Integrity and Efficiency in Sustainable Public Contracts

Balancing Corruption Concerns in Public Procurement Internationally

Ensuring **efficiency and integrity** throughout the public procurement cycle is essential to a sound allocation of taxpayers' money. Yet public contracts are plagued by **corruption, collusion, favoritism and conflicts of interest**. This book addresses these problems from sophisticated, academic, institutional and practical perspectives.

The book's ambition is to shape the public debate in the procurement community by highlighting how corruption implies **violations of fundamental rights** and undermines the fiduciary **relationship between citizens and public institutions**. The analysis underlines how corruption may stem from - and yet be resolved - through the exercise of discretion in the public procurement system. Focusing on the **effects** of public corruption and private collusion on procurement integrity, the book marks the features of misconduct and suggests needed **counter-measures**. The work also emphasizes that the pursuit of efficiency and integrity in public contracts must be rooted in professional skills, and in ethical regulations and training for public officers.

The research reflected in these pieces comes from sources around the world, and offers an excellent foundation for further development of these topics. Expanding on prior research, this volume builds on a more active transnational academic cooperation and exchanges of ideas on integrity in public contracts for the benefit of citizens.

This book is intended as both a textbook and an edited collection and it is available as e-book too. The authors of the chapters are all specialists in their respective fields, and their different geographical and professional perspectives represent a valuable contribution to the scientific literature.

✔ European Law
✔ International Law

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CHAPTER 1
Material changes in contract management as symptoms of corruption: a comparison between EU and U.S. procurement systems

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1. Fair competition in the selection and fair execution of the promised performance

Fair competition during the award procedure is a requirement for any procurement system. To avoid value for money remaining an abstract concept, the contractor's actual performance must coincide with what was promised at the competitive stage. However, the EU Directives mainly concern the awarding phase of the contracts, rather than their execution,(1) which is left up to the rules of the 28 Member States. Nonetheless, the question of the limits of possible changes during the execution stage has also arisen in the EU, first before the EU Court of Justice and then in the new Directive.(2)

In the EU, once a contract notice has set a call for tenders, any interested economic operator can submit a binding offer, in accordance with the requirements set out in the contract documents. The tender is binding for a limited time(3) and cannot be withdrawn. Normally, the selection of the winning

(1) Directive 2014/24/EU on *public procurement and repealing Directive 2004/18/EC*, 26 February 2014, Wh. 107.

(2) ECJ, 19 June 2008, *Pressetext Nachrichtenagentur GmbH* v *Republik Österreich* in Case C-454/06, ECR I-4401; ECJ, 29 April 2004, *Commission* v *CAS Succhi di frutta,* in Case C-496/99 P; Directive 2014/24/EU, Art. 72; G. M. Racca – R. Cavallo Perin – G. L. Albano, *Competition in the Execution Phase of Public Procurement,* in *PCLJ*, 2011, 89; R. Noguellou, *La Cour de justice prend une position de principe restrictive sur les cessions de marchés, puisqu'elle admet que celles-ci constituent, sauf si elles ont été prévies dans le marché initial, un changement de l'un des termes essentiels du marché, appelant par là une mise en concurrence*, in *Droit Administratif*, 2008. Id., *France*, in R. Noguellou & U. Stelkens (eds.) *Droit comparé des contrats publics*, Bruylant, Bruxelles, 2010, 689 et seq. M. Trybus – R. Caranta – G. Edelstam (eds. by), *EU Public contract Law. Public Procurement and Beyond*, Bruylant, Bruxelles, 2014.

(3) 180 days in Italy. Art. 11(6) of Italian Legislative Decree No 163 of 12 April 2006, see also Art. 75(5).

tenderer has to be carried out in two stages.(4) The contracting authority verifies the candidate requirements and excludes any tenderers that do not comply with the qualitative selection criteria.(5) In the EU, the contracting entities normally pre-qualify every participant.(6) At a later stage, in application of the award criteria, the procuring entities will accept the best offer, and must withdraw from negotiations with the other competing tenderers.(7) This withdrawal is fair insomuch as it complies with the award criteria.(8) Particularly in Europe, the required objective evaluation of the tenders involves establishing a precise ranking of the tenderers according to the scores received.

If losing bidders find any fault or contradiction, they are entitled to file claims and complaints, requesting that the procuring entity review its final decision.(9) The EU Remedies Directives(10) are directed at facilitating the correction of the award procedure before the signing of the contract in order to assign the execution of the contract to the highest-ranking tenderer, instead of awarding it to an economic operator chosen unfairly or as a result of a faulty application of the award criteria.(11) The Directive permits procuring entities to correct the award procedure without having to pay for both the costs of the awarded contract and the award of damages to the successful protesting tenderer.(12) For this purpose,

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

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

(6) M. STEINICKE, *Qualification and Shortlisting*, in M. Trybus – R. Caranta – G. Edelstam (eds. by), *EU Public contract Law. Public Procurement and Beyond*, *cit.*, 105.

(7) For the awarding criteria see: Directive 2004/18/EC, Art. 53. For Italian Public Contract Code see: Legislative Decree No. 163 of 12 April 2006, Artt. 81, 82 and 83.

(8) M. FRANCH – M. GRAU, *Contract Award Criteria*, in M. Trybus – R. Caranta – G. Edelstam (eds. by), *EU Public contract Law. Public Procurement and Beyond*, *cit.*, 131-135 and 155 – 161.

(9) Directive 2007/66/EC, Wh. No. 17, "A review procedure should be available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement". See generally: *Remedies Mechanisms*, available at *http://europa.eu/legislation_summaries/internal_market/businesses/public_procurement/l22006b_en.htm*.

(10) Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts), OJ L 335, implemented by Legislative Decree March 20th, 2010, No. 53 and Legislative Decree No. 104 of 2010. *See*: C. NICHOLAS, *Remedies for breaches of procurement rules and the UNCITRAL model law in procurement*, in *PPLR*, 2009, NA151. For an EU Directives analysis, *see*: J. GOLDING – P. HENTY, *The new remedies directive of the EC: standstill and ineffectivness*, in *PPLR*, 2008, 146. For an interesting French perspective: J. ARNOULD, *Ineffectivness of contracts under the new Remedies Directive in the UK and in the EC*, speech on *Public Procurement: Global Revolution IV* (Copenhagen, September 8th, 2010). For a UK law perspective: P. HENTY, *U.K.: public procurement remedies directive – an update on the implementation process*, in *PPLR*, 2010, NA17, and P. HENTY, *Remedies directive implemented into UK law*, in *PPLR*, 2010, NA115.

(11) C. H. BOVIS, *Legal Redress in Public Procurement Contracts*, in M. Trybus – R. Caranta – G. Edelstam (eds. by), *EU Public contract Law. Public Procurement and Beyond*, *cit.*, 365 and 368-371.

(12) Directive 2007/66/EC, Art. 1, Amendments to Directive 89/665/EEC, Art. 2, *Requirements for review procedures* provides the possibