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Material Amendments of Public Contracts during their Terms: From Violations of Competition to Symptoms of Corruption

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The problems of incorrect contract execution are widespread in any procurement system. Often the quality promised in the contract signed after the award procedure is not delivered during the execution phase and the procuring entities accept a different and worse-than-promised performance. The infringement of the contract can lead to a material amendment related to a modification of the economic balance of the initial contract. Such situation can be due to the incompetence of the procuring officials or can be considered a symptom of lack of integrity. Adequate efforts in favour of competition, transparency and objective criteria in decision-making as fundamental principles and instruments to prevent corruption are necessary throughout the entire cycle of the public procurement process, from the beginning of the procedure to the conclusion of the performance phase. Otherwise, after the award, the procuring entity may accept a different and less costly performance in violation of free competition and equal treatment principle. The new Directive Proposal on Public procurement addresses such issues and for the first time regulates the execution phase, by identifying and thus limiting the amendments admitted.

I. The Benefits of Free Competition in Public Procurement

Efficiency and integrity should be the primary goals in every procurement system.[1] Nonetheless, contracting authorities often consider their purchasing power as an instrument to achieve domestic policy goals such as favouring local suppliers.[2] A closer look at national procurement markets reveals that governments often keep their domestic market closed, without clear and specific procurement strategies.[3] Only recently, because of increasingly stringent fiscal poli-

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1 P. Trepte, *Regulating Procurement. Understanding the Ends and Means of Public Procurement Regulation*, Oxford University Press, 2004; Id., *Transparency and Accountability as Tools for Promoting Integrity and Preventing Corruption in Procurement: Possibilities and Limitations*, 2005, available at *https://bvc.cgu.gov.br/bitstream/123456789/transparency_and_accountability_tools.pdf*. A. Sánchez Graells, *Public Procurement and the EU Competition Rules*, Oxford, 2011, pp. 97 et seq.

2 World Trade organization, *Government Procurement*, www.wto.org/english/tratop_e/gproc_e/gproc_e.htm. For a long time public procurement has been effectively excluded from the application of the main multilateral trade rules under the GATT and the WTO, because the governments wanted to pursue domestic aim, 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. S. Arrowsmith, *Government Procurement in the WTO*, 2003, ch. 1 and ch. 3; R. Anderson, 'Current Developments on Public Procurement in the WTO', in *PPLR*, NA 2006, pp. 167–178; R. Anderson, 'Renewing the WTO Agreement on Government Procurement: Progress to Date and Ongoing Negotiations', in *PPLR*, 2007, p. 255. *See* also: R. Anderson, 'Coverage of the GPA: gaps and challenges for the future', speech on Public Procurement: Global Revolution V (Copenhagen, 8–9 September 2010); R. Anderson and S. Arrowsmith, *The WTO Regime on Government Procurement: Challenge and Reform*, Cambridge, 2011; P. Wang, R. Cavallo Perin and D. Casalini, *Adressing* 'Purchasing Arrangements between Public Sector Entities – What WTO can learn from EU's experience?', in R. Anderson and S. Arrowsmith (eds.) *The WTO Regime on Government Procurement: Challenge and Reform*, Cambridge, 2011, p. 252.

3 On fragmentation of procuring entities and the lack of specific strategies in procurement policies: G. M. Racca, 'Professional buying organizations, sustainability and competition in public procurement performance', 4th *International Public Procurement Conference* (Seoul, 26–28 August 2010), available at *www.ippa.org/IPPC4/Proceedings/18TransparencyAccountabilityinProcurement/Paper18-13.pdf*.

cies, governments seem to have realized the urgency to deliver a growing flow of services to citizens in spite of decreasing financial resources,[4] and that competition may be instrumental to reconcile means and ends. Favouring inefficient national suppliers in public procurement and securing State aids for them is no longer sufficient to keep them on the market and it is too costly for public finance.[5] Needless to say, competition should be favoured and strengthened to select the most efficient and innovative firms.[6] Open, transparent and non-discriminatory procurement becomes the best tool to achieve "value for money" as it spurs, when appropriately designed, the right degree of competition among suppliers,[7] generating benefits for both domestic and foreign stakeholders.[8]

Although competition enhances economic development and a fair quality-price *ratio* for consumers, the main aim of EU rules is to safeguard the rights of undertakings actively involved in competitive processes. This implies that the procuring entities must guarantee fair treatment to undertakings participating in public award procedures.[9] Competition is considered as a principle that should define the relations among undertakings providing public utilities. While it is commonly accepted that competition must be assured among suppliers beyond mere access to the market,[10] the idea that the respect of the competition principle ought to be assured also during the performance of a public contract of works, goods or services has not yet been considered. 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. However, as confirmed in the draft of the new Directive on which the Council and Parliament agreed,[11] the EU rules concern mainly the awarding phase of the contracts, rather than its execution.

With the implementation of the Remedies Directives,[12] the EU aims at facilitating the correction of the award procedure before the signing of the contract, in order to award the execution of the contract to the highest-ranking bidder, instead of awarding it to any bidder chosen unfairly or with a faulty application of the award criteria. The Directive makes it possible for procuring entities to address unexpected problems without having to pay for both the execution by the illegitimate winner and the award of damages to another undertaking which was entitled

4 EU Commission, *Green Paper on the modernisation of EU public procurement policy: Towards a more efficient European Procurement Market* – COM(2011) 15 final (hereafter 'Modernisation Green paper'), p. 27.

5 See generally: G. M. Racca, 'Collaborative Procurement and Contract Performance in the Italian Healthcare Sector: Illustration of a Common Problem in European Procurement', in *PPLR*, 2010, p. 119; G. M. Racca, 'Le modalità organizzative e le strutture contrattuali delle aziende sanitarie', in A. Pioggia, M. Dugato, G. M. Racca and S. Civitarese Matteucci (Eds.), *Oltre l'aziendalizzazione del servizio sanitario. Un primo bilancio*, Milano, 2008, p. 274.

6 In the case of SMEs see: EU Commission, *"Think Small First" A "Small Business Act" for Europe* – COM(2008)394 final, 28 June 2008, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0394:FIN:en:PDF. R. Anderson and W. Kovacic, 'Competition policy and international trade liberalisation: essential complements to ensure good performance in public procurement markets', in *PPLR*, 2009, p. 67.

7 S. Cassese, 'Le droit tout puissant et unique de la société. Paradossi del diritto amministrativo', in *Riv. Trim. Dir. Pubbl.* 2009, p. 893, now also in S. Cassese, *Il diritto amministrativo: storia e prospettive*, 2010, p. 539. See generally: S. L. Schooner et al., *Public Procurement Systems: Unpacking Stakeholder Aspirations and Expectations*, George Washington University Law School – Public Law and legal theory – Legal studies research paper no. 1133234 (2008), available at *http://papers.ssrn.com/sol3/papers.cfm?abstract _id=1133234*.

8 S. Arrowsmith and C. Nicholas, 'Regulation of Framework agreements/Task order contracts – Regulating framework agreements under the UNCITRAL Model Law', in S. Arrowsmith (Ed.) *Public Procurement Regulation in the 21st Century: Reform of the UNCITRAL Model Law on Procurement*, 2009, p. 95.

9 C. H. Bovis, *EU Public Procurement Law*, 2007, pp. 72 et seq.; S. L. Schooner, *Desiderata: objectives for a system of government contract law*, in *PPLR* 2002, p. 107, in that article, Schooner outlined nine objectives, or desiderata, of public procurement systems: competition, integrity, transparency, efficiency, customer satisfaction, best value, wealth distribution, risk avoidance, and uniformity. In order to achieve the secondary goals see: S. Arrowsmith and P. Kunzlik, *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions*, Cambridge, 2009. For ensuring sound procedures see: *Modernisation Green paper*, para. 5, p. 48 et seq.

