 12 aprile 2006, n. 163, art. 59, cl. 8, in G.U. 2 maggio 2006, n. 107.

72. Organisation for Econ. Co-operation & Dev., *supra* note 8, at 26–27; *see* Directive 2004/18, 2004 O.J. (L134) at 137.

73. That is, just after the framework agreement is concluded and before any specific contract is awarded.

74. The logic used here is reminiscent of James J. Anton & Dennis A. Yao, *Coordination in Split Award Auctions*, 107 Q.J. Econ. 681 (1992).

deemed to be high,[75] the "suitable" pool of losing bidders is unlikely to be those selected at the first stage.

There are a different set of "losing firms" that might have stronger incentives to cooperate with the awarding authorities during the execution of the stream of specific contracts, following any reopening of competition: the set of competitors that were not included in the framework agreement. The two final steps of our analysis explain why FAs may enhance the "monitoring" role of first-round losers and argue that in order to fully exploit the "competition-in-the-execution" feature of FAs we should, in principle, consider some "open" format of FAs themselves.

Because they have been cut off from competing for specific contracts, first-round losers of any FA have conflicting interests with those firms that are part of the agreement. Because FAs aggregate demand over time, unsuccessful bidders cannot benefit from the opportunity to compete for an ongoing stream of contracts. It is, however, exactly the potentially high value of the stakes involved that provides first-round losers with a strong incentive to uncover evidence about discrepancies between the successful firms promised quality standards and their performance during either the first stage or second stage of the competition.

The greater the estimated value of the FA, the greater the incentive. The monitoring task performed by losing bidders would be easier the more homogeneous the stream of specific contracts, which generally involves a more complete master contract (that is, with most performance dimensions laid down at the first stage).

An important question is: Are all losing bidders on an equal ground in performing such a socially valuable activity? In other words, are all losing bidders' interests aligned with contracting authorities'? If, for example, fifty firms competed to enter an FA that will be concluded with ten of them using a meticulous and publicly announced ranking algorithm, then the "marginal losers" are those with the highest incentive to get another chance to be part of the agreement. The top-ranked losing firm is most likely to have the highest incentive, although circumstances may exist under which contracting authorities would be willing to consider more losing bidders.[76]

In order to become an effective tool for monitoring actual performance throughout the duration of the FA, losing bidders need to have an incentive. As pointed out earlier, at least in Italy, contracting authorities can "scroll down" the ranking to replace the current contractor for serious contractor infringements.[77] The most natural way to extend such a provision would be to reopen an FA at a later stage by replacing the first contractor whose per-

75. This might be caused by a low number of firms that are chosen as part of the FA relative to the overall number of competing firms at the first stage.

76. Suppose that the twentieth-ranked firm was awarded 50 points on a 0 to 100 scale. There may be five losing bidders with a score close enough—say, between 46 and 49—to the lowest-ranked winner to be worth considering.

77. Decreto Legislativo 12 aprile 2006, n. 163, art. 140, in G.U. 2 maggio 2006, n. 107.

formance was seriously subpar with the highest-ranked losing bidder, the second underperforming contractor with the second-highest losing bidder, and so on.

The final question is: to what extent is it possible to reopen a framework agreement after it has been concluded? Directive 2004/18 already defines a two-stage, entirely electronic, purchasing arrangement—the Dynamic Purchasing System (DPS). The DPS starts off with an initially closed set of firms, but the set remains open throughout the entire period of the DPS.[78] While the prevailing interpretation of FAs as defined in articles 1.5 and 32 of Directive 2004/18 is that of a closed system, it would seem efficient, at least from an ex post viewpoint,[79] to "open up" a framework agreement, thus allowing the possibility of replacing an existing firm with the highest-ranked losing bidder(s).

V. CONCLUDING REMARKS

While playing a primary role in the award phase of public procurement processes, the principle of competition essentially disappears from the execution phase of public contracts. This seems to be a prevailing feature of public procurement regulation worldwide. Often, in the performance phase—the proverbial "black hole"—opacity, incompetence, and corruption undermine the objectives of public procurement policies.

In this Article, we argued that when delivered quality is shattered by opportunistic behavior at the execution stage, transparency and nondiscrimination principles are betrayed. This is because inferior contract performance undermines the competition principle put in place among competing bidders in the selection phase. In public procurement, unlike private contracts, any change in contractual requirements affects third parties—namely, the losing bidders. Because losing bidders have a stake in a winner's conformance with the contract specifications, losing bidders should be encouraged to report infringements and challenge the contractor's lower-than-promised performance in a contract they might have otherwise won. As a result, losing bidders' rights to fair competition would be more stringently enforced and, if properly ranked, the second-best bidder would earn the right to replace the winner.

We also argued that the ability to collect *and* interpret information during the execution phase can make losing bidders, working together with the procuring authority, the most effective "supervisors" of the contractor's compliance with contractual clauses. As competitors in the same market, losing bidders are potentially the ideal candidates to ascertain what dimensions of performance are most vulnerable to opportunism.

78. Directive 2004/18, of the European Parliament and of the Council of 31 March 2004 on the Coordination of Procedure for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts, 2004 O.J. (L134) 114, 137–38.

79. Ex post efficiency refers here to the potential solution of the moral hazard problem arising at the execution stage, that is, after any specific contract has been awarded.

The idea of having losing bidders "cooperate" with the procuring authority might, in principle, be stretched to other phases of the procurement process, such as the evaluation of abnormally low bids, especially for complex public contracts where both quality and price matter. Although these issues would require a separate line of investigation, the basic theory is consistent with the rationale discussed in this Article. Even when the contracting authority is not obliged by regulation to evaluate abnormally low bids,[80] losing bidders might provide relevant information as to whether the overall winning tender hinges on a sustainable and sound business plan. As we emphasized in the main sections, allowing for such proactive initiatives by losing bidders ought to be carefully defined by the procuring authority in order to fully exploit the potential benefits while limiting the risk of making the overall public procurement system even more adversarial and, possibly, ruthless.

80. In Italy, for instance, when a public contract is awarded by means of the economically most advantageous tender, all tenders being assigned at least eighty percent of *both* the technical and the financial score are deemed to be considered abnormally low unless bidding firms provide convincing evidence of the sustainability of the involved business plan.