COLLECTION

DROIT ADMINISTRATIF
ADMINISTRATIVE LAW

SOUS LA DIRECTION DE JEAN-BERNARD AUBY

# Contrôles et contentieux des contrats publics

# Oversight and Challenges of public contracts

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Où il est encore une fois démontré que ce pluralisme interrelié qu'est la globalisation juridique trouve dans le registre des valeurs et des principes un vecteur essentiel de l'harmonisation minimale sans laquelle il ne ferait que tendre vers une entropie croissante.

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## *1. Objet et historique de la recherche*

Cet ouvrage s'inscrit dans la lignée des travaux menés par le « Réseau Contrats publics dans la globalisation juridique » qui a été créé il y aura bientôt 10 ans. À cet égard, il a pour objet d'approfondir la question des contentieux et des contrôles des contrats de la commande publique qui avait déjà été abordée partiellement dans les ouvrages collectifs précédents, à commencer par le livre qui a inauguré la série : *Droit comparé des Contrats Publics – Comparative Law on Public Contracts* (2010) sous la direction de R. Noguellou et U. Stelkens. Premier ouvrage bilingue présentant un panorama de la législation en place dans 28 pays pour encadrer les contrats publics, il abordait également la question des contentieux et des modes de règlement des litiges. Cette préoccupation apparut également en filigrane des ouvrages suivants de la série, notamment dans *EU Public Contract Law. Public Procurement and Beyond* (2014) sous la direction de R. Caranta, G. Edelstam et M. Trybus, et en particulier, dans l'ouvrage *Contrats Publics et arbitrage international* (2011) sous la direction de M. Audit et dans le dernier en date intitulé *Transnational Law of Public Contracts* (2016) dirigé par M. Audit et S. Schill.

Afin d'approfondir ces premières analyses du traitement des litiges liés aux contrats publics, il fut décidé de réunir des spécialistes juristes du monde entier, membres du Réseau, pour dessiner les caractéristiques nationales et appréhender les grandes lignes directrices, convergentes ou divergentes, de ce paysage

# The role of third parties in the execution of public contracts

BY

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## *1. Introduction : peculiarities of public contracts*

The execution phase of the public procurement cycle is usually considered to fall outside the scope of the EU procurement Directives.(1) However, the choice was made, even in the recent 2014 Directives, to concentrate on the award process which has been considered as the most relevant phase for the application of the EU principles regarding the principle of competition among economic operators. Member States have thus considered as sufficient to deal with the award phase to ensure non-discrimination, transparency and the opening of the EU procurement market. However, such policy decision is not supported by data, and cross-border participation with procurement procedures reaches an extremely limited percentage.(2) Because of this choice, the execution phase of procurement is left to the national sovereignty of Member States.

This chapter highlights how the limitation of the Directives' scope has maintained legal barriers for participation, and how it risks undermining the goal of opening the EU procurement market. Such limits will be underscored while examining the role of third parties during the procurement cycle, particularly after the signing of a contract between a contracting authority/entity and a winning tenderer (awardee).

In general, a public contract must pursue public interest throughout its entire cycle for the benefit of the citizens. It is required that its performance

(1) *See* also EU Commission, *Green Paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market*, COM(2011) 15 final, 27 January 2011, p. 24.

(2) EC, Commission staff working paper, *Evaluation Report: Impact and Effectiveness of EU Public Procurement Legislation*, I, p. 134. *See* Rambøll Management, Rambøll study for the EC, *Crossborder procurement above EU thresholds*, May 2011, p. 38. This study also found that 50% of public procure-

conform to certain quality standards that were established in the contract. For these reasons, any means of monitoring the procurement cycle – and mainly the adequate performance of the contract, not only by the contracting authorities, but also by any "third party" – can ensure an effective, timely and good execution of the contract, which is the goal of any procurement system. Moreover, even from the point of view of economic operators, it is very important to know that what has been promised in the award procedure will be correctly executed, and will not be substantially changed. Only this certitude can ensure widespread participation to an award procedure based on trust in the fairness and competitiveness of a procurement system.

Because of these reasons, it is a matter of public interest to know how a public contract is executed, and it is why it cannot be considered a purely private issue regarding only the two parties of the contract. In fact, if the public contract was a regular private contract, it could be modified with the agreement of the two parties after the award. Conversely, first the EU Court of Justice (ECJ), then followed by the Directives, have clearly restricted such possibility, mainly in the interest of one category of third parties: the unsuccessful tenderers. Consequently, a *minimal* level of transparency(3) is required, otherwise suspicion of discrimination, favouritism, unfair arrangements, or lack of integrity during the execution of the contract could arise, and would discourage participation – as well as trust – in public administration.

The role of third parties (economic operators interested in the award of the contract, media, social witness, academia, NGOs, civil society) is of outstanding importance to guarantee the awarding of the contract and its correct performance. The role of third parties is different when considered during the award phase or after the signing of the contract. It is also different if it is related to the award phase infringements – ruled by the Remedies Directive – or if it is related to the execution phase. The role of third parties can vary greatly in different legal systems according to their characteristics. It can also vary in relation with the effectiveness of other monitoring systems over the contract awarding, managing and execution. It depends on many factors and monitoring tasks could be assigned to different topics and authorities (anticorruption, antitrust, mystery shopper, audit systems, unsuccessful tenderers). Nonetheless, the idea that fairness of the competition during the award procedure cannot be thwarted after

(3) Hamburgisches Transparenzgesetz (HmbTG), 19 July 2012, *HmbGVBl*, 2012, p. 271. The citizen of Hamburg pushed for the approval of the "*loi sur la transparence à Hamburg*" (Hamburgisches



the signing of the contract with material amendments is a key issue, as it founds the trust in any procurement system.(4)

The ECJ recognized such principle when deciding that material amendments during the execution must be considered ineffective. Material amendments are considered as an award without notice, and thus a violation of the principles of transparency, participation, and fair competition. It may be often difficult to discover material amendments, especially if they consist of a lower-than-promised performance. This is the reason why third parties should have a role in trying to 'help' the contracting authorities to require (and possibly obtain) the due and exact performance of the contract.

The role of third parties is even more important as it can also be played against the contracting authority that could have accepted, or even required, the material amendments of the contract. It is necessary to clarify that material amendments, as outlined by the ECJ, are mainly extensions of the contract duration or value. Nonetheless, it is evident that a material amendment can also consist of the acceptance of a lower-than-promised performance, which is even more difficult to discover.

## 2. *'Indirect' EU provisions on the execution of public contracts and on the limits to material amendments*

To safeguard the principles of non-discrimination, transparency and competition, the ECJ limited the modification of contracts during their term.(5) The ECJ maintained that material amendments are modifications beyond the scope of the awarded contract, which tenderers could not have reasonably anticipated at the time of the original award when they joined the competition. It could also happen in a settlement agreement, with both parties agreeing to mutual waivers designed to bring an end to a dispute when the outcome is uncertain, which arose from the difficulties encountered in the performance of that contract.(6) Such material amendments to the subject matter of the contract might have led to different participation (different set of tenderers) and, possibly, to a different award (different winning tenderer).(7) According to ECJ case law, material

(4) G.M. Racca and Ch.R. Yukins (eds), "Introduction. Steps for integrity in public contracts", in *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally*, Brussels, Bruylant, 2014, pp. 2 and ff.

(5) *See* Dir. 2014/23/EU, Art. 43; Dir. 2014/24/EU, Art. 72; Dir. 2014/25/EU, Art. 89, according to the previous ECJ case law: ECJ, 19 June 2008, *Pressetext Nachrichtenagentur GmbH v. Republik Österreich*, C-454/06, ECR I-4401.

(6) ECJ, 7 September 2016, *Finn Frogne A/S v. Rigspolitiet ved Center for Beredskabskommunikation*,

amendment to a contract during its implementation is 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 its ineffectiveness 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".(8)

Thus, the ECJ preserves the right of any economic operator – and mainly of the unsuccessful tenderers in the specific award procedure – for fair competition during the award phase, and during the execution. This principle of fair competition is considered violated in case of a significant (material) unforeseeable amendment to the contract conditions during the execution phase.(9)

The award of a public contract normally gives rise to a sort of (bilateral) 'exclusive right', whereby the public entity is 'locked in' with the awardee.(10) In European public contract systems, once it is in place any contract is considered 'sacred'. In many cases, all sorts of interferences from third parties (e.g. unsuccessful tenderers) are excluded.(11) Contracts issued after a competitive award procedure result to be different from contracts among private parties, even during the execution phase. A contract that is signed after a competitive award procedure cannot be modified in the manner of a common private law contract, even if the parties agree.

Moreover, according to the public legal order of some EU Member States – such as Italy and Germany – the jurisdictional competence in the awarding phase differs from that of the execution phase.(12) This might induce to consider

*CAS Succhi di frutta*, C-496/99 P; ECJ, 29 April 2010, *Commission v. Federal Republic of Germany*, C-160/08; ECJ, 13 April 2010, *Wall AG v. Stadt Frankfurt am Main*, C-91/08; ECJ, 25 March 2010, *Helmut Muller*, C-451/08; ECJ, 4 June 2009, *Commission v. Greece*, C-250/07; ECJ, 15 October 2009, *Acoset*, C-196/08; ECJ, 7 September 2016, *Finn Frogne A/S v. Rigspolitiet ved Center for Beredskabskommunikation*, C-549/14.

(8) Dir. 2007/66/EC, recital no. 14.

(9) G.M. Racca and R. Cavallo Perin, "Material changes in contract management as symptoms of corruption: a comparison between EU and U.S. procurement systems", in *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally*, *op. cit.*

(10) R. D. Anderson and W.E. Kovacic, "Competition policy and international trade liberalisation: essential complements to ensure good performance in public procurement markets", *PPLR*, 2009, p. 67; Ch.R. Yukins, "Are IDIQs Inefficient? Sharing Lessons with European Framework Contracting", *PCLJ*, 2008, p. 545.

(11) *See* Chap. on Greece in this book.

(12) For Italian jurisdictional competence, *see* A. Massera and M. Simoncini, "Basics of Public contracts in Italy", *Ius-Publicum Network Rev.*, February 2011, available at www.ius-publicum.com/repository/uploads/21_02_2011_14_41_Massera%20inglese.pdf, pp. 2 and ff.; G.M. Racca, "Public contracts", *Ius-Publicum Network Rev.*, November 2010, available at www.ius-publicum.com/repository/uploads/06_12_2010_10_17_Raccaeng.pdf, pp. 19 and ff. For German jurisdictional compe-



that the execution of the public contract becomes only a private law issue. The 2004 EC Directives on public procurement did not deal with this issue, as contract management was completely left up to the 28 national legal systems.(13) To transpose the ECJ case-law, the 2014 Public Contracts Directives raised the question of the limits to the modification of contracts – what U.S. courts have called 'cardinal' changes – that can be admitted during the execution of the contract, while paying attention to the whole procurement cycle, particularly to the contract management. The 'delivered' quality should coincide with what has been promised by the economic operator in the award phase. Therefore, limits to material amendments are clearly set out in the 2014 EU Directives.(14)

2.1. A new award procedure is not required when the modifications "have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses". Contracting authorities must clarify such clauses in the contract documents, and state the scope and nature of any possible modifications or options, as well as the conditions under which they may be used. The procurement documents "may include price revision clauses or options"(15). An extension of the contract, because of an objectively evaluated high quality performance, whenever provided, might be possible(16). Recently, the ECJ has clarified that "the position would be different only if the contract documents provided for the possibility of adjusting certain conditions, even material ones, after the contract had been awarded and fixed the detailed rules for the application of that possibility".(17)

Procurement Rules – A Report about the German Remedies System", in *Enforcement of EU Public Procurement Rules* (S. Treumer and F. Lichère eds), Copenhagen, Djøf, 2011.