10 G. Napolitano and M. Abrescia, *Analisi economica del diritto pubblico*, Bologna, 2009, p. 95.

11 Council of EU, *Proposal for a Directive of the European Parliament and of the Council on public procurement (Classical Directive) (First reading) – Approval of the final compromise text*, 12 July 2013 (hereafter 'Compromise draft').

12 Directive 2007/66/EC 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), OJ L 335, implemented by Legislative Decree No. 53, 20 March 2010 and Legislative Decree No. 104 of 2010. *See*: C. Nicholas, *Remedies for breaches of procurement rules and the UNCITRAL model law in procurement*, *PPLR* 2009, NA151. For an EU Directives analysis, *see*: J. Golding and P. Henty, 'The new remedies directive of the EC: standstill and ineffectivness', in *PPLR* 2008, p. 146. For an interesting French perspective: J. Arnould, 'Ineffectivness of contracts under the new Remedies Directive in the UK and in the EC', speech on *Public Procurement: Global Revolution IV* (Copenhagen, 8 September 2010). For a UK law perspective: P. Henty, 'U.K.: public procurement remedies directive – an update on the implementation process', in *PPLR 2010* NA17, and P. Henty, 'Remedies directive implemented into UK law', in *PPLR* 2010, NA115.

to win.[13] It is to that effect that the European Remedies Directive introduced a standstill period of at least 10 days between the award and the signing of the contract, so as to prevent the consequences of an unlawful award from becoming irreversible. After the signing of the contract, any correction of infringements that occurred during the award procedure and/or of any unlawful award becomes more difficult, so that awarding damages often remains the only available remedy.

II. Compliance with the Competition Principle throughout the Public Procurement Process

Safeguarding competition in the award procedure is a compulsory requirement for any fair and transparent procurement system. In the EU, once the contract notice has set a call for tenders, any interested bidder can submit a binding offer, in accordance with the requirements set in the contract documents. The offer is binding for a limited time[14] and cannot be withdrawn. Under the current Directives, the choice of the winning bidder has to be carried out in two stages.[15] The contracting authority verifies the requirements of candidates and excludes the tenderers that do not comply with the qualitative selection criteria.[16] In the EU, the contracting entities normally pre-qualify every participant. At a later stage, in application of the award criteria, the procuring entities will accept the best offer, and will have to withdraw from the negotiation with the other competing bidders.[17] Such withdrawal is fair insomuch as it complies with the award criteria. If losing bidders find any fault or contradiction, they are entitled to file claims and complaints and ask the procuring entity to review its final decision.[18]

The plurilateral Agreement on Government Procurement (GPA) also makes a distinction between the selection and the contract award decision. However, this distinction is less strict than in the ECJ case law quoted above.[19] The EU Commission, in the Green Paper *on the modernization of EU public procurement policy*, reconsidered the organisation and the sequence of the examination of selection and award criteria within the procedural framework with the aim of reducing the administrative burdens.[20] In accordance with the EU principle of equal treatment and non-discrimination, the EU Directive Proposal[21] shall allow contracting authorities, only in open procedures, to choose whether to examine tenders before verifying the absence of grounds for exclusion and fulfilment of the selection criteria.

As is well known, the past performance of economic operators can be evaluated as a tenderer requirement, but not within the award criteria. The main risk associated with evaluating past performance is a disadvantage of newcomers, who might however be optimal contractors. In the EU, the Green Paper suggested to take into account past performance highlighting the problems of safeguarding the equal treatment principle of tenderers, but it confirmed its exclusion from the award crite-

13 Directive 2007/66/EC, Art. 1, Amendments to Directive 89/665/EEC, Article 2, *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". For the implementation of EU directive 2007/11 see S. Treumer and F. Lichère (eds.), *Enforcement of EU Public Procurement Rules*, Copenhagen, 2011.

14 180 days in the Italian case Art. 11(6) of Legislative Decree No 163 of 12 April 2006, see also Art. 75(5), concerning the guarantees in support of supply.

15 ECJ, 20 September 1988, *Beentjes* in Case C-31/87, paras. 15–19; ECJ, 24 January 2008, *Lianakis*, in Case C-532/06, para. 30; and 12 November 2009, *Commission* v *Greece*, in Case C-199/07, paras. 51 to 55.

16 This is done on the basis of exclusion criteria and criteria of economic and financial standing, professional and technical knowledge and ability.

17 For the awarding criteria see: Art. 53 of Directive 2004/18/EC. For Italian public contract code see: Italian Legislative Decree No 163 of 12 April 2006, Art. 81, 82 and 83.

18 Directive 2007/66/EC, recital No 17, "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*, available at *http://europa.eu/legislation_summaries/internal_market/businesses/public_procurement/l22006b_en.htm*.

19 The GPA does not explicitly prohibit the taking into account, at the award stage, of criteria which are not linked to the goods and services offered, and hence allows bidder-related criteria to be taken into account.

20 *Modernisation Green paper*, pp. 16–17.

21 *Compromise draft*, Art. 54(2).

ria.[22] The current EU Directives provide that contracting authorities are entitled to establish minimum standards of technical or professional ability which must be met by potential bidders for public contracts with the aim of ensuring consistently good delivery of public services and value for money. In particular EU Directive 2004/18 states the exclusion from the award procedure of an economic operator that "has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate"[23] or that "has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority".[24] The National implementation may provide the termination of the contract in case of a breach of its terms. Nonetheless, "a consistent approach to the consideration of the past performance of tenderers to ascertain whether they can confidently be relied on to perform the obligations under the contract to be awarded" has not always been adopted in the past. The UK Government, according to the UK policy on *Buying and managing government goods and services more efficiently and effectively*[25] recently published a note suggesting to take into account the bidders' past performance in public procurement award procedures, providing a higher level of reputation to be admitted in the selection phase.[26] This note applies to the procuring of goods and services "with a total anticipated contract value of £ 20 million" (also for call-off agreements) but the same document allows a generalized application with regards to "contracting authorities procuring goods, services and works outside the scope" of the note and admits the implementation of the principles set out with suitable modifications". The aim is to assure the correct performance and a greater protection for the taxpayers and recipients of the services provided. The UK "Departmental Bodies" should "include (in the OJEU Notice) minimum standards for reliability based on past performance". Departmental Bodies should ask for specified information (including certificates of performance) about past performance in the last 3 years. They should make sure: "a) that the principal contracts of those who would provide the goods and/or services have been satisfactorily performed in accordance with their terms; or b) where there is evidence that this has not occurred in any case, that the reasons for any such failure will not recur if that bidder were to be awarded the relevant contract".

Such provisions require the economic operators to demonstrate a "*quid pluris*" concerning their professional skills. The evaluation required from the tenderers concerns "a list comprising a statement of the principal goods sold and/or services provided by the bidder in the previous 3 years". Each tenderer should attempt to obtain *Certificates* from those to whom the goods and/or services on the list were provided. If any such *Certificate* cannot be obtained, the certification may be provided by the supplier itself. Thus, the evaluation of the past performance is related to the content of the *Certificate* and its discretionary evaluation during the award procedure. A further problem might arise for the economic operators wishing to enter for the first time in the market and who can not provide the required *certificates.* Additional concerns may relate to the participation in *consortia* of economic operators (especially SME) that "may wish to rely on the resources of other entities (including members of the consortium or other group entities) when discharging their obligations under the contract to be awarded; or that they may wish to sub-contract performance of parts of the contract". In such case procuring entities "should enable bidders (including consortia or other group entities) to satisfy the minimum standards for reliability based on past performance by reference to the past performance of such other entities". The choice to raise the qualification requirements of the tenderers, respecting the proportionality principle, might be a smart strategy to ensure better execution and the delivery of the promised quality by the winning undertaking. It is crucial that the winning economic operator perform correctly what was promised in his tender, other-

22 *Modernisation Green paper*, p. 18.

23 Directive 2004/18/EC Art. 45(2)(d).

24 Directive 2004/18/EC Art. 45(2)(e).

25 UK Government, *Buying and managing government goods and services more efficiently and effectively*, published 20 February 2013, available at *www.gov.uk/government/policies/buying-and-managing-government-goods-and-services-more-efficiently-and-effectively.*

26 UK Government – Procurement Policy Note, *Taking Account of Bidders' Past Performance*, 8 November 2012, available at *www.gov.uk/government/uploads/system/uploads/attachment_data/file/80220/PPN_Taking_Account_of_Bidders_Past_Performance_08-11-12_1.pdf*.

wise the competition principle would be undermined.[27]

III. The Consequences of Material Amendments during the Execution Phase of Public Procurement

In order to safeguard the principles of non-discrimination, transparency and competition, the European Court of Justice (ECJ) limited the possibility to change the terms of the procurement after the award.[28] The ECJ maintained that material amendments are those modifications beyond the scope of the awarded contract that bidders could not have reasonably anticipated at the time of the original award when they joined the competition. Such material amendments to the subject matter of the contract might have led to a different participation (different set of bidders) and, possibly, to a different award (different winning bidder).[29] According to ECJ case law, material amendments to a contract during its currency are equivalent to the illegal direct award of a public contract, without a contract notice. This allows the ECJ to examine the performance of a public procurement process as amended (which would otherwise fall outside the EU competence) and to declare it 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".[30]

The EU Court of Justice thus preserves the right of any economic operator – and mainly of the unsuccessful tenderers in the specific award procedure – to fair competition in the selection phase and consequently during the execution. This principle of fair competition is considered as violated in case of a significant (material) unforeseeable amendment to the contract conditions during the execution phase.

1. The Authorized Amendments to a Public Contract.

Following such ECJ case law, the reform of the current procurement Directives raised the question of the limits to the material amendments that can be admitted during the execution of the contract. [31]

The Proposal describes five different circumstances under which the contracts or framework agreements may be modified without a new award procedure.

a. Precise and Unequivocal Review Clauses

As provided for in Article 72(1)(a) of the final compromise text, a new award procedure is not required where the modifications "have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses". Procuring entities have to clarify "precise and unequivocal review clauses" in the procurement documents. The procurement documents "may include price revision clauses or options".[32] Such clauses "shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used." An extension of the contract as a consequence of the achievement of objectively evaluated high quality of the performance, whenever provided, might be possible. The Directive admits such modifications of the original contract "irrespective of their monetary value". Nonetheless, the contract documents will have to foresee the maximum value of the contract in order to permit to the economic operators to know in advance the possible value of the contract. The discretionary power to modify the value and conditions of the contract is limited[33] by the exclusion of the al-

27 G. M. Racca, R. Cavallo Perin, G. L. Albano, 'Competition in the execution phase of public procurement', in *Public Contract Law Journal*, 2011, Vol. 41, n. 1, p. 105.

28 ECJ, 19 June 2008, *Pressetext Nachrichtenagentur GmbH* v *Republik Österreich* in Case C-454/06, ECR I-4401.

29 It was used the "counterfactual argument" that is normally used in antitrust cases. ECJ, *Pressetext Nachrichtenagentur GmbH* v *Republik Österreich*, cit. See also ECJ, 29 April 2004, *Commission* v *CAS Succhi di frutta*, in Case C-496/99 P; ECJ, 29 April 2010, *Commission* v *Federal Republic of Germany* in Case C-160/08; ECJ, 13 April 2010, *Wall AG* v *Stadt Frankfurt am Main* in Case C-91/08; ECJ, 25 March 2010, *Helmut Muller* in Case C-451/08; ECJ, 4 June 2009, *Commission* v *Greece* in Case C-250/07; ECJ, 15 October 2009, *Acoset* in Case C-196/08.

30 Directive 2007/66/EC, recital No. 14.

31 *Compromise draft*, Art. 72.

32 *Compromise draft*, Art. 72(1)(a) also states that "Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used".

33 ECJ 29 April 2004, *EC Commission* v *CAS Succhi di Frutta SpA* in Case C-496/99 P, para. 118. The ECJ state that "the contracting authority wish, for specific reasons, to be able to amend some conditions of the invitation to tender, after the successful tenderer has been selected, it is required expressly to provide for that possibility, as well as for the relevant detailed rules, in the notice of invitation to tender which has been drawn up by the authority itself and defines the framework within which the procedure must be carried out, so that all the undertakings interested in taking part in the procurement procedure are aware of that possibility from the outset and are therefore on an equal footing when formulating their respective tenders".

teration to "the overall nature of the contract or the framework agreement".[34]

b. Impossible Change of Contractor

Additional works, services or supplies may be provided if a change of contractor "cannot be made for economic or technical reasons"[35] or "would cause significant inconvenience or substantial duplication of costs".[36] This provision defines cases in which it could be possible to use the negotiated procedure without prior publication. The proposal provides a quantification of the contract modifications. "Any increase in price may not be higher than 50 % of the value of the original contract".[37] The proposal clarifies that "for the purpose of the calculation of the price (...) the updated price shall be the reference value when the contract includes an indexation clause".[38] Consecutive modifications are admitted, always according to the same principle.

The envisaged provisions are the result of intense negotiations resulting in substantial amendments to the original text of December 2011. The Commission Proposal originally referred the quantification to the total amount of the modifications. Limitations to the amount of modifications were suppressed in the current draft and the provision of a fix maximum amount of the possible increase in price was generally considered inappropriate. Article 72(1)(b) of the 12 July 2013 draft thus provides that, in case of several successive modifications, the limitations attached to the increase in price shall apply to "each modification". Obviously, any modification, and in particular subsequent modifications, shall not be aimed at circumventing the Directive.

c. Unpredictable Circumstances

Unpredictable circumstances can justify contract amendments whenever a diligent contracting authority could not foresee them, provided that they do not "alter the overall nature of the contract", as provided in Article 72(1)(c)(ii). Moreover, it is required to respect the limit of 50 % of the price of the contract for each modification, always making sure not to circumvent the directive.

In both this situation and the previous one, the publication of a notice in the OJEU is necessary. Such publicity can assure external control over the respect of the provided limits by the other economic operators who participated in the original tender and by all the economic operators of the relevant sector, as well as by associations, citizens and any stakeholder of the procurement system.

d. Change of the Contractor

A modification may also concern the change of the contractor by which a new supplier replaces the original awardee.[39] In the ECJ *Pressetext* case law, a change of contractor was considered as a substantial amendment to an essential contractual term, unless this replacement is admitted by the initial contract. This jurisprudence caused some concerns, as the case is not infrequent especially in the work procurement.[40] As a rule, "the substitution of a new contractual partner for the one to which the contracting authority had initially awarded the contract must be regarded as constituting a change to one of the essential terms of the public contract in question, unless that substitution was provided for in the

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34 ECJ, *Pressetext Nachrichtenagentur GmbH* v Republik *Österreich* (C-454/06) , cit., para. 57. The *Pressetext* case law state that "the changeover to the euro, an existing contract is changed in the sense that the prices initially expressed in national currency are converted into euros, it is not a material contractual amendment but only an adjustment of the contract, provided that the amounts in euros are rounded off in accordance with the provisions in force, including those of Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro". According to ECJ "Where the rounding off of the prices converted into euros exceeds the amount authorised by the relevant provisions, that is an amendment to the intrinsic amount of the prices provided for in the initial contract". "Nevertheless, the conversion of contract prices into euros during the course of the contract may be accompanied by an adjustment of their intrinsic amount without giving rise to a new award of a contract, provided the adjustment is minimal and objectively justified; this is so where it tends to facilitate the performance of the contract, for example, by simplifying billing procedures". The Proposal directive allow "price revision clauses" when provided in contract document and "irrespective of the monetary value of the amendments of the contract".