(13) M. Trybus, "Public contracts in European Union internal market law: foundations and requirements", in *Droit comparé des contrats publics op. cit.*, pp. 81-82.

(14) Dir. 2014/23/EU, Art. 43; Dir. 2014/24/EU, Art. 72; Dir. 2014/25/EU, Art. 89. G.M. Racca and R. Cavallo Perin, "Material Amendments of Public Contracts during their Terms: From Violations of Competitions to Symptoms of Corruption", *EPPPL*, pp. 279-293.

(15) Dir. 2014/24/EU, 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". A. Brown, "Whether a new tendering procedure is required when a public contract is amended under a settlement agreement: the EU Court of Justice ruling in case C-549/14 Finn Frogne A/S", *PPLR*, 2017, 1, NA5-NA10.

(16) R. Domínguez Olivera, "Modification of Public Contracts. Transposition and Interpretation of the New EU Directives", *EPPPL*, 2015, p. 35; K. Hartlev and M. Wahl Lilienbol, "Changes to Existing Contracts Under the EU Public Procurement Rules and the Drafting of Review clauses to Avoid the Need for a New Tender", *PPLR*, 2013, pp. 58-67, concerning the use of the review clause for a change: in the nature and scope of the subject of the contract, in price, of the duration of the contract, of contractual partner and replacement of subcontractor. S.T. Poulsen, "The possibilities of amending a public contract without a new competitive tendering procedure under EU law", *PPLR*, 2012, p. 179; H. Hoepfener, "La modification des contrats de la commande publique à l'épreuve du droit communautaire", *Rev. fr. dr. adm.*, 2011, pp. 98-111.

(17) *See* ECJ, 7 September 2016, *Finn Frogne A/S v. Rigspolitiet ved Center for Beredskabskommunikation*, C-549/14. The case concerned procedure for the award of a public contract

Many jurisdictions acknowledge that, where the authority has the right to extend the existing contract unilaterally, this option may be used without a new tendering procedure. This is based on the argument that "all bidders participating in the original competitions could have taken the possible amendment into account when preparing their bid".(18) In case of the reduction of the contract's subject matter, this may result in it being brought within reach of a greater number of economic operators.(19) The need for a new tender depends on how much the terms of the existing contract have changed and if these amendments have a significant economic impact. If the law clearly provides the limit for such possible extension, it can be admitted as it cannot be considered a material amendment.

It should be noted that the choice of applying such a revision clause could also be induced by an improper advantage being given to the procurement official in charge of the decision.(20) The EU Directives admit such modifications of the original contract, "irrespective of their monetary value".(21) Nonetheless, the contract documents must set out the maximum value of the contract to allow the economic operators to know the possible value of the contract beforehand. The discretionary power to modify the value and terms of the contract is limited by excluding the possibility to alter either the overall nature of the contract or the framework agreement.(22)

2007 by the Danish State. The contract, concluded on 4 February 2008, involved a total amount of DKK 527 million (approx. EUR 70,629,800), DKK 299 854 699 (approx. EUR 40,187,000) of which related to a minimum solution which was described in the tender specifications, with the remainder relating to options and services which would not necessarily be subject to a request for performance. In the course of the performance of that contract, difficulties arose in meeting delivery deadlines. Following negotiations, the parties agreed to a settlement under which the scope of the contract was to be reduced to the supply of a radio communications system for regional police forces, worth approximately DKK 35 million (approx. EUR 4.69 million), while CFB would acquire two central server farms, worth approximately DKK 50 million (approx. EUR 6.7 million), which Terma (the awardee) had itself acquired with a view to leasing them to CFB in performance of the original contract. As part of that settlement, each party intended to waive all rights arising from the original contract other than those resulting from the settlement. A. Brown, "Whether a new tendering procedure is required when a public contract is amended under a settlement agreement: the EU Court of Justice ruling in case C-549/14 *Finn Frogne A/S*", *PPLR*, 2017, 1, NA5-NA10.

(18) H.-J. Priess, *Public Procurement. In 30 jurisdictions worldwide*, London, Law Business Research, 2015.

(19) ECJ, 7 September 2016, *Finn Frogne A/S v. Rigspolitiet ved Center for Beredskabskommunikation*, C-549/14, par. 29.

(20) UNODC, "Good practices in ensuring compliance with Article 9 of the United Nations Convention against Corruption", p. 23.

(21) Dir. 2014/23/EU, Art. 43(1)(a); Dir. 2014/24/EU, Art. 72(1)(a); Dir. 2014/25/EU, Art. 89(1)(a).

(22) ECJ, 29 April 2004, *EC Commission v. CAS Succhi di Frutta SpA*, Case C-496/99 P, para. 118. The ECJ states 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





From a U.S. perspective, the contract itself is a source that empowers the procuring official to make modifications because procurement regulations require that Government contracts comprise 'changes clauses',(23) granting the discretion to introduce unilateral changes, if the modification falls "within the general scope of the contract".(24) In U.S. law, contractual modifications that fall "within the scope of the contract" are exempted from competition requirements, as are exercises of options that were evaluated under the original competition, and can be exercised at prices "specified in or reasonably determinable from the terms of the basic contract".(25) An increase in the price of a public contract in the U.S. is not considered to be a substantial modification since it does not alter the original scope of the contract.(26)

are aware of that possibility from the outset and are therefore on an equal footing when formulating their respective tenders". ECJ, *Pressetext Nachrichtenagentur GmbH v. Republik Österreich*, aforesaid, para. 57. The *Pressetext* case law states 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". ECJ, 22 April 2010, *EU Commission v. Kingdom of Spain*, C-423/07, concerning the extension of the subject matter of a works concession for the construction, maintenance and operation of a motorway.

(23) *Jamsar, Inc.*, GSBCA 4396, 76-2 BCA 12053, the board refused to insert the Changes clause in a building services contract. Under the FAR, the Changes clause is a mandatory clause for almost all types of contracts. D.I. Gordon and G.M. Racca, "Integrity Challenges in the EU and U.S. Procurement systems", in *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally*, *op. cit.*, pp. 117 and ff.

(24) *See* the general guidelines set forth in FAR 43.205 and the language of the clauses that must be included in the contract between the authority and the contractor in FAR subsections 52.243-1 through 52.243-6. For reference to this as a Changes clause, *see* AT&T Communications, *Inc. v. Wiltel, Inc.*, 1 F.3d 1201, 1205 (Fed. Cir. 1993). G.M. Racca and R. Cavallo Perin, "Material changes in contract management as symptoms of corruption: a comparison between EU and U.S. procurement systems", *op. cit.*, pp. 247 and ff.

(25) FAR 17.207(f).

(26) This is more evident when the contractor's price for the additional services requested, which are the cause for the price increase, was lower that the losing bidder's price for performing the same services. *See Atlantic Coast Contracting Inc.*, B-288969.4, 21 June 2002, 2. Considering the time extension of a public contract, the question arose in the U.S. in relation to Research and Development contracts that may involve uncertainty. A time extension, even if it was significant, was therefore not considered to be a cardinal change of the public contract awarded, since there was no material difference between the modification and the original public contract. An important decision has been stated with regard to public contracts, awarded through a request for proposal, in the field of Research and Development *A 5 year extension of vaccine development effort was not an out-of-scope change of the original 10-year contract* has been significantly stated in *Emergent BioSolutions Inc.*, B-402576, 8 June 2010, 14.

2.2. An "impossible change of contractor" occurs whenever additional works, services or supplies must be provided for "economic or technical reasons",(27) or whenever such a change "would cause significant inconvenience or substantial duplication of costs".(28) This provision defines cases in which it could be possible to use the negotiated procedure without prior publication. The 2014 EU Directives provide a quantification of the admitted contract modifications.(29) Any increase in price may not be higher than 50% of the value of the original contract.(30) Consecutive modifications are also admitted, always according to the same principle.(31) In case of several successive modifications, the limitations attached to the increase in price shall apply to 'each modification'. Obviously, any modification, particularly subsequent modifications, shall not be aimed at circumventing the Directive.

From a U.S. perspective, there are situations where adjusting the terms of a contract to meet actual circumstances is thought to be more efficient than a new solicitation of tenders, or continuing to follow the original terms of the contract.(32) The U.S. regulations provide that the incurrence of losses by a contractor in carrying out a contract is not a sufficient reason to allow for a modification of the contract, and that discretion in this matter is given to the contracting authority, in accordance with the facts of the situation.(33) Modifications are legitimate if related to a situation in which the failure to modify a contract will cause the contractor to suffer heavy losses, rendering them unable to complete the project or supply the product, with the result that national security may be threatened.(34)

(27) Dir. 2014/24/EU, Art. 72(1)(b)(i).

(28) Dir. 2014/24/EU, Art. 72(1)(b)(ii).

(29) G. M. Racca and R. Cavallo Perin, "Material Amendments of Public Contracts during their Terms: From Violations of Competitions to Symptoms of Corruption", *op. cit.*, pp. 279-293; S. Treumer, "Contract changes and the duty to retender under the new EU public procurement Directive", *PPLR.*, 2014, pp. 148-155.

(30) Dir. 2014/24/EU, Art. 72(1)(b). The Directive 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", *see* Dir. 2014/24/EU, Art. 72(3).

(31) 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 final provision of a fix maximum amount of the possible increase in price was generally considered inappropriate.

(32) This can occur when: the requested change does not entail a heavy financial burden; the modification is due to changed circumstances; a new competitive bidding procedure would produce a predictable result; the change clearly improves the Government's position as a party to the contract; or when the contract is complicated and a delay would entail serious penalties. *See* O. Dekel, "Modification of a government contract awarded following a competitive procedure", *PCLJ*, p. 407.

(33) FAR 50.301.

(34) FAR 50.302-1(a). A situation in which the contractor suffers a loss as a result of an act com-



2.3. 'Unpredictable circumstances' can justify contract amendments whenever they could not have been foreseen by a diligent contracting authority, provided they do not "alter the overall nature of the contract".(35) Moreover, the limit of 50% of the price of the contract must be respected for each modification, always ensuring that the directive is not circumvented. From a U.S. perspective, the tendency is to admit modifications when they are motivated by unforeseeable circumstances.(36)

2.4. A modification may also imply a change of contractor by which a new supplier replaces the original awardee.(37) In ECJ law,(38) a change of contractor was considered as a substantial amendment to an essential contractual term, unless this replacement was admitted by the initial contract. This decision raised some concerns as the case is not infrequent, especially in work procurement.(39) In that case, the ECJ distinguished a simple internal reorganisation of an economic operator(40) from cases where a transfer of shares during the currency of the contract(41) 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

(35) As provided in Dir. 2014/24/EU, Art. 72(1)(c).