35 *Compromise draft*, Article 72(1)(b)(i).

36 *Compromise draft*, Article 72(1)(b)(ii).

37 *Compromise draft*, Article 72(1)(b).

38 *Compromise draft*, Article 72(3).

39 *Compromise draft*, Art. 72(1)(d).

40 R. Noguellou, 'La Cour de justice prend une position de principe restrictive sur les cessions de marchés, puisqu'elle admet que celles-ci constituent, sauf si elles ont été prévies dans le marché initial, un changement de l'un des termes essentiels du marché, appelant par là une mise en concurrence', in *Droit Administratif*, 2008. Id., *France*, in R. Noguellou & U. Stelkens (eds.) *Droit comparé des contrats publics*, pp. 689 et seq.

terms of the initial contract, such as, by way of example, provision for sub-contracting".[41] In that case, the ECJ distinguished a simple internal reorganisation of an economic operator[42] from cases where a transfer of shares during the currency of the contract[43] is made, or where the "transfer of shares in the subsidiary to a third party was already provided for at the time of transfer of the activities to the subsidiary".[44] The ECJ stated that, in these cases, it "would be liable to constitute a new award of contract". Public contracts are regularly awarded to legal persons. If a legal person is established as a public company listed on a stock exchange, it follows from its very nature that the composition of its shareholders is liable to change at any time, without affecting the validity of the award of a public contract to such a company. Yet, such validity might be affected when "there are practices intended to circumvent Community rules governing public contracts".[45] Similar considerations "apply in the case of public contracts awarded to legal persons established not as publicly-listed companies but as limited liability registered cooperatives. Any changes to the composition of the shareholders in such a cooperative will not, as a rule, result in a material contractual amendment".[46]

In the *Wall AG* case law the ECJ considers that "A change of subcontractor, even if the possibility of a change is provided for in the contract, may in exceptional cases constitute such an amendment to one of the essential provisions of a concession contract where the use of one subcontractor rather than another was, in view of the particular characteristics of the services concerned, a decisive factor in concluding the contract, which is in any event for the referring court to ascertain".[47]

According to the Proposal, a modification of the contractor is admitted whenever it is provided by a review clause or option in the procurement documents or in case of "corporate reconstruction, merger, acquisition or insolvency". Obviously, the new contractor has to fulfil all the qualitative criteria provided in the initial award procedure.

The change of the contractor is also possible "in the event that the contracting authority itself assumes the main contractor's obligations towards its subcontractors where this possibility is provided for under national legislation".[48] Such provision seems to recall provisions in French law that admit the extension to the awarding authority of liability towards subcontractors, for the contractual relationships among the contractor and its subcontractors.[49]

e. Non-Substantial Modifications

A final rule considers as not substantial and thus admitted any other modification, irrespective of value, as far as they do not fall within the scope of the cases listed in the subsequent paragraph 4.[50] The listing of the cases of material amendment that make the contract modification ineffective clarifies the limits set to the discretion of the contracting authorities for the benefit of transparency and competition among the economic operators.

A further specification concerns modifications below threshold and that do not exceed 15 % of the initial contract value for works, and 10 % of the initial contract value for service and supply con-

41 ECJ, *Pressetext Nachrichtenagentur GmbH* v *Republik Österreich* (C-454/06), cit., para. 43. "However, some of the specific characteristics of the transfer of the activity in question permit the conclusion that such amendments, made in a situation such as that at issue in the main proceedings, do not constitute a change to an essential term of the contract".

42 ECJ, *Pressetext Nachrichtenagentur GmbH* v *Republik Österreich* (C-454/06), cit., para. 45 "an internal reorganisation of the contractual partner, which does not modify in any fundamental manner the terms of the initial contract".

43 ECJ, *Pressetext Nachrichtenagentur GmbH* v *Republik Österreich* (C-454/06), cit., para. 47 "If the shares in APA-OTS were transferred to a third party during the currency of the contract at issue in the main proceedings, this would no longer be an internal reorganisation of the initial contractual partner, but an actual change of contractual partner, which would, as a rule, be an amendment to an essential term of the contract. within the meaning of Directive 92/50".

44 ECJ, *Pressetext Nachrichtenagentur GmbH* v *Republik Österreich* (C-454/06), cit., para. 48.

45 ECJ, *Pressetext Nachrichtenagentur GmbH* v *Republik Österreich* (C-454/06), cit., para. 51.

46 "The terms 'awarding' and 'awarded' (…) must be interpreted as not covering a situation, such as, where services supplied to the contracting authority by the initial service provider are transferred to another service provider established as a limited liability company, the sole shareholder of which is the initial service provider, controlling the new service provider and giving it instructions, provided that the initial service provider continues to assume responsibility for compliance with the contractual obligations". See also: ECJ, *Pressetext Nachrichtenagentur GmbH* v Republik *Österreich* (C-454/06), cit., para. 52.

47 ECJ, 13 April 2010, *Wall AG* v *Stadt Frankfurt am Main* in Case C-91/08, para. 39.

48 *Compromise draft,* Art. 72(1)(d)(iii).

49 R. Noguellou, *France*, cit., p. 691.

50 *Compromise draft,* Art. 72(1)(e).

tracts.[51] The risk that must be avoided is the illicit fragmentation of the contract value during the initial award procedure and its increase with successive modifications.

2. Substantial Modifications to a Public Contract that are Considered Ineffective and Require a New Award Procedure

According to the draft, the amendments to the contract shall be considered substantial and thus ineffective whenever the contract or the framework agreement is "materially different in character from the one initially concluded".[52] The EU Proposal draws on the ECJ case law regarding the definition of forbidden "substantial modifications" of the contract.

Pursuant to Article 72(4)(a), a modification is substantial if it "introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of an offer other than that originally accepted or would have attracted additional participants in the procurement procedure". A different set of tenderers might have been interested in participating in the award procedure.

Material amendments such as extensions of awarded contracts have the effect of precluding other undertakings from competing for the award of contract extensions, the value of which may be as considerable as the one of the original contract. Regulatory limits to public contract extensions are foreseen precisely to avoid the distortions of competition that such extensions entail. If not foreseen in the initial contract notice, extensions entail the same competition violation effect as the award of a contract without prior publication of a contract notice.[53]

The principle of transparency is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. It implies that "all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract."[54] Therefore, although any tender which does not comply with the specified conditions must obviously be rejected, "the contracting authority nevertheless may not alter the general scheme of the invitation to tender by subsequently proceeding unilaterally to amend one of the essential conditions for the award, in particular if it is a condition which, had it been included in the notice of invitation to tender, would have made it possible for tenderers to submit a substantially different tender".[55] The ECJ case law stated that "the terms governing the award of the contract, as originally laid down, would be distorted" in case of modifications of the conditions of the tender "when the contract was being performed". Such modifications constitute a violation of transparency but also of fair competition among participants to the tender, damaging other economic operators that might have been interested in participating.