(36) Significant new technological developments could require revisions to an agreement in the midst of a long-term project awarded to a contractor after a competitive bidding procedure.

(37) Dir. 2014/24/EU, Art. 72(1)(d). G.M. Racca and R. Cavallo Perin, "Material Amendments of Public Contracts during their Terms: From Violations of Competitions to Symptoms of Corruption", *op. cit.*, pp. 279-293.

(38) ECJ, *Pressetext Nachrichtenagentur GmbH v. Republik Österreich*, aforesaid. G.M. Racca and R. Cavallo Perin, "Material changes in contract management as symptoms of corruption: a comparison between EU and U.S. procurement systems", *op. cit.*, pp. 258-259.

(39) 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 prévues dans le marché initial, un changement de l'un des termes essentiels du marché, appelant par là une mise en concurrence", "France", in *Droit comparé des contrats publics*, *op. cit.*, pp. 689 and ff. 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 terms of the initial contract, such as, by way of example, provision for sub-contracting", see ECJ, *Pressetext Nachrichtenagentur GmbH v. Republik Österreich*, aforesaid, 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".

(40) ECJ, *Pressetext Nachrichtenagentur GmbH v. Republik Österreich*, aforesaid, para. 45: "an internal reorganisation of the contractual partner, which does not modify in any fundamental manner the terms of the initial contract". G.M. Racca and R. Cavallo Perin, "Material changes in contract management as symptoms of corruption: a comparison between EU and U.S. procurement systems", *op. cit.*, pp. 247 and ff.

(41) ECJ, *Pressetext Nachrichtenagentur GmbH v. Republik Österreich*, aforesaid, 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

activities to the subsidiary".(42) A change of subcontractor may in exceptional cases constitute a material 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 characteristics of the services concerned, a "decisive factor in concluding the contract, which is in any event for the referring Court to ascertain".(43) According to the new Directive, 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".(44)

A change of 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".(45) Such a provision seems to recall provisions in French law, which admit the extension to the awarding authority of liability towards subcontractors, for the contractual relationships among the contractor and its subcontractors.(46)

2.5. A final rule considers any other modification to be non-substantial and thus admitted, irrespective of value, insofar as it does not fall within the scope of the cases listed in the subsequent paragraph.(47) A further specification concerns modifications below the amount of the EU thresholds, which do not exceed 15% of the initial contract value for works contracts and 10% for service and supply contracts.(48) The risk to be prevented is the illicit fragmentation (underestimation?)

(42) ECJ, *Pressetext Nachrichtenagentur GmbH v. Republik Österreich*, aforesaid, para. 48. 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, this validity might be affected when "there are practices intended to circumvent Community rules governing public contracts", *see* ECJ, *Pressetext Nachrichtenagentur GmbH v. Republik Österreich*, aforesaid, para. 51. 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". *See* also ECJ, *Pressetext Nachrichtenagentur GmbH v. Republik Österreich*, aforesaid, para. 52.

(43) ECJ, 13 April 2010, *Wall AG v. Stadt Frankfurt am Main*, C-91/08, para. 39. A. Brown, "Changing a sub-contractor under a public services concession: *Wall AG v. Stadt Frankfurt am Main* (C-91/08)", *PPLR*, 2010, NA160-166.

(44) Dir. 2014/24/EU, Art. 72 (1)(d)(ii). The new contractor has to fulfil all the qualitative criteria provided in the initial award procedure.

(45) Dir. 2014/24/EU, Art. 72 (1)(d)(iii).

(46) R. Noguellou, "France", *op. cit.*, p. 691.

(47) Dir. 2014/24/EU, Art. 72(1)(e). G.M. Racca and R. Cavallo Perin, "Material Amendments of Public Contracts during their Terms: From Violations of Competitions to Symptoms of Corruption", *op. cit.*, pp. 279-293.

(48) Dir. 2014/24/EU, Art. 72(2). A. Giannelli, "Performance and renegotiation of public contracts"



of the contract value in the initial award procedure, and its increase with successive modifications.

Amendments to the contract shall be substantial and thus ineffective whenever the contract, or the framework agreement, is "materially different in character from the one initially concluded".(49) The 2014 EU Directives draw on the ECJ case law regarding the definition of forbidden 'substantial modifications' of the contract. Therefore, although any tender that 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".(50)

The 2014 EU Directives qualify as being substantial enough of a modification that "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". Such change can undermine fair competition, since the award is decided through the evaluation of the tenders, and in the EU through a precise ranking after an objective evaluation. Significantly changing the economic balance means that the winner is favoured, and the previous competitive selection is thwarted.(51) Even when the award procedure has been carried out with complete respect of the principles of fairness and transparency, the contractor's infringements or non-compliance with

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.

(49) Dir. 2014/24/EU, 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.

(50) ECJ, 29 April 2004, *Commission v. CAS Succhi di Frutta SpA*, C-496/99 P, paras 111 and 115. 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. Moreover, such a modification may favour the contractor and be accepted or solicited by corrupt behaviour.

(51) ECJ, *EU Commission v. Federal Republic of Germany*, aforesaid, paras 98-101. The amounts

contractual clauses might modify the economic balance, thus distorting bids ranking *a posteriori*, and thwarting the competitive selection process.(52)

U.S. public contract regulations seem to be more flexible regarding possible subsequent modifications: even when a contract has been signed, the Court but also some other authorities may step in and undo it, and usually no damages are provided.(53) Material or cardinal changes should, in principle, not be admitted.(54) The contract contains the "changes clause" (55) that permits unilateral changes if the modifications fall "within the general scope of the contract".(56) The contractor can only request adequate compensation for this, and if an agreement is not reached on this matter, the main interest is considered to prevail, so to obtain the execution with the required modifications. The U.S. perspective considers that the need often arises to modify the terms of a contract after it has been signed. In such cases, the U.S. system follows the most efficient options from an economic standpoint: the modification of the contract.(57) The level of discretion of the contracting officer appears to be quite high and has been considered to admit a 'presumption of allowance' of such modifications.(58)

(52) Concerning the principle of Transparency *see* C.H. Bovis, *EU Public Procurement Law*, Cheltenham, Edward Elgar, 2007, p. 67. *See* also *id.*, "Regulatory Trends in Public Procurement at the EU Level", *EPPPL*, 2012, pp. 225-226.

(53) *See* F.A.R. 33.102.

(54) 41 U.S.C., §§ 601 and ff. Prior to the Contract Disputes Act of 1978, a claim arising from such a change could not be brought to the various boards of contract appeals.

(55) F.T. Vom Baur, "The Origin of the Changes Clause in Naval Procurement", *PCLJ*, 1976, p. 175. The Changes clause was first used in defense contracts where it was taken to be essential in time of war for the government to include new technologies without halting work to renegotiate the contract. Changes clauses are in almost all categories of government contracts.

(56) Market Facts, Inc., Comp. Gen. B-210226: May 28, 1985, available at www.gao.gov/assets/470/464184.pdf. GAO does not approve payment of a claim for extra compensation under the changes clause of a contract performed for a defunct federal agency where there is no written evidence that the alleged extra work performed was authorized, and the contracting officer of the defunct agency contends that such work was not authorized. Under the circumstances, the claimant has not met its burden of proving entitlement to payment.

(57) O. Dekel, "Modification of a government contract awarded following a competitive procedure", *PCLJ*, 2009, pp. 405 and ff.; G.M. Racca and R. Cavallo Perin, "Material changes in contract management as symptoms of corruption: a comparison between EU and U.S. procurement systems", *op. cit.*, pp. 247 and ff.

(58) O. Dekel, "Modification of a government contract awarded following a competitive procedure", *op. cit.*, pp. 405 and ff. The U.S. Federal Government identifies the party authorized to modify the terms of a contract between the agency and awardee as being the contracting officer. See FAR 43.102(a). "Only contracting officers acting within the scope of their authority are empowered to execute contract modifications on behalf of the Government". The regulations set out the procedure by which the contracting officer may act (the documents that must be completed etc.), *see* FAR 43.101(a)(1), but provide poor guidance as to the circumstances under which such modifications are to be deemed legitimate. *AT&T Commc'ns, Inc. v. Wiltel, Inc.*, 1 F.3d 1201, 1205 (Fed. Cl. 1993) (quoting *Allied Materials & Equip. v.*



In determining whether a modification constitutes a "cardinal change"(59) influencing the competition, it is necessary to evaluate the material difference between the modified contract and the original one, examining any changes in the type of work, performance period, and costs between the contract as it was awarded,(60) and as later modified.(61) It is also necessary to consider whether the solicitation for the original contract adequately advised potential tenderers about the type of change created by the modification, and how the modification could have changed the field of competition.(62)

### *3. The role of the third parties after the conclusion of the contract in case of infringements occurred in the award phase and of improper implementation of the contract*

The EU Remedies Directive requires that review procedures be made 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".(63) This provision seems to concern only the award phase of public contracts. Nonetheless, the effects of the infringements during the award phase can also emerge during the performance phase.

Moreover, contract modifications during the execution phase can undermine the principles of a correct award, while affecting transparency and competition among tenderers or other economic operators who might have been interested in participating.(64) The Remedies Directive does not qualify which degree of 'interest' is required to submit a claim. In each Member State the directives are applied according to the national legal system, keeping in mind that the award phase of public contracts is the only phase ruled by the EU Directives on public contracts. As just recalled, the remedies system concerning the execution phase of public contracts has been normally regulated by National law, according to the legal framework of each Member State. In Germany and Italy, the competent judge for the execution phase is the same for private contracts.

(59) The effective nature of a cardinal change is still debated: the contracting authority aims to adopt a narrow definition of the concept, in order to not be compelled to set a new award, while the losing bidders usually claim that any modification that has occurred has effectively modified the public contract and that a new award is therefore needed.

(60) *MCI Telecomms. Corp.*, B-276659.2, 29 September 1997, 97-2 CPD 90, 7.

(61) *Atlantic Coast Contracting, Inc.*, B-288969.4, 21 June 2002, 2002 CPD 104 at 4.

(62) *DOR Biodefense, Inc.; Emergent BioSolutions*, B-296358.3; B-298358.4, 31 January 2006, 2006 CPD.

(63) Dir. 89/665/EEC and 92/13/EEC, Art. 1(3).

Concerning the award phase, the Directives require that any persons having or having had an interest in the award procedure may submit a claim – some specifically provide that this includes economic operators not having submitted a tender.(65) Several Member States also provide that other subjects are eligible to start a review procedure, which includes different kinds of third parties.(66) Concerning the execution phase, any Member State follows different rules, and it cannot be excluded that an interest in obtaining a contract might arise during the execution phase.

Thus, in some jurisdictions, a role may be recognized regarding economic operators that did not submit a tender - individually or in trade associations,(67) to Competition Authorities(68) or other representatives of the State (*i.e.* "the Prefect").(69) Such authorities can report on the infringements occurred in both phases, either in the award or in the execution phase. An example can be found in the United Kingdom where the Mystery Shopper has been introduced since 2011 to receive complaints, and to help contracting authorities to enhance the quality of their procurement activities and contract management.(70)

Some Member State allows stakeholders beyond those with an immediate interest in the contract to launch a review process, implying a varying impact of the EU Directives on public contracts. As clarified, "these stakeholders can include operators not tendering(71) and even third parties".(72) In some Member States, the Directive is relevant to a wider range of stakeholders(73) and these could well have a role in the monitoring of the execution phase, considering that the goal of any procurement system should be the effective and timely execution of the performance.(74) A holistic view on the entire public procurement cycle is required, as recently outlined by OECD recommendations.(75)

(65) In Czech Republic, Denmark, Hungary, Ireland and Slovenia, according to: EC, *Economic efficiency and legal effectiveness of review and remedies procedures for public contracts*, Final study report MARKT/2013/072/C, April 2015, p. 53.

(66) Czech Republic, Denmark and Portugal.

(67) Bulgaria, Denmark, Hungary and Poland.

(68) Czech Republic, Denmark, Sweden and Slovenia.

(69) France, Finland, Croatia, Hungary and Slovenia.

(70) Crown Commercial Service, *Scope and remit of the Mystery Shopper Service*, www.gov.uk/government/uploads/system/uploads/attachment_data/file/584208/Mystery_Shopper_Scope_and_Remit_2017.pdf.

(71) In Czech Republic, Denmark, Hungary, Ireland and Slovenia.

(72) Czech Republic, Denmark and Portugal.

(73) EC, Economic efficiency and legal effectiveness of review and remedies procedures for public contracts, *op. cit.*, p. 133.

(74) G.M. Racca and Ch.R. Yukins, "Introduction. Steps for integrity in public contracts", in *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public*



## 3.1. The role of unsuccessful tenderers in the execution phase

The remedies system on the execution phase of public contracts is normally regulated by National law, according to their own legal framework. In some cases, the possibility to scroll the ranking of tendering economic operators in case of breach of the contract is provided.(76) Such a provision highlights the interest of the unsuccessful tenderer in the monitoring of the execution phase and in the possibility to obtain the contract.

The monitoring of the contract management assumes a strategic role in ensuring the correct performance of public contracts, and the coherence of what has been promised in the tender and what should be executed.(77) 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 way to protect the integrity and correctness of the choices made by the contracting authority, as well as detecting unlawful decisions or errors of assessment.

The quality promised in the contract signed after the competitive award procedure is often not delivered during the execution phase, and the procuring entities may accept a different or even worse-than-promised performance.(78) The infringement of the terms of the public contract can lead to material amendments, mostly concerning a modification of the economic balance of the initial contract. Such a situation can be due to the incompetence of the procuring officials or be considered as a symptom of lack of integrity, conflicts of interest, collusion or corruption.(79)

Systems (MAPS)", available at www.oecd.org/gov/ethics/public-consultation-methodology-assessing-procurement-systems.htm.

(76) *I.e.* in Italy is provided the scroll of the ranking at the same condition of the original awardee, *see* Italian Legislative Decr., 18 April 2016, No. 50, Art. 110.

(77) OECD, "OECD Principles for Integrity in Public Procurement", 2009, available at www.oecd.org/gov/ethics/48994520.pdf, pp. 69 and ff.

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

(79) R. Hernandez Garcia (ed.) *International Public Procurement: A Guide to Best Practice*, London, Globe Law And Business, 2009; T.M. Arnaiz, "EU Directives as Anticorruption Measures: Excluding Corruption-Convicted Tenderers from Public Procurement Contracts", in *International Handbook of Public Procurement* (K.V. Thai ed.), Abingdon, Routledge, p. 105; E. Auriol, "Corruption in procurement and public purchase", *Int'l J. Industrial Org.*, 2006, p. 885; Transparency International, *Handbook for Curbing Corruption in Public Procurement*, 25 February 2006, available at www.transparency.org/content/download/12496/120034; D.I. Gordon, "Protecting the integrity of the U.S. federal procurement system: Conflict of interest rules and aspects of the system that help reduce corruption", in *Corruption*

This risk should be managed by providing monitoring by third parties. The failure to monitor the contractor's performance, as well as a lack of supervision over the quality and timing of the execution process, is one of the principal risks in public contracts and requires tools to enhance an effective remedies system against the misconduct of the execution phase.(80) This situation may arise because of malice and corruption(81) intended as the offering, giving, receiving, or soliciting - directly or indirectly – of anything of value to influence the action of a public official during the selection procedure or the contract execution. Indeed, this risk also requires more effective compliance and ethics programs by suppliers. Poor contractor performance may also be due to poorly drafted contract requirements that leave public officials unarmed when problems arise.(82) This risk requires efforts to develop the capacities of procurement officials.

The compliance between the signed terms of the contract and the performance is a strategic tool to verify the efficiency of the choices resulting from the award procedure, and allows data collection concerning the reputation of the economic operators in the relevant markets. A rigorous oversight of contract implementation is therefore of paramount importance. In that regard, it seems increasingly necessary for unsuccessful tenderers, and for other third parties, to act as diligent 'watchdogs',(83) verifying that the review process functions

(80) OECD, "Implementing the OECD Principles for Integrity in Public Procurement", OECD, 21 November 2013, p. 81. *Id.*, "OECD Principles for Integrity in Public Procurement", 2009, available at www.oecd.org/gov/ethics/48994520.pdf, pp. 69 and ff.

(81) *See* Ch.R. YUKINS, "A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model", 40 *Public Contract L.J.*, 63-86, 2010, p. 70; R. HERNANDEZ GARCIA (ed.), "Introduction: The Global Challenges of International Public Procurement", in *International Public Procurement: A Guide to Best Practice*, *op. cit.*, p. 11; T. M. ARNÁIZ, "EU Directives as Anticorruption Measures: Excluding Corruption-Convicted Tenderers from Public Procurement Contracts", *op. cit.*, p. 106; E. AURIOL, "Corruption in Procurement and Public Purchase", in *Int. J. Indus. Org.*, 2006, p. 867; Transparency International, *Handbook for Curbing Corruption in Public Procurement*, *op. cit.*, pp. 18-19. OECD, "OECD Principles for Integrity in Public Procurement", aforesaid, p. 69, on the common risks to integrity in the post-tendering phase. Cardinal changes or material amendments can be considered as a red flag of corruption and entail a risk of improper agreements being made between the contractor and the public official, or they may simply imply an incorrect decision that has been made as a consequence of a lack of adequate needs assessment, planning and budgeting. Integrity is the basic prerequisite for achieving the *desiderata* of a procurement system and to obtain the correct reaction to the effective need for material amendments to awarded contracts.

(82) In Italy, both the theory and practice of public contracts have traditionally overlooked the relevance of contract management. The regulation of Italian Public Contract Code has introduced a specific 'procurement execution director' in charge of the management and monitoring of the execution of goods and services procurement only recently. For the aspects related to the contract execution, *see* EU Commission, *Green Paper on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market*, 27 january 2011, 24.

(83) UNODC, "Guidebook on anti-corruption in Public Procurement and the management of public finances. Good practices in ensuring compliance with article 9 of the United Nations Convention against [illegible] p. 26. *See* Ch.R. YUKINS, "Integrating



appropriately, and challenging infringements. However, this requires a certain level of transparency during the management of the contract.(84) Whenever it is not included in the law, it should be provided in the contract documents that third parties may have access both to data and the place of performance of the contract to monitor its correct execution.

Unsuccessful tenderers ought to be ensured that they lost because the selected contractor not only submitted the best 'promised' value for money (price-quality *ratio*), but has in fact delivered the best value-for-money performance. Otherwise, the main goal of the competitive mechanism would be undermined, thus distorting competition in the procurement market. Only fair behaviour in contract management, namely overall compliance with the contract conditions set at the awarding stage, ensures a real and effective competition throughout the entire public procurement cycle. Since unsuccessful tenderers harmed by the unlawful award of a contract have access to remedies, they should also have access to remedies when they seek to provide evidence that the execution of the contract does not correspond to what was defined in the award.(85)

Unsuccessful tenderers can file a claim(86) on the procuring entity's evaluation of another tenderer's offer, solely based on minimum differences in the points assigned to an element of the tender. This can be a key factor in the awarding of the contract, thus overturning the result of the award itself. According to the European Directives, the ranking can be modified in favour of the protesting tenderer.(87) The procuring entity's ability to evaluate tenders correctly and fairly is important not only for ensuring the public contract is correctly allocated, but also to guarantee its correct performance. It is normal to have challenges on the award phase to demonstrate that the evaluation of the awarding jury was wrong, and additional points on an element of the tender might change the ranking.

Domestic courts often annul the award or correct the ranking permitting to change the awardee because of a different assignment of scores, according to the

(84) OECD, "Preventing corruption in public procurement", 2016, pp. 18 and ff.; S.L. SCHOONER, D.I. GORDON and J.L. CLARK, *Public Procurement Systems: Unpacking Stakeholder Aspirations and Expectations*, Working paper available at ssrn.com/abstract = 1133234, 2008, pp. 13-14; UN Commission on International Trade Law, United Nations Convention against Corruption: implementing procurement-related aspects, 2nd sess., Nusa Dua, Indonesia, 28 January-1 February 2008, available at www.uncitral.org/uncitral/en/index.html.

(85) M. TRYBUS, "Public contracts in European Union Internal Market Law: foundations and requirements", *op. cit.*, p. 312; ECJ, 29 April 2004, *EU Commission v. CAS Succhi di Frutta*, C-496/99.

(86) H. SCHRÖDER and U. STELKENS, "EU Public Contract Litigation", in *EU Public Contract Law Public Procurement and Beyond*, (M. TRYBUS, R. CARANTA and G. EDELSTAM eds), coll. Droit administratif,

award criteria. This process is based on the evaluations of the proposed tenders: if the award is obtained for having promised to send ten persons for eight hours a day instead of the six persons of the second ranked offer, the concrete infringement of this provision in the day by day execution should have effects on the contract, otherwise the winning offer would remain just on the paper.

In this perspective of fair competition, a tenderer included in the ranking might assure the more effective contract oversight as he knows what has been promised by the winner and by himself, and could have interest in checking that the performance would be in line with what was promised. If, for instance, the highest-ranked tender was to be ranked 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. Therefore, in Italy, it is possible to provide that the second-highest tender have the right to replace the winner in the case of termination of the contract due to serious infringements.(88) This provision applies only if serious infringements occur, but in principle any modification that affects the decisive elements in the award might be relevant in this perspective.

Since unsuccessful tenderers have the right to a fair competition throughout the *whole* cycle of the procurement procedure, and therefore even during the execution phase, they should be entitled to provide evidence of the infringement of selection procedure rules and could also be active in the monitoring of the subsequent execution phase.(89) In this sense, procurement documents should provide for penalties concerning such infringements in favour of the public entities, as well as the possibility to settle a wider monitoring activity.