Drawing on the ECJ case law, Article 72(4)(b) qualifies as substantial a modification that "changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner

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51 *Compromise draft,* Art. 72(2). A. Giannelli, Performance and renegotiation of public contracts, in *Ius Publicum Network Review*, 2013, available at *www.ius-publicum.com/pagina.php?lang=en&pag=report&id=44*. See also Italian Law No. 127 dated 8 February 1995, Art. 8, establishing that any proposed amendment to a public contract involving a price increase of at least 5% of the original price should be subjected to a mandatory but non-binding opinion by the tender commission who had decreed the assignment.

52 *Compromise draft*, Art. 72(4). This substantial change is also present whenever the modification: (a) introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of an offer other than that originally accepted or would have attracted additional participants in the procurement procedure; (b) changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement; (c) extends the scope of the contract or framework agreement considerably; and (d) where a new contractor replaces the one to which the contracting authority had initially awarded the contract in other cases than those provided for under point d) of paragraph 1.

53 Directive 2007/66/EC, recital No 13, "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 regard as being material: ECJ, *Pressetext Nachrichtenagentur GmbH* v *Republik Österreich* cit.; ECJ, *Commission* v *Federal Republic of Germany* in Case C-160/08, cit.; ECJ, *Wall AG* v *Stadt Frankfurt am Main*, in Case C-91/08, cit.

54 ECJ 29 April 2004, *Commission* v *CAS Succhi di Frutta SpA* in Case C-496/99 P, paras. 111 and 115.

55 ECJ 29 April 2004, *Commission* v *CAS Succhi di Frutta SpA* in Case C-496/99 P, paras. 111 and 115.

which was not provided for in the initial contract or framework agreement". This change would undermine fair competition, as the award is decided through the evaluation of the tenders and, in the EU, through a precise ranking subsequent to an objective evaluation. Changing significantly the economic balance means that the winner is favoured and the previous competitive selection is thwarted.[56]

Even when the award procedure has been carried out in strict respect of the principles of fairness and transparency, the contractor's infringements or non-compliance with contractual clauses might modify the economic balance and, thus distorting bids ranking *a posteriori*, thwart the competitive selection process.[57] In such case, opportunism in the contract execution has, retrospectively, an impact on competition at the award stage. Consequently, losing bidders have legal means to act at the execution stage comparable to their power to file claims and complaints during the award procedure. Indeed, throughout the procurement procedure, and by extension during contract execution, losing bidders enjoy a "right to fairness and competition" according to the European and national rules. These rights are mandatory and their infringement can lead to the ineffectiveness of the contract at stake.[58] Similarly, material amendments outside the scope of the contract preclude other undertakings from taking part in competitions for the award of a new, different contract. In accordance with the recent Remedies Directive,[59] in such cases the contract becomes ineffective and void.

The European tradition of a "sacred" contract which, after it signature, becomes an exclusive matter between parties and national regulations is overcome by the provision of the European Court of Justice and the new Directive Proposal concerning limits to "material amendments".[60] Whenever occurring during the execution phase, "material amendments" are in breach of EU law either if they are added to the original contract (extensions), or if they take the form of a worse-than-promised performance.[61] This encroachment into contract law is necessary to protect competitors against potential violations of the principle of transparency and fair competition in the award of the public procurement.

IV. The Role of Unsuccessful Tenderers after the Signing of the Contract

The monitoring of the contract management assumes a strategic role to ensure the correct performance of public contracts.[62] The compliance between the signed contract and the performance is a strategic tool to verify the efficiency of the choices resulting from the award procedure. This is also a means to protect the integrity and correctness of the

56 ECJ, *EU Commission* v *Federal Republic of Germany* in Case C-160/08, cit., paras. 98–99–100 e 101. The amounts of the extension of the contract was quantified in € 673 719.92. This case law concern the award of contracts for public ambulance services where it has been considered substantial the extension of the subject matter of the contract to a "district association" non indicated in the contract.

57 Concerning the principle of Transparency see: C. H. Bovis, *EU Public Procurement Law*, Cheltenham, 2007, p. 67. See also: Id., *Regulatory Trends in Public Procurement at the EU Level*, in *EPPPL,* 2012, pp. 225–226.

58 G. M. Racca, R. Cavallo Perin, G. L. Albano, 'Competition in the execution phase of public procurement', *cit.*, p. 105. Directive 2007/66/EC, Art. 1, Amendments to Directive 89/665/EEC, Art. 2(d), 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". For the Italian System see the Administrative process code: Legislative Decree No 104, of July 2, 2010, Art. 121

59 Directive 2007/66/EC of (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) that was implemented in Italy by Legislative Decree No 53, 20 March 2010.

60 ECJ, *Pressetext Nachrichtenagentur GmbH* v *Republik Österreich* (C-454/06) cit., 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 favour of the contractor in a manner which was not provided for in the terms of the initial contract. The same principle is established in G.M. Racca, R. Cavallo Perin, G. L. Albano, 'Competition in the execution phase of public procurement', *cit.*, p. 105.

61 ECJ, *Pressetext Nachrichtenagentur GmbH* v *Republik Österreich* (C-454/06), cit.

62 Organisation for Economic Co-operation and Development, *OECD Principles for Integrity in Public Procurement*, 2009, available at *www.oecd.org/gov/ethics/48994520.pdf*, pp. 69 et seq.

choices made by the contracting authority and to detect unlawful decisions or errors of assessment.

A rigorous oversight of contract implementation is therefore of paramount importance. In that regards, it seems increasingly necessary for unsuccessful tenderers to act as diligent "watchdogs" verifying that the review process functions appropriately, and challenging infringements. This however requires a certain level of transparency in the management of the contract.[63] Losing tenderers ought to be assured that they lost because the selected contractor did not only submit the best "promised" value for money (price-quality ratio), but will in fact deliver the best value-for-money performance. Were this not to be the case, the main goal of the competitive mechanism would be undermined, thus distorting competition in the procurement market. Only fair behavior in contract management, 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. Since unsuccessful tenderers harmed by an unlawful award of the contract have access to remedies, they should also have access to remedies where they want to provide evidence that the execution of the contract does not correspond to what was defined in the award.[64]

The new provision on the publication of information relating to the modification of the awarded contract in the OJEU might strengthen the monitoring of the unsuccessful tenderers and the other economic operators.[65] In this perspective, taxpayers or users of the contracting authority performance may also be interested to survey the modifications and the possible misconduct or failure that may occur in the performance of a public contract, especially in the field of services.

In Europe, regulations on public procurement set fairly strict and *objective* criteria to award public contracts. Competing tenders are to be evaluated according to how much of the announced points[66] they score for (both technical and financial) criteria and sub-criteria.[67] Despite the fact that tenders have to be evaluated objectively, or because of that, competition is frequently fierce and ruthless. Tenderers tend to scrutinize each other and, most importantly, they control how the procuring entity made use of those objective awarding criteria. Unsuccessful bidders can file a claim[68] on the procuring entity's evaluation of another tenderer's offer even on the basis of minimum differences in the points assigned to an element of the tender: this can be a key factor for the award of the contract, thus overturning the result of the award itself. According to the European rules, the ranking can be modified in favor of the protesting bidders.[69]

The procuring entity's ability to correctly and fairly evaluate tenders matters not only for the right allocation of the public contract, but also for its correct performance. However, the closer tenders included in the ranking at the evaluation stage have been submitted by the economic operators that could assure

63 United Nations Commission on International Trade Law, United Nations Convention against Corruption: implementing procurement-related aspects (Second session, Nusa Dua, Indonesia, 28 January-1 February 2008), available at *www.uncitral.org/uncitral/en/index.html*.

64 M. Trybus, 'Public contracts in European Union Internal Market Law', in R. Noguellou & U. Stelkens (eds.) *Droit comparé des contrats publics*, p. 312. ECJ, 29 April 2004 *EU Commission* v *CAS Succhi di Frutta* in C-496/99.

65 G. M. Racca, G. L. Albano, 'Collaborative Public Procurement and Supply Chain in the EU Experience', in C. Harland, G. Nissimbeni, E. Schneller, *Strategic Supply Management* (SAGE Handbook), London, 2013, pp. 179–213.

66 Directive 2004/18/EC of Art. 23 for the technical specifications and Art. 53(1), for the awarding criteria, where is provided that "when the award is made to the tender most economically advantageous 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 60%, then up to 60 points are awarded to a tender's technical specifications while up to 40 points are awarded to the price. It is worth mentioning though that public procurement regulations in the US moved away from a numerical comparison of tenders.

67 Directive 2004/18/EC Art. 53(2), where is provided that "Without prejudice to the provisions of the third subparagraph, in the case referred to in paragraph 1(a) the contracting authority shall specify in the contract notice or in the contract documents or, in the case of a competitive dialogue, in the descriptive document, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender. Those weightings can be expressed by providing for a range with an appropriate maximum spread. Where, in the opinion of the contracting authority, weighting is not possible for demonstrable reasons, the contracting authority shall indicate in the contract notice or contract documents or, in the case of a competitive dialogue, in the descriptive document, the criteria in descending order of importance". See: ECJ, 14 June 2007, *Medipac-Kazantzidis AE* v *Venizeleio-Pananeio* in Case C-6/05.

68 B. Marchetti, 'Il sistema di risoluzione delle bid disputes nel modello federale statunitense di public procurement', in *Riv. Trim. Dir. Pubb.*, 2009, p. 963.

69 See generally: Directive 2007/66/EC, recitals No 13 and 14.

the more effective contract oversight. If, for instance, the highest-ranked tender were to be only slightly above the second-highest, then any lower-than-expected performance during the execution of the contract would result in the winning tender being (*ex post*) worse than the highest-ranked-loser. The contractor's opportunism at the execution stage ought to be considered *de facto* as a lower-quality tender at the competition stage. This is why, in Italy, it is also possible to provide that the second-highest tender would have the right to replace the winner in case of termination of the contract due to serious infringements.[70]

Since losing tenderers have a "right to fairness and competition" throughout the *whole* cycle of the procurement process and thus even in the execution phase, they are entitled to provide evidence on the infringement of the selection procedure rules and could also be active in the monitoring of the subsequent execution phase.[71]

Relying on non-winning tenderers to monitor winners' performance becomes essential. In fact, unsuccessful tenderers have an in-depth knowledge of the subject matter of the contract and are endowed with the suitable professional skills to monitor the winner's performance. This might help soothe the moral hazard problem arising at the execution stage that affects the procuring entity's welfare.[72]

This monitoring task could be assigned to them by the procuring entity itself through a precise clause inside the contract documents and could be linked to the provision of their right to substitute the winner in case of termination of the contract. Such provision should be carefully defined in order to prevent colluding strategies that would resemble those that arise in a second-lowest bid competitive mechanism.[73] It would be necessary, for instance, to provide that the subsequent tenderer in the ranking should accept the same conditions set in the terminated contract.[74]

A correct monitoring activity can lead to having data on how economic operators run the performance. From such data, forms may be created of blacklisting, debarment[75] and cross-debarment[76] as anti-corruption initiatives, but also to be able to evaluate the past performance of economic operators in the award procedure.

The EU legal framework provides the exclusion from the award procedure of a tenderer whenever its personal situation does not comply with the requirements provided by EU rules and implemented by Member States.[77] This is defined as a disqualification

70 Legislative Decree No 163 of April 12, 2006, Art. 140, where is provided that Contracting authorities include in the contract notice that in the event of failure of the contractor or termination of a contract for breach of the same (in accordance with articles 135 and 136), will be progressively challenged the subjects who participated in the original tender, resulting from its ranking, in order to sign a new contract for the award of completion. It is possible to scroll the ranking and call the subject which has made the second best offer, until the fifth highest bidder, except the original contractor. In this case the award is concluded under the same conditions already proposed by the original contractor on his offer. G. M. Racca, 'Public Contracts – Annual Report 2012', in *Ius Publicum Network Review*, 2012, available at www.ius-publicum.com/repository/uploads/07_09_2012_11_04_RaccaEN.pdf, pp. 32 et seq.; L. Fertitta, 'La figura del secondo classificato nell'aggiudicazione degli appalti pubblici', *Rivista trimestrale degli appalti*, 2005, p. 442; V. Palmieri, *Scorrimento della graduatoria e tutela della concorrenza nell'esecuzione degli appalti pubblici*, *Foro amministrativo – C*.d.S., 2208, p. 868. See also: A. Massera and M. Simoncini, 'Basic of Public Contracts in Italy', in *Ius Publicum Network Review*, 2011, available at *www.ius-publicum.com/pagina.php?lang=en&pag=report&id=43*, pp. 8 et seq.

71 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. See also: C. Ginter, N. Parrest and M. A. Simovart, 'Access to the content of public procurement contracts: the case for a general EU-law duty of disclosure', in *PPLR*, 2013, pp. 156–164, where the Autors link the transparency and the non-discrimination principles to the relevance of considering the contract as a Public document. Concerning the disclosure of procurement documents they remind that "transparency and equal treatment are fundamental principles of procurement law and in fact inherent to exercise of public powers in general. These principles do not cease to apply after a procurement procedure ends".

72 G. Napolitano and M. Abrescia, *Analisi economica del diritto pubblico*, cit., although the authors seem to consider almost exclusively the role of informational asymmetries on the subject matter of the contract.

73 A second-lowest bid is the buying equivalent of a Vickrey auction. Assuming 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 (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: G.M. Racca, R. Cavallo Perin, G. L. Albano, *Competition in the execution phase of public procurement*, cit., p. 105.

74 EU Commission, note 2007/2309/C, 30 January 2008 containing observations on Art. 140, Legislative Decree No 163 of 12 April 2006.

75 GAO Report, *Suspension and Debarment*, September 2012, available at: *www.gao.gov/assets/650/648577.pdf*. See also: S. L. Schooner and al., 'Suspension and Debarment: Emerging Issues in Law and Policy', in *PPLR*, 2004.

76 C. H. Yukins, *Cross-Debarment: A Stakeholder Analysis*, GW Law Faculty Publications, 2013.

77 Directive 2004/18/EC, Art. 45, an example is the exclusion where the tenderer "has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate".

sanction.[78] Every Member State may use databases[79] to collect online data on the performance of economic operators and an EU network of such systems should be provided.[80] The aim is to simplify the administrative burden of procuring entities whenever they have to evaluate the ability and professional skills of economic operators.