A rigorous oversight of contract implementation is therefore of paramount importance. The role of losing tenderers as 'good watchdogs' to implement a

(88) Decr. of 18 April 2016, No. 50, Art. 110. *See* G.M. Racca, "Public Contracts – Annual Report 2012", *Ius Publicum Network Rev.*, 2012, available at www.ius-publicum.com/repository/uploads/07_09_2012_11_04_RaccaEN.pdf, pp. 32 and ff.; L. Fertitta, "La figura del secondo classificato nell'aggiudicazione degli appalti pubblici", *Rivista trimestrale degli appalti*, 2005, p. 442. *See* also A. Massera and M. Simoncini, "Basic of Public Contracts in Italy", *Ius Publicum Network Rev.*, 2011, available at www.ius-publicum.com/pagina.php?lang=en&pag=report&id=43, pp. 8 and ff.

(89) 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", *PPLR*, 2013, pp. 156-164, where the authors 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 treat-



functioning review or an effective challenge mechanism seems increasingly necessary, and requires a certain level of transparency in the management of the contract.(90) This is required by the new EU Directives as they provide that material modifications (normally having in mind a contract extension, but it can also be applied to lower-than-promised performances) are to be considered ineffective as they are considered as illicit direct award (without a prior award procedure).(91) Relying on non-winning tenderers to monitor winners' performance might be useful as the former have 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 alleviate the moral hazard problem arising at the execution stage in relation to the contracting authority.(92)

This monitoring task could be assigned to them by the contracting authority itself – through precise clauses included in the contract documents, while providing the possibility to substitute the winner in the event of a termination of the contract (scrolling of the ranking in case of a breach of the contract or because of the bankruptcy of the awardee).(93)

### 3.2. The role of the economic operators of the relevant market

Third parties that are economic operators (or their trade associations) of the relevant market could have a role in the monitoring of the correct execution of the contract. According to the *Pressetext* case law,(94) a different set of tenderers could have participated to the award procedure having known that the subject matter of the contract would have been different. Other economic operators who did not participate in the award procedure might be interested in the monitoring of the contract execution. The substantial modification must be considered ineffective as awarded without any competitive tender, so the annulment of such modification could open a new business opportunity for the economic operators of the relevant market.

(90) UN Commission on International Trade Law, United Nations Convention against Corruption: implementing procurement-related aspects, aforesaid.

(91) Dir. 2014/23/EU, Art. 44; Dir. 2014/24/EU, Art. 73; Dir. 2014/25/EU, Art. 90.

(92) G. Napolitano and M. Abrescia, *Analisi economica del diritto pubblico*, Bologna, Il Mulino, 2009, although the authors seem to consider almost exclusively the role of informational asymmetries on the subject matter of the contract.

(93) In the U.S. it is possible to find case law involving challenges to the administration of a contract that were filed by potential bidders or unsuccessful bidders. These bidders challenged the authority's decision to change the terms of the contract with the awardee, arguing that by making such changes, the

The infringements during the performance phase can be pursued in France through the *délit de favoritisme*(95) as *manquements au devoir de probité*. It is designed to protect the effectiveness of the principles and rules established to protect competition (freedom of access to competitions and equal treatment of candidates) and good management of the entire public procurement cycle. This can contribute to the fight against corruption and waste in public contracts.(96) The *délit de favoritisme* occurs if the public official (or appointed to public service or who acts on behalf of such persons) has procured – or attempted to procure for others – an unfair advantage that the French courts have identified in the mere infringement of rules governing the award procedure (such as the use of abusive fragmentation,(97) the transmission of confidential information to one or more economic operators(98) or, during the execution phase, accepting a performance of lower value than the one promised in the tender).(99)

French law provides different legal tools to fight against corruption, based on the criminal repression of the phenomenon specifically in the public contracts sector, by determining the ineffectiveness of the contract awarded through corruption.(100) The role of the economic operators in the relevant market could be significantly extended to monitor the execution of the contract to ensure value for public money and an overall correct performance. For a long time, French law denied that third parties could directly claim the contract, as they had to bring an action against administrative acts (decision of the local assembly authorizing the executive to sign the contract, decision of the representative of the public person signing the contract). The *Conseil d'État* has progressively

(95) Art. 434-14 Fr. Penal C., "*Est puni de deux ans d'emprisonnement et d'une amende de 200 000 €, dont le montant peut être porté au double du produit tiré de l'infraction, le fait par une personne dépositaire de l'autorité publique ou chargée d'une mission de service public ou investie d'un mandat électif public ou exerçant les fonctions de représentant, administrateur ou agent de l'Etat, des collectivités territoriales, des établissements publics, des sociétés d'économie mixte d'intérêt national chargées d'une mission de service public et des sociétés d'économie mixte locales ou par toute personne agissant pour le compte de l'une de celles susmentionnées de procurer ou de tenter de procurer à autrui un avantage injustifié par un acte contraire aux dispositions législatives ou réglementaires ayant pour objet de garantir la liberté d'accès et l'égalité des candidats dans les marchés publics et les délégations de service public*". *Cf. Il rapporto*, "Lutter contre la corruption et la fraude dans les marchés publics", 27 July 2015.

(96) *See* French Ministry of Justice, 4 March 2002. with the amendments of the *Code des marchés publics* of 2001, the *délit de favoritisme* has been extended to all contracts (also below threshold) in case of violation of the principles of free competition, equal treatment, transparency of award procedures, or failures in the needs analysis and in the evaluation of the most economically advantageous tender.

(97) Fr. Cass. (crim.), 12 November 1998, *Marcel Graud*, No. 97-85.333.

(98) Paris, 23 mars 2000, *Juris-Data*, No. 2000-117773.

(99) G.M. Racca, "Dall'Autorità sui contratti pubblici all'Autorità Nazionale Anticorruzione: il cambiamento del Sistema", *Dir. Amm.*, 2015, pp. 345-387.



developed its case law: it was first admitted in 2007(101) that unsuccessful tenderers/candidates may bring an action directly against the contract if the contract in question was a contract whose award was formalized. By 2014, any interested third party may directly appeal the contract in front of the administrative judge.(102) The possibility to claim the contract by third parties – even though normally provided for infringements occurred in the award phase – could be enlarged to infringements occurred during the execution phase.

### 3.3. The role of independent authorities

In some Member States, Independent Authorities have been established to monitor the whole public procurement cycle, and they are equipped with the necessary adequate professional skills regarding the public contracts sector. In some cases, such tasks can be given to National antitrust authority, in other cases to a National authority with specific competence in public contracts.

For instance, in Italy (since 2014) this task is assigned to the Italian Anti-Corruption Authority (ANAC).(103) The Italian Anti-Corruption Authority has the task to monitor the award and execution phases of public contracts (also outside the scope of 2014 EU Directives on public contracts) to avoid the risk of loss of public finances.(104) During the execution of public contracts, ANAC

(101) Fr. C.E. (Ass.), 16 July 2007, *Société Tropic Travaux Signalisation*, *AJDA*, 2007, p. 1577; *see* also O. Henrard, "Le recours du concurrent évincé: le maintien provisoire de la jurisprudence Tropic", *RFDA*, 2016, p. 301.

(102) *See* Chap. of Prof. Noguellou in this book. *See* also Fr. C.E. (sect.), 3 October 2008, *SMIRGEOMES*, req. No. 305420, *RFDA*, 2008, p. 1128, with concl. and note B. Dacosta and P. Delvolvé. *See* also Fr. C.E. (Ass.), 4 April 2014, *Department du Tarn-et-Garonne*, req. No. 358994, *RFDA*, 2014, p. 436, with note P. Delvolvé and B. Dacosta, "De Martin à Bonhomme, le nouveau recours des tiers contre le contrat administratif", *RFDA*, 2014, p. 425; G.M. Racca, "Dall'Autorità sui contratti pubblici all'Autorità Nazionale Anticorruzione: il cambiamento del sistema", *op. cit.*, pp. 383 and ff.; O. Henrard, "Le recours du concurrent évincé : le maintien provisoire de la jurisprudence *Tropic*", *RFDA*, 2016, p. 31.

(103) *See* It. Decr. lg., 24 June 2014, No. 90, converted in Law, 11 August 2014, No. 114, it abolished the previous Italian Authority for the Supervision of Public Contracts for works, services and supplies – AVCP and transferred the functions to the functions to the ANAC.

(104) It. Decr. lg., 18 April 2016, No. 50, Art. 213, § III. The Italian implementation of 2014 EU Dir. on Public contracts strengthen the role of the ANAC. As clarified by the Italian State Council (*Consiglio di Stato*, with consultant and judicial functions in the Italian legal framework), the past EU directives on public contracts were implemented by Law of the Parliament and legislative decree of the Government, followed by more detailed regulatory interventions by the Government (D.P.R. No. 207 of 2010). At present, the Italian legislator provides for different measures and types of administrative provision in order to pursue flexibility: a) decrees adopted by the Prime Minister or by the Ministers (secondary sources in the Italian legal framework); b) binding resolutions by ANAC with *erga omnes* applicability (guidelines with the legal effect of general administrative acts); c) non-binding resolutions by ANAC (guidelines from which public administrations can deviate upon presentation of a valid justification). *See* advice Cons. St.,

has the task to verify the modification of the contracts during their terms.(105) The monitoring activity has revealed that in many cases the successful economic operator (awardee) manages to recover during the execution phase – often through modifications of the contract – exactly the downward proposed in the award procedure.(106) Contracting authorities have the possibility to ask ANAC the establishing of a *vigilanza collaborativa* (so-called collaborative surveillance) for the award procedure and the management of contracts of relevant value.(107) The agreement *protocollo d'intesa* concluded among the contracting authority and ANAC is intended to support the preparation of the contract documents and the contract management during the execution phase.(108) The agreement requires the contracting authorities to include in the contract documents the clause imposing the termination of the contract in case of specific crimes against public administration even before the final judgement.

In Germany, it is provided that contracting authorities may require professional help when drafting public contracts. Some administrative entities are responsible for developing 'model contracts' applicable to specific cases and whose use is either recommended or prescribed to the administrative authorities by the Government.(109) A similar role with guidelines and 'model contracts' is played in Italy by ANAC.(110) Such modules should also include clauses for the monitoring of the execution phase.

In the United Kingdom, in addition to the National Audit Office (an independent parliamentary body who has the role of scrutinising public spending for UK Parliament)(111) the 'Mystery Shopper Service' has been recently introduced as part of the Crown Commercial Service. It is structured as an executive agency and trading fund of the Cabinet Office (central government department). This Office investigates complaints that fall within the remit of the scheme, and, the supplier will be given the option of anonymity. The Mystery Shopper Service works with individual authorities "to put them right,

(105) N. PARISI, "The main functions of the Italian National Anti-corruption Authority in preventing corruption in the field of public procurement", 2015, available at www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup4/2015-August-31-to-September-2/Presentations/Italy_-_Nicoletta_PARISI.pdf.

(106) ANAC, *Relazione annuale 2014*, 2 July 2015, p. 113.

(107) It. Decr. lg. 18 April 2016, No. 50, Art. 213, § III (h).