Normally, contracts include penalty terms in case of infringements in the performance, or in case of serious breaches, provide the withdrawal or the resolution of the contract. In some Member States such as Italy, in case of bankruptcy or criminal infiltration the contracting authority may scroll the ranking deriving from the award procedure (until the fifth). In this case the award is made under the same conditions already proposed by the original contractor. This might be a tool to prevent the improper fulfillment of the contract and "reward" the most efficient economic operator. It could also be a means for preventing and fighting the risk of corruption in the field of public contracts. The EU anti-corruption policy has different purposes as the protection of EU finances, [81] the guarantee to the EU citizens of a "high level of safety in an area of freedom, security and justice"[82] as well as ensuring compliance with the internal market policies considering corruption as an infringement of non-discrimination and competition principles.[83]

V. Framework Agreements as Tools to Improve Competition during the Execution of a Public Contract

The new Directive Proposal considers the material amendment of public contracts and framework agreements. It is of interest to consider the wide range of possible utilizations of such contractual models. The framework agreement is the "agreement between one/more contracting agencies and economic operator(s) to establish the terms governing contracts to be awarded during a given period with regard to price and the quantities envisaged".[84]

The Framework agreement, whenever multiple and open, can lead to the signing of a master contract that does not define yet the specific commitments of the economic operators included.

The common feature of framework agreements is the aggregation of demand for goods and services to be delivered at different points in time with the possible adoption of a two-stage procurement process.[85] These features seem to depict a competitive environment that may result in an enhanced contract management by procuring authorities. The material amendments may relate either to the master contract or to the subsequent specific contracts.

The framework agreement provides for two sets of losing tenderers: on the one hand, the ones that remained outside the master contract, which according to EU rules can file claims and remedies; on the other hand, the ones who have lost the second-stage mini-competition that could be ready to easily replace the defaulting contractor. Both categories could help the public official in the monitoring not only of the correct selection, as provided in the EU Directives, but also of the correct execution of the contract. While monitoring the procuring entity's contract management efforts, losing tenderers may play a crucial role in supporting the latter in gathering information about the contractor's actual performance.[86]

In order to become an effective tool for monitoring actual performances throughout the duration of the framework agreement, unsuccessful tenderers need an incentive. As pointed out earlier, at least in Italy, contracting authorities can "scroll down" the ranking to replace the current contractor in case of serious contract infringement.[87] The most natural way to extend such a provision would then be to re-

78 W.-E. Sope, *Fighting Corruption in Public Procurement*, cit., pp. 43–44.

79 C. Stefanou, 'Databases as a Means of Combating Organised Crime within the EU', in *Journal of Financial Crime*, 2010, p. 100.

80 UK Government – Procurement Policy Note, *Taking Account of Bidders' Past Performance*, cit.

81 W.-E. Sope, *Fighting Corruption in Public Procurement*, cit., pp. 41 et. seq. Committee of Independent Experts, First Report on Allegations regarding Fraud, Mismanagement and Nepotism in the European Commission, 15 March 1999, available at *www.europarl.europa.eu/experts/pdf/reporten.pdf*.

82 W.-E. Sope, *Fighting Corruption in Public Procurement*, cit., p. 42, where this function is connected to Art. 4, 67 and 83 of the Treaty on the Functioning of the European Union.

83 L. Ferola, 'Anti-Bribery Measures in the European Union: A Comparison with the Italian Legal Order', in *International Journal of Legal Information*, 2000, p. 512.

84 Directive 2004/18/EC, Art. 1(5) and Art. 32 of the Directive is devoted to Framework Agreements.

85 An interesting analysis of differences and common traits between the adoption of framework arrangements in Europe and in the US is provided in *See* C. R. Yukins, '*Are* IDIQs Inefficient? Sharing Lessons with European Framework Contracting', in *PCLJ*, 2008, p. 545.

86 G.M. Racca, R. Cavallo Perin, G. L. Albano, C*ompetition in the execution phase of public procurement,* cit., p. 105.

87 Legislative Decree No 163 of 21 April 2006, Art. 140.

open a framework agreement at a later stage by replacing the first contractor that seriously underperformed during the execution of a specific contract with the highest-ranked losing bidder, the second underperforming contractor with the second-highest unsuccessful tenderer and so on.

The double set of unsuccessful tenders in framework agreements might enhance the role of watchdogs preventing the possible collusion agreements[88] among the tenderers inside the master contract.[89]

Moreover, the new Directive simplifies the two-stage electronic purchasing arrangement, i.e. the Dynamic Purchasing System, which is concluded with an initially closed set of firms, but remains open throughout the entire period.[90] Such instrument might permit to have all the economic operators as participants and could avoid the need and the risks of material amendments.

A significant amount of resources can be wasted due to inappropriate contract management[91] and such risk might arise when the contract is awarded by a central purchasing body[92] on behalf of other public authorities.[93] 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).[94]

Nonetheless, the choice of aggregating procurement could free up a significant number of procuring officials and permit to dedicate trained task forces to the monitoring of the execution phase of procurement.

VI. Material Amendments and Integrity Issues.

The problems of incorrect contract execution are widespread in any procurement system. The quality promised in the contract signed after the award procedure is often not delivered during the execution phase and the procuring entities accept a different and worse-than-promised performance.[95] The infringement of the contract can lead to a material amendment related to a modification of the economic balance of the initial contract. Such situation can be due to the incompetence of the procuring officials or can be considered a symptom of lack of integrity.

This may happen as a consequence of malice and corruption,[96] 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

88 P. Aden, *Legal regulation of multi-provider framework agreements and the potential for bid rigging: a perspective from the UK local government construction sector*, in *PPLR*, 2013, pp. 165–182.

89 Organisation for Economic Co-operation and Development, *Fighting Cartels in Public Procurement*, 2008, available at *www.oecd.org/competition/cartels/41505296.pdf*, p. 2, "full transparency of the procurement process and its outcome can promote collusion".

90 Directive 2004/18/EC, Art. 33. Concerning the use of IT tools in the Directive No. 2004/18 see: G. M. Racca, 'The Electronic Award and Execution of Public Procurement', in *Ius Publicum Network Review*, 2012, available at *www.ius-publicum.com/repository/uploads/17_05_2013_19_31-Racca_IT_IUS-PUBLICUM-_EN.pdf*.

91 For more information about the waste caused by incompetence in the *awarding phase*, see generally O. Bandiera, A. Prat and T. Valletti, 'Active and Passive Waste in Government Spending: Evidence from a Policy Experiment', in *Am. Econ. Rev*. 2009, p. 1278.

92 Coordination of Procedure for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts, 2004 OJ L 134/114, 127 (defining central purchasing body), 131 (allowing member states to use central purchasing bodies).

93 *See* C. R. Yukins, *Are IDIQs Inefficient?*, cit., p. 554 ; O. Soudry, 'A Principal-Agent Analysis of Accountability in Public Procurement', *in* G. Piga and Khi V. Thai (Eds.) *Advancing Public Procurement: Practices, Innovation and Knowledge-sharing,* PrAcademics Press. 2007, pp. 441–42, available at *www.ippa.ws/IPPC2/BOOK/Chapter_19.pdf*.

94 G. M. Racca, 'Collaborative Procurement and Contract Performance in the Italian Healthcare Sector: Illustration of a Common Problem in European Procurement', in *PPLR,* 2010, p. 131; G. M. Racca, 'La professionalità nei contratti pubblici della sanità: centrali di committenza e accordi quadro', in *Foro amministrativo – C.d.S*., 2010, p. 1727.

95 G. M. Racca, R. Cavallo Perin and G. L. Albano, 'Competition in the execution phase of public procurement', in *PCLJ*, 2011; G. M. Racca, R. Cavallo Perin and G. L. Albano, 'The safeguard of competition in the execution phase of public procurement: framework agreements as flexible competitive tools', in *Quaderni Consip*, VI (2010); R. Cavallo Perin and G. M. Racca, 'La concorrenza nell'esecuzione dei contratti pubblici', in *Dir. amm*., 2010, p. 325.