(108) ANAC, Public statement of 19 July 2016, *Sintesi delle attività di Vigilanza collaborativa dell'ANAC – Gennaio 2015 – Luglio 2016*, available at www.anticorruzione.it/portal/public/classic/AttivitaAutorita/AttiDellAutorita/_Atto?ca=6542.

(109) *See* Chap. of Prof. STELKENS.

(110) It. Decr. lg., 18 April 2016, No. 50, Art. 213, § II. N. PARISI, "An international perspective on the main functions of the Italian National Anti-corruption Authority in the prevention of corruption in public procurement", *Diritto del Commercio Internazionale*, 2015, p. 1053.

(111) www.nao.org.uk/freedom-of-information/publication-scheme/who-we-are-and-what-we-do/ (accessed 25 March 2016).





and help ensure similar cases do not arise in future", taking "action to reduce the likelihood of similar issues arising in other authorities" and identifying "examples of good practice that we can share with other authorities".(112) The enquiry of this Office should concern procurement practice, and should highlight a potential conflict with best practice or the Public Contracts Regulations 2015 (2006 for older contracts). This can happen at any stage of the procurement, also in the management of contracts, and includes payments to suppliers and subcontractors.(113) In 2015, the service was strengthened by the Small Business Enterprise and Employment Act,(114) which provides a statutory footing for mystery shopper investigations, the results of which are published online.(115) This kind of service gives a role to any interested economic operator with respect to the problems on the award procedure and the procurement strategy: for example, on the choice of splitting into lots for the participation of SMEs or on the requirements set for participation. This seems an effective instrument to address the problem, and help contracting authorities better manage the award and management of the contracts.

As far as the execution is concerned, usually only the awardee who asks to be played on time the invoices, while no cases have been reported on the different issues of an improper execution. Other third parties, end-users or losing tenderers might have a role on this if they were admitted for reporting on contract modifications. The Dutch Public Contracts system provides a Public Procurement Ombudsman contributing to the resolution of public procurement complaints, a 'complaint' being defined as: "an expression of dissatisfaction by one party regarding the acts or omissions of another, to the extent that such acts or omissions fall within the scope of the Dutch Public Procurement Act 2012".(116) In some States, the National Authority provide an *ex ante* monitoring activity on the public contracts documents drafted by contracting authorities, while having the power of requiring the modifications of the terms.(117) In Romania, the National Agency for Public Procurement (hereinafter referred to as NAPP) is the most important authority of administrative oversight in the field of public procurement, public works and services concessions.(118) This Agency is entitled to evaluate (before its publication) the compliance of tender documentation with the Romanian public procurement legislation. In Romania, there

(112) *See* Chap. of R. CRAVEN in this book.

(113) *See* www.gov.uk/government/publications/mystery-shopper-scope-and-remit.

(114) Which came into force on 26 May 2015.

(115) UK Small Business Enterprise and Employment Act, Sect. 40(8).

(116) *See* Chap. of Art. 1(c) of the Decr. of 4 March 2013, *Stcrt.* 2013, p. 6182 (*Instellingsbesluit Commissie van Aanbestedingsexperts*) and Art. 1(c) of the Rules pursuant to Art. 6(1) of the Decr. (*Reglement van de Commissie van Aanbestedingsexperts*).

(117) *See* Chap. on Romania in this book.

(118) Regulated by EGO No. 13/2015. *See* Chap. of D.C. DRAGOS and D.M. SPARIOS in this book.

is also the National Agency for Integrity (ANI) with duties in preventing and fighting against conflicts of interest in the public sector, including the award and performance of the public contracts. This authority does not oversee the procedure of awarding the contract, but is entitled to find and investigate the instances of conflict of interests that occurred in the awarding procedure or during the performance of the public contract.(119)

As an alternative dispute resolution tool, the National independent authority may also oversee a pre-litigation activity, based on the specific professional skills required to solve litigations in the field of public contracts. This may reduce judicial complaints before courts.(120) In these cases, the decision of the National Authority does not preclude a judicial litigation. With their special qualification, National Authorities are entitled to find illicit distortion of competition made by economic operators, even during the execution of the contract.

To capture the role of third parties within the EU legal framework, one must consider the provisions on "rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union".(121) Actions for damages are only one element of an effective system of private enforcement on infringements of competition law, and "are complemented by alternative avenues of redress, such as consensual dispute resolution and public enforcement decisions that give parties an incentive to provide compensation".(122) The new rules aim to ensure effective private enforcement actions under civil law, and effective public enforcement by competition authorities. Both tools are required to interact in a way to ensure maximum effectiveness of the competition rules, especially in cross-border contracts.(123) The protection of fair competition is an issue for all economic operators in the relevant market, and they can find different instruments to assure it, particularly in the award and execution of public contracts.

### 3.4. The role of other third parties: civil society, media, associations and academia

It has been recognized that civil society has an important role to play in the monitoring activity, by ensuring efficiency and integrity of public contracts,

(119) *See* Chap. of D.C. Dragos and D.M. Spa rios in this book.
(120) *See* Chap. of Prof. Marchetti in this book.
(121) EU Dir. 2014/104.
(122) EU Dir. 2014/104, recital No. 5.
(123) EU Dir. 2014/104, recital No. 9, "It is necessary, bearing in mind that large-scale infringements of competition law often have a cross-border element, to ensure a more level playing field for undertakings



especially during their execution phase.(124) Governments are realizing the growing importance of civil society participation, and are starting to involve citizens in scrutinizing government activities.(125) The availability of clear and accurate data can also facilitate the monitoring by civil society, media, companies, NGOs and academia.(126) Transparency can help in assuring the satisfactory execution of the contract.

The UK Government has adopted policies providing the availability and accuracy of information about the delivery of publicly-funded public services. Thus, "citizens are entitled to know how taxpayers' money is spent through the disclosure of information and appropriate auditing of public service delivery publicizing good performance is integral to spreading good practice".(127) There should be a presumption in favour of disclosing information, with exemptions provided by the Freedom of Information Act (*i.e.* national security or commercial confidentiality grounds).

By highlighting potential cases of underperformance, civil society helps contracting authorities in enhancing accountability of its suppliers. In any contract system, only a deep and effective monitoring of the execution phase can stave off the risks of corruption and waste of taxpayers' money. This seems to give a qualified interest to final users in highlighting every instance of misconduct

(124) UNODC, "Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption", aforesaid, p. 26. G.M. Racca and R. Cavallo Perin, "Corruption as a violation of fundamental rights: reputation risk as a deterrent against the lack of loyalty", in *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally* (G.M. Racca and Ch.R. Yukins eds), Brussels, Bruylant, 2014, pp. 42 and ff.; R. Cavallo Perin, "L'etica pubblica come contenuto di un diritto degli amministrati alla correttezza dei funzionari pubblici", in *Al servizio della Nazione. Etica e statuto dei funzionari pubblici* (F. Merloni and R. Cavallo Perin eds), Milan, Franco Angeli, 2009, pp. 159-161; on the right of citizens to require compliance of civil servant to their duties. P. Szarek-Mason, "OLAF: The anti-corruption policy within the European Union", in *Corruption and Conflicts of Interest. A Comparative Law Approach*, *op. cit.*, p. 288.
(125) *See* also a Mexican case where the participation of 'social witnesses' to scrutinise the integrity of the procurement procedure is mandatory for large contracts. A study of the OECD and the World Bank Institute (2006) found that such practice had resulted in savings of approximately USD 26 million in 2006 and increased the number of bidders by over 50%.
(126) OECD, "Implementing the OECD Principles for Integrity in Public Procurement", aforesaid, p. 119; the principle No. 10 provides that "Member countries should empower civil society organisations, media and the wider public to scrutinise public procurement. Governments should disclose public information on the key terms of major contracts to civil society organisations, media and the wider public. The reports of oversight institutions should also be made widely available to enhance public scrutiny. To complement these traditional accountability mechanisms, governments should consider involving representatives from civil society organisations and the wider public in monitoring high-value or complex procurements that entail significant risks of mismanagement and corruption". D. Sorace and A. Torricelli, "Monitoring and Guidance in the Administration of Public Contracts", in *Droit comparé des Contrats Publics*, *op. cit.*, pp. 205-208. *See* also S. Boyron and A.C.L. Davies, "Accountability and Public Contracts", *Droit comparé des Contrats Publics*, *op. cit.*, pp. 221-225.

in the public contract's execution. Furthermore, as noted by UNODC, "civil society, therefore, frequently generates pressure against corruption in public procurement, leading to the penalization of corrupt actors".(128)

The monitoring of procurement processes by an independent voice might provide a source of expertise and make it possible "to raise issues and difficult questions, to manage conflict and balance powers and bring together groups of people".(129) In a far-reaching transparency policy, civil society can become very active in the "complex monitoring of procurement processes and public contracts".(130) "Integrity pacts"(131) could become an effective tool in defining further instruments to provide transparency in the framework of monitoring activities by civil society organizations. Recently, the ECJ stated that the general principles of the Treaty on the Functioning of the European Union (TFEU), in particular the principles of equal treatment and of non-discrimination, as well as the consequent obligation of transparency, do not preclude that a contracting authority may decide the automatic exclusion of a candidate or tenderer for not having lodged, with its tender, a written acceptance of the commitments and declarations contained in a legality protocol, the purpose of which is to prevent organized crime from infiltrating the public procurement sector.(132)

Integrity pacts, intended as project-specific agreements between the contracting authority, and the tenderers – all of which are committed to abstaining from any corrupt practices(133) – could help enhance public trust in government contracting, and therefore contribute to improving the credibility of government procedures, and of administration in general.(134) Integrity pacts can establish the contractual rights and obligations of all the parties in a public

(128) UNODC, "Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption", aforesaid, pp. 26-27.

(129) Transparency International, *Handbook for Curbing Corruption in Public Procurement*, *op. cit.*, pp. 80 and ff.

(130) EC, Report from the Commission to the Council and the European Parliament, *EU Anti-Corruption Report*, 3 February 2014, COM(2014) 38 final, p. 31.

(131) *Ibid.* Transparency International, *The integrity pact. The Concept, the Model and the Present Applications: a Status Report*, 31 December 2002, p. 12.

(132) ECJ, 22 October 2015, *Impresa Edilux Srl and SICEF v. Assessorato Beni Culturali e dell'identità siciliana*, C-425/14. *See* also S. SMITH, "The Application of Treaty Principles to Public Procurement Exclusions, and Exclusion for Failing to Lodge a Declaration Confirming Compliance with a 'Legality Protocol' that Governs the Award Procedure as Well as Contract Performance: Case C-425/14 *Impresa Edilux*", *PPLR*, 2016, NA40-NA44; S. VINTI, "I protocolli di legalità e il diritto europeo", *Giorn. dir. amm.*, 2016, pp. 318-331.

(133) EC, *EU Anti-Corruption Report*, aforesaid, p. 31.