96 *See* C. H. Yukins, *A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model*, in *PCLJ* 2010, p. 70; R. Hernandez Garcia, 'Introduction: The Global Challenges of International Public Procurement', in R. Hernandez Garcia (Ed.) *International Public Procurement: A Guide to Best Practice*, London, 2009, p. 11; T. Maria Arnáiz, 'EU Directives as Anticorruption Measures: Excluding Corruption-Convicted Tenderers from Public Procurement Contracts', in Khi V. Thai (Ed.) *International Handbook of Public Procurement* 2008, p. 106; E. Auriol, 'Corruption in Procurement and Public Purchase', in *Int. J. Indus. Org*. 2006, p. 867; *Transparency Int'l, Handbook for Curbing Corruption in Public Procurement* 2006, pp. 18–19, available at *www.transparency.org/content/download/12496/120034*.

poorly drafted contract requirements that leave public officials unarmed when problems arise.[97]

Integrity "beyond the selection of suppliers"[98] is required[99] from the definition of needs to the contract administration phase as both the needs assessment and the contract management are "increasingly exposed to corruption"[100] and are neither duly addressed nor sufficiently monitored.

Adequate efforts in favour of competition, transparency and objective criteria in decision-making as fundamental principles and instruments to prevent corruption are necessary throughout the entire cycle of the public procurement process, from the beginning of the procedure to the conclusion of the performance phase. Otherwise, after the award, the procuring entity may accept a different and less costly performance in violation of free competition and equal treatment principle.[101] This can happen as a consequence of malice and corruption,[102] but frequently it may be due to ineffective instruments in the performance phase that do not ensure the achievement of the public interest as defined in the contract conditions (incompetence[103]). Moreover, the much debated phenomenon of "abnormally low bids" may occur because of tenderers' choice of recovering their additional "investment" (i.e. lower mark-ups).

A malicious agreement between one of the tenderers and the procurement officer allows the former to bid aggressively and win the contract as he already knows that he will not be obliged to perform properly.[104] By underperforming, the winner will get additional profit to be shared with the procurement officer. If delivered quality differs from the quality that was promised in the award, the whole equilibrium of the ranking of the tenders is undermined and the economic balance of the contract is modified in favour of the winner.

Material amendments are subject to the risks of corruption or can lead to an incorrect decision of procurement officials also as a consequence of a lack of adequate needs assessment, planning and budgeting.[105] Integrity becomes the basic prerequisite for achieving the "desiderata" of a procurement system.

VII. Concluding Remarks

Transparency and competition principles play a key role in the awarding phase of public procurement,

97 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 No 207, 5 October 2010, Art. 299, 300 and 301. For the aspects related to the contract execution see *Modernisation Green paper*, supra, note 4, at p. 24.

98 United Nations Comm'n on Int'l Trade Law, *United Nations Convetions Against Corruption: Implementing Procurement Related-Aspect*, p. 14.

99 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. United Nations Comm'n on Int'l Trade Law, *UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment*, 1994, available at *www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf*.

100 Transparency Int'l, *supra* note 94, at p. 20; *see also* C. H. Yukins, *A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model*, at pp. 83&88; United Nations 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): "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 non-selection phases of procurement may thus be addressed within the general governance system in a State party: for the reasons, it is vital that they are integrated into the procurement system itself.

101 R. Cavallo Perin and G. M. Racca, *La concorrenza nell'esecuzione dei contratti pubblici*, cit., p. 325.

102 R. Hernandez Garcia (Ed.) *International Public Procurement: A Guide to Best Practice*, London, 2009; T. M. Arnaiz, *EU Directives as Anticorruption Measures: Excluding Corruption-Convicted Tenderers from Public Procurement Contracts,* cit. p. 105; E. Auriol, *Corruption in procurement and public purchase*, in *International Journal of Industrial Organization*, 2006, p. 885; Transparency International, *Curbing Corruption in Public Procurement*, 2007, available at *www.transparency.org/global_priorities/public_contracting/tools_public_contracting/*. See also: OECD, *Fighting Corruption and Promoting integrity in Public Procurement*, 2005, available at http://browse.oecdbookshop.org/oecd/pdfs/browseit/ 2805081E.pdf.

103 About the waste linked with incompetence in the awarding phase: O. Bandiera, A. Prat and T. Valletti, *Active and passive waste in government spending: Evidence from a policy experiment,* cit., p. 1278.

104 G. M. Racca, *The safeguard of competition in the execution phase of public procurement*, Speech at the seminar *The New Public Law in a Global (Dis)Order A Perspective from Italy*, New York University School of Law, 19–20 September 2010. See also: G.M. Racca, R. Cavallo Perin and G. L. Albano, *Competition in the execution phase of public procurement,* cit., p. 105.

105 Organisation for Economic Co-operation and Development, *OECD Principles for Integrity in Public Procurement*, cit., p. 69, where are located the common risks to integrity in the post-tendering phase.

but they seem to vanish during the execution phase of public contracts. This seems to be a prevailing feature of public contracts regulation worldwide. In the "black hole" of the performance phase, lack of transparency, incompetence, and corruption might undermine the multiple objectives of public procurement policies.

The award and the execution of public contracts should not be affected by factors harming the impartiality of the decision (incompatibilities of public officials and transparency are means to guarantee it). Avoiding interference of political or external bodies seems another of the key issues to prevent the distortion of the public contracts market and to favour the implementation of best practices in the award of public contracts and in monitoring activity on them.

Whenever delivered quality is shattered by opportunistic behaviour at the execution stage, transparency and non-discrimination principles are betrayed, since an incorrect execution undermines the competition principle put in place among competing bidders in the selection phase. In public contracts, unlike private contracts, any amendment to contractual conditions due to the contractor's underperformance affects third parties, namely unsuccessful bidders. By having a substantive stake in the adherence of the contractor's performance to what committed at the award stage, losing tenderers should be enabled to report infringements to challenge the contractor's lower-than-promised performance set in a contract they might have otherwise won. As a consequence, they would exercise their right to fair competition and, if properly ranked, the subsequent bidder in the ranking could have the right to replace the winner.

The ability to collect *and* interpret information during the execution can make losing tenderers, together with the procuring authority, the most effective "supervisors" of the contractor's compliance with contractual clauses. Being competitors in the same market, losing tenderers are in the potentially ideal situation to figure out what dimensions of performance are most vulnerable to opportunism. A precise evaluation of the limits for admitted "material amendments" during the execution phase is required in order to avoid thwarting competition.

The idea of having losing tenderers that "cooperate" with the procuring authority might, in principle, be stretched to other crucial phases of the procurement process such as the evaluation of seemingly abnormally low tenders, especially in the case of somewhat complex public contracts where both quality and price matter. Allowing for such proactive initiatives by losing tenderers 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 or pro-collusive.

The monitoring of the performance of the contract by unsuccessful tenderers, and/or by third parties such as other economic operators, final users organizations and civil society, becomes a way to ensure the respect of EU principles that rule the award procedure. The respect of competition in performance phase seems a requirement to allow his respect in the award phase. Any misconduct in the performance phase turns into a distortion of the EU rules on competition and involve the risk of corruption. Such situations should be sanctioned at the EU level in the form of ineffectiveness of the contract. However, the monitoring of the correct implementation of the contract may be a useful tool to prevent potential illegal or collusive conduct among economic operators and better ensure competition in the entire public procurement cycle and in the procurement sector.