(134) Using the integrity pacts economic operators wishing to participate in a procedure for the award of a public contract, contracting and public officials acknowledge that they understand and accept the obligations arising as a result of their turning. OECD, "Integrity in Public Procurement: good practice from A to Z", 2007, p. 158.





contract, thus eliminating uncertainties regarding the quality, applicability and enforcement of criminal and contractual legal provisions in a country.(135) Moreover, such obligations could attribute a role to third parties to assure further monitoring during the selection and execution of the contract. Codes of conduct and integrity pacts may introduce additional constraints on transparency and monitoring during the period of execution of the contract, by allowing for the collaboration of other participants in the competition, as well as social witnesses(136) and citizens' associations.(137) Voluntary compliance with the terms defined in integrity pacts might allow economic operators to engage in the monitoring activity. Reciprocal obligations among private parties and public entities make each party liable with respect to the others(138) for any violations that occur during the whole procurement cycle.(139)

By ensuring that they are effectively implemented, integrity pacts(140) could be monitored by civil society groups at the initiative of NGOs, especially regarding certain large public contracts (e.g. large-scale infrastructure projects), thus assuring their correct execution.(141)

Public oversight verifies the transparent management of public finances to improve the likelihood that limited resources are used for the intended purposes and for the public interest. All countries should establish transparent and accountable public finance management systems, including for budgeting and procurement.(142) Similarly, a planning of the procurement activities for the

(135) Transparency International, *The integrity pact. The Concept, the Model and the Present Applications: a Status Report*, aforesaid, pp. 3-4. "The IP is intended to accomplish two primary objectives: (a) to enable companies to abstain from bribing by providing assurance to them that i) their competitors will also refrain from bribing, and ii) government procurement, privatisation or licensing agencies will undertake to prevent corruption, including extortion, by their officials and to follow transparent procedures; and (b) to enable governments to reduce the high cost and the distortionary impact of corruption on public procurement, privatisation or licensing". Transparency International, *Handbook for curbing corruption in public procurement*, 2006, pp. 125 and ff.

(136) OECD, "CleanGovBiz Integrity in practice. Fighting corruption in public procurement", February 2012, pp. 25 and ff.; *id.*, "Integrity in Public Procurement. Good Practice From A To Z", aforesaid, pp. 117 and ff.

(137) Transparency International, *The integrity pact. The Concept, the Model and the Present Applications: a Status Report*, aforesaid, p. 5. The report highlights the two arguments that "often rised against such a monitoring role for civil society can easily be disarmed: availability of the necessary expertise among the Civil society monitors [...] and the legitimate confidentiality of property information, to which civil society representatives would gain access".

(138) *Ibid.*; OECD, *Principles for Integrity in Public Procurement*, 2009, pp. 36-37.

(139) Transparency International, *Handbook for curbing corruption in public procurement*, 2007, p. 82.

(140) EC, *EU Anti-Corruption Report*, aforesaid, p. 31. Integrity pacts are agreements between the contracting authority for a particular project and the bidders, all committing themselves to abstain from any corrupt practices.

(141) *Ibid.* Integrity pacts are agreements between the contracting authority for a particular project and the bidders, all committing themselves to abstain from any corrupt practices.

(142) UNODC, "Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption", aforesaid, pp. 30-31.

purchase of works, goods and services is required as a mandatory activity for every contracting authority to favour the monitoring activity.(143) Information regarding awarded contracts, including the name of the contractor and the contract price, should be publically available, either through transparency measures or through access to information regimes.(144) These provisions are aimed at safeguarding not only the economic efficiency in public contracts, but also the perceived legitimacy of public decisions. This legitimacy is fostered by due procedures in awarding public contracts even if they may represent an increase in economic costs (*i.e.* less economic efficiency).(145)

Civil society initiatives have already generated a "beneficial effect on the accountability of local administrations about transparency of public spending".(146) Civil society, "be it a single citizen, media, a company, an NGO, academia etc." may identify possible improper public official actions which may be the result of collusion between a public official and a tenderer.(147) Directing media attention towards procurement spending might help in discovering that the number of computers contracted and purchased by a public school was not delivered or that a procurement official provided incomplete information to selected tenderers to favour a certain company.(148) The reputation of the economic operator involved would be compromised and might be an incentive for appropriate behaviour by other economic operators. Civil society can generate

(143) *I.e.* in Italy, the implementation of 2014 EU Dir. provides, as mandatory, the planning of the procurement activities. *See* It. Decr. lg., 18 April 2016, No. 50, Art. 21.

(144) (UNODC, "Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption", aforesaid, p. 27.

(145) EU Parliament, Directorate General for Internal Policies, "Political and other forms of corruption in the attribution of public procurement contracts and allocation of EU funds: Extent of the phenomenon and overview of practices", 2013, p. 30.

(146) EC, *EU Anti-Corruption Report*, aforesaid, p. 28.

(147) G.M. Racca, R. Cavallo Perin and G.L. Albano, "Competition in the execution phase of public procurement", *op. cit.*, pp. 99-100; OECD, "Implementing the OECD Principles for Integrity in Public Procurement", aforesaid, p. 119. One of the ten OECD principles for enhancing integrity in public procurement provides that "Member countries should empower civil society organisations, media and the wider public to scrutinise public procurement. Governments should disclose public information on the key terms of major contracts to civil society organisations, media and the wider public. The reports of oversight institutions should also be made widely available to enhance public scrutiny. To complement these traditional accountability mechanisms, governments should consider involving representatives from civil society organisations and the wider public in monitoring high-value or complex procurements that entail significant risks of mismanagement and corruption".

(148) OECD, *Implementing the OECD Principles for Integrity in Public Procurement*, *cit.*, 119. One of the ten OECD principles for enhancing integrity in public Procurement provide that "Member countries should empower civil society organisations, media and the wider public to scrutinise public procurement. Governments should disclose public information on the key terms of major contracts to civil society organisations, media and the wider public. The reports of oversight institutions should also be made widely available to enhance public scrutiny. To complement these traditional accountability mechanisms, governments should consider involving representatives from civil society organisations and the wider



pressure against corruption in public contracts, leading to various kinds of sanctions against the corrupt actors.

The 'direct social control' could complement more traditional accountability mechanisms under specific circumstances. Strict criteria should be defined to determine when direct social control mechanisms may be used, based on the high value, complexity and sensitivity of the procurement, and for selecting the external observers.(149) Obviously, a systematic verification should be carried out to ensure that the external observers are exempt from any conflict of interests. They also should be aware of any restrictions and prohibitions regarding potential conflict-of-interest situations, such as the handling of confidential information. The oversight of third parties could prove extremely useful for ensuring both the respect of the competition principle, and the correct performance of the contract.(150)

Governments should support an effective monitoring activity by civil society "by ensuring timely access to information, for instance through the use of new technologies, and providing clear channels to allow the external observer to inform control authorities in the case of potential irregularities or corruption".(151)

In Brazil, contracts' execution requires internal and external control procedures. In the exercise of control, aside from problems relating to performance of the contract itself, it is also possible to raise issues relating to possible illegal conducts during the awarding procedure. External control on the execution of public contracts can be carried out by any person or entity. They can legitimately call for the implementation of a review, by the competent Courts of accounts. These same courts may also decide to perform an automatic control, and then, if necessary, decide on the temporary suspension of the execution of any administrative contract. In Brazilian law, there is also the possibility to submit the contractual execution to judicial review, either by way of popular action at the initiative of any citizen or by way of public civil action, including initiatives reserved to the prosecution.(152)

(149) OECD, "OECD Principles for Integrity in Public Procurement", aforesaid, p. 47.

(150) G.M. Racca, R. Cavallo Perin and G.L. Albano, "Competition in the execution phase of public procurement", *op. cit.*, pp. 99-100; UNODC, "Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption", aforesaid, pp. 26-27.

## *4. The benefits of the monitoring of the execution phase: efficiency and integrity of fair competition in the execution phase*

Adequate efforts in favour of third parties' monitoring of the performance phase can ensure efficiency and integrity of public contracts. Transparency and competition principles play a key role in the awarding phase,(153) but they are at risk of vanishing 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 execution phase; lack of transparency, incompetence, and corruption undermine the multiple objectives of public procurement policies. Effective and adequate monitoring activities can produce relevant data on how economic operators run the performance, highlighting the relevance of the transparency principle.(154)

Competition, transparency and objective criteria in decision-making can thus be considered as fundamental principles, as well as instruments to be enhanced. Otherwise, as already underscored, after the award, the procuring entity may accept a different and less costly performance in violation of the free competition principle, and of the equal treatment principle.(155) Moreover, the phenomenon of 'abnormally low tenders' may occur because of tenderers' choice of recovering their additional "investment" (*i.e.* lower mark-ups). The conduct of transparent and non-discriminatory award procedures based on market and needs' analysis becomes the best tool to achieve 'value for money'. It spurs, when appropriately designed, the right degree of competition among suppliers,(156) and generates benefit for both domestic and foreign stakeholders.(157)

(153) S. ROSE-ACKERMAN, "Corruption and conflicts of interest", in *Corruption and Conflicts Of Interest. A Comparative Law Approach*, *op. cit.*, pp. 4 and ff. The principle of transparency is essentially intended to preclude any risk of conflicts of interest, 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. This is to ensure that, firstly, 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. ECJ, 29 April 2004, *Commission v. CAS Succhi di Frutta SpA*, C-496/99, §§ 111 and 115.

(154) OECD Recommandation, 2015.

(155) R. CAVALLO PERIN and G.M. RACCA, "La concorrenza nell'esecuzione dei contratti pubblici", *Dir. amm.*, 2010, p. 325.

(156) S. CASSESE, "Le droit tout puissant et unique de la société. Paradossi del diritto amministrativo", *Riv. Trim. Dir. Pubbl.* 2009, p. 893, now also in S. CASSESE, *Il diritto amministrativo: storia e prospettive*, Milan, Giuffrè, 2010, p. 539. *See* gen. 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 papers.ssrn.com/sol3/papers.cfm?abstract_id = 1133234.

(157) S. ARROWSMITH and C. NICHOLAS, "Regulation of Framework agreements/Task order contracts –



The definition of a contractual strategy requires different professional skills and resources that only 'qualified' contracting authorities (like central purchasing bodies) have. The ability to collect *and* interpret information during the execution can make third parties, along with the contracting authority, the most effective 'supervisors' of the contractor's compliance with contractual clauses. Being competitors in the same market, losing tenderers are potentially in the 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 to avoid thwarting competition.(158)

A first step can be the use of eProcurement tools and IT solutions for the drawing up and transmission of notices. In the EU, they can be used for sending and publishing data with the aim of advertising an intention to award a contract, regardless of the need of the publication of a formal notice in the *OJEU*. However, the problem is that there is often not a single institutional designated web portal in each country. Contracts may be published on an institutional website or a non-governmental, business run, website. The latter can be particularly expensive for an individual contracting authority, and more importantly does not provide an absolute assurance that all possible interested tenderers are made aware of the contract opportunities. To increase transparency and, possibly, cross-border participation for below threshold contracts, it should be provided that any Member States should designate specific websites where economic operators can easily access information relating to the publication of the contract. As reported by the Commission,(159) there is one single accepted and established system for the publication of above threshold notices across the EU (Tenders Electronic Daily), supported by compatible infrastructure at national level. In 2009, just over 90% of forms sent to TED were received electronically and in a structured format.(160)

In Italy, traceability of public contracts(161) is provided with the aims of collecting and processing data on public contracts. The information also provides

(158) 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.

(159) EC, "Evaluation of the 2004 Action Plan for Electronic Public Procurement Accompanying document to the Green Paper on expanding the use of e-Procurement in the EU", SEC(2010) 1214 final, 10 October 2010, p. 54.

(160) The UK experience with contract finder could potentially be an example of a unique portal for below threshold contracts, even though indications suggest that it is not yet being used as an exclusive point of reference for below threshold contracts. *See* L.R.A. BUTLER, "Below Threshold and Annex II B Service Contracts in England, Wales and Northern Ireland: A Common Law Approach", in *Outside the EU*

indications on measures that need to be taken to promote transparency, simplification and competition.(162) Transparency regarding the choices made by the procuring entity with regard to contract conditions and prices could be one way to let other economic operators, end-users, and the public, know whether best value for money was achieved. In the long term, such processes can improve the correct and efficent use of public funds.

As observed in the OECD documents, an unsuccesful tenderer should have a role in checking the execution phase of the contract, with associations of end-users and public representatives.(163) By automating and strengthening the flow of information about individual tender opportunities and providing greater publicity, it could be possible to increase participation, and therefore to increase competition.(164) An additional advantage of IT solutions is that because publicity must be given *ex post* of the award, if such an obligation was fulfilled through electronic tools it would be possible to map the entities who have been awarded such contracts in each country. Especially for below threshold procurements in the EU, such publicity could also enable the gathering of significant data on the type and value of such contracts. Furthermore, such instruments could also demonstrate possible infringments connected with artificial splitting of contracts.(165)

For the moment, the different rules regarding the execution, invoicing, and payment that could be addressed through e-documents are limited to cross-border participation.(166) The 2014 EU Directives rethink the public procurement process through digitalization, identifying e-procurement as one of the future challenges. Electronic tools allow a monitoring of the entire public procurement cycle (from the pre-award until the execution phase). The aim is to simplify the participation of tenderers and the management of the contracting authorities collecting data. The EU Commission encourages interoperability and standardization of

(162) OECD, "Country case: Transparency and traceability in public procurement in Italy", 2016, available at www.oecd.org/governance/procurement/toolbox/search/transparency-traceability-public-procurement-italy.pdf.

(163) OECD, "Guidelines for fighting bid rigging in public procurement", 2009, www.oecd.org/dataoecd/27/19/42851044.pdf; *id.*, "Principles for integrity in Public procurement", 2009, www.oecd-ilibrary.org/governance/oecd-principles-for-integrity-in-public-procurement_9789264056527-en, p. 70.

(164) EC, "Evaluation of the 2004 Action Plan for Electronic Public Procurement Accompanying document to the Green Paper on expanding the use of e-Procurement in the EU", aforesaid, p. 7.

(165) *See* L.R.A. Butler, "Below Threshold and Annex II B Service Contracts in England, Wales and Northern Ireland: A Common Law Approach", *op. cit.*

(166) PEPPOL opens up a new dimension in public eProcurement with extended market connectivity and EU-wide interoperability, facilitating seamless electronic communication across borders. PEPPOL defines 3 user groups as typical PEPPOL pilot participants. Together, they form an eProcurement community: A contracting authority means a State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law; an economic operator: in the PEPPOL context means a company which supplies goods and/or services



e-procurement processes to pursue these goals.(167) The use of digital tools and integration of data-based approaches at various stages of the procurement process will ensure more transparency and accountability.(168) According to the new Directives, the rules on e-procurement in the EU will be gradually introduced. Tender opportunities and tender documents are meant to be electronically available since April 2016. Central purchasing bodies should move to full electronic means of communication – including electronic bid submission – by April 2017. The e-submission should be made mandatory for all contracting authorities and all procurement procedures by October 2018.(169) Member States may postpone the application of some of these provisions but the path is defined.(170)

In the execution phase, cross-border interoperability and exchange of data is considered, especially for data related to the invoicing and payments. Indeed, the EU services are developed to allow public entities "to check their level of readiness to exchange e-Invoices in compliance with Directive 2014/55/EU" (on e-Invoicing in public procurement).(171) E-Procurement tools are considered the foundations of instruments for the oversight and monitoring phase, promoting the implementation of effective and efficient systems in the public sector and in public procurement (at the international and European level).(172)

Electronic procurement tools can simplify contract management.(173) The more sophisticated the use of electronic technologies, the more specific standards are needed to ensure consistent application of the technology; providing unrestricted and full access to the system, ensuring privacy and security of data

(167) Multi-Stakeholder Expert Group on e-procurement (EXEP), "Solutions and Interoperability", 24 October 2016, available at ec.europa.eu/DocsRoom/documents/20843.

(168) *See* the EU e-Procurement policy available at ec.europa.eu/growth/single-market/public-procurement/e-procurement_en. The use of electronic tools in public procurement offers a range of important benefits such as: significant savings for all parties; simplified and shortened processes; reductions in red-tape and administrative burdens; increased transparency greater innovation; new business opportunities by improving the access of enterprises, including small and medium-sized enterprises (SMEs) to public procurement markets.

(169) *See* the Timetable for the rollout of e-procurement in the EU, available at ec.europa.eu/DocsRoom/documents/16332/attachments/1/translations. *See* also Multi-Stakeholder Expert Group on e-procurement (EXEP), "Regulatory Aspects and Interpretation", 24 October 2016, available at ec.europa.eu/DocsRoom/documents/20842.

(170) EU Dir. 2014/24, Art. 90. G.M. Racca, "Joint Procurement Challenges in the Future Implementation of the New Directives", in *Modernising Public Procurement: the New Directive* (F. Lichère, R. Caranta and S. Treumer eds) Copenhagen, Djof, 2104, p. 230.

(171) *See* the eInvoicing Readiness Checker, available at ec.europa.eu/cefdigital/wiki/display/CEFDIGITAL/2017/01/31/Now + Live%3A + CEF + eInvoicing + Readiness + Checker. Furthermore, the service offers service and solution providers an opportunity to demonstrate their capabilities in implementing eInvoicing solutions.

(172) OECD, "Preventing corruption in public procurement", 2016, available at www.oecd.org/gov/ethics/Corruption-in-Public-Procurement-Brochure.pdf.

(173) OECD, "Methodology for Assessment of National Procurement Systems Version of 2016",

and authentication. This can favour external control from third parties, as well as harmonized internal control practices to ensure consistency in the application of procurement rules and standards across the public sector.(174)

Data collected can also be used for the benchmarking of the quality of the different procurement national systems. Case indicators (such as time) and procedure needed for suppliers to receive payment during the contract execution phase can be mobilized.(175) Being aware of this, the EU Commission has recently strengthened its commitment to achieving a single digital market,(176) ensuring the removal of all regulatory and technical barriers which prevent widespread adoption of e-invoicing.(177) The need to quickly enforce such instruments is becoming clear.(178)

The OECD has identified relevant indicators for assessing the quality of the national legal framework, including the complete and timely implementation of the contract.(179) Monitoring of the execution through external control over the procurement cycle, by other economic operators who participated in the original tendering process, and by all the economic operators of the relevant sector, as well as by associations, citizens and any stakeholder of the procurement system, can promote efficiency, transparency, accountability and integrity in public contracting.

(174) For instance, the Federal Procurement Agency in the Ministry of the Interior in Germany monitors workflows electronically, enabling more efficient controls. *See* OECD, "Preventing corruption in public procurement", 2016, p. 25, available at www.oecd.org/gov/ethics/Corruption-in-Public-Procurement-Brochure.pdf.

(175) World Bank, "Benchmarking public procurement". Assessing public procurement regulatory systems in 180 economies, 2017.

(176) According to the Europe 2020 strategy, for a digital agenda for Europe.

(177) EC, "Communication from the commission to the European parliament, the council, the European economic and social committee and the committee of the regions. Reaping the benefits of electronic invoicing for Europe", COM (2010) final, p. 712.

(178) OECD, "Public Procurement for Sustainable and Inclusive Growth. Enabling reform through evidence and peer review", available at http://www.oecd.org, p. 15; *id.*, "Implementing the OECD Principles for Integrity in Public Procurement", aforesaid, p. 13. GAO, "The National Flood Insurance Program: Progress Made on Contract Management but Monitoring and Reporting Could Be Improved", 15 January 2014, suggest to improve monitoring and reporting of contractor performance, recommending that the Federal Emergency Management Agency FEMA (1) determine the extent to which quality assurance surveillance plans and CPARS assessments have not been prepared, (2) identify the reasons why, and (3) take steps, as needed, to address those reasons. FEMA concurred with GAO's recommendations. The OECD report on Federal Public Procurement in the U.S. suggested that the Government ensures a better integration among its e-procurement systems, so as to generate better quality data and promote performance analysis.

(179) Methodology for Assessment of National Procurement Systems Version of 2016 aforesaid. The Methodology for Assessing Procurement Systems provides a common tool which countries, as well as development partners, can use to assess the quality and effectiveness of procurement systems. The sub-indicators identified for the execution phase are the following: 1) functions and responsibilities for managing contracts; 2) methods to review, issue, and publish contract amendments in a timely manner; 3) requirements for timely payment; and 4) dispute resolution procedures that provide for an efficient and fair process to resolve disputes during the performance of the contract.



# Challenge and review mechanisms for International Organizations' contracts

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## *1. Introduction*

This chapter will consider the protest and review mechanisms of public contracts by International Organizations (IOs). Globalization undeniably affects the internationalization of public contracts,(1) not only by bringing more foreign companies to domestic procurement markets but also by multiplying cross-border projects conducted by IOs. Most of these contracts are financed by IOs implementing development agendas, but are actually awarded by governments and national agencies borrowing money and using development grants. Although claims for these contracts often fall outside the scope of domestic law with exemption provisions and arbitration clauses for their disputes, for the most part, domestic laws and national protest mechanisms govern issues arising from their award process.

However, IOs also need to purchase goods and services, either for their own use through what is sometimes called 'corporate contracts,' or as a way to render public services that they direct. With some of the largest sums spent on pharmaceuticals, medical equipment, food, transportation, and construction,(2) the United Nations spent a total of $17 billion on the procurement of goods and services in 2016 (versus $10 billion in 2008). The largest purchasers overall were the United Nations Development Program (UNDP), the United Nations Procurement Division (UN/PD), the World Food Program (WFP), the United Nations Children's Fund (UNICEF), and the United Nations Office for Project Services (UNOPS), in descending order. Of course, this volume depends on the activities entrusted to the international organization. A UN agency

(1) L. FOLLIOT LALLIOT, "From the Internationalization of Rules to the Internationalization of Public Contracts: How International Instruments Are Reshaping Domestic Procurement Systems", in *Transnational Law of Public Contracts* (M. AUDIT & S. SCHILL, eds), Bruylant, 2016.

(2) Source UNOPS procurement website, last visited January 14, 2017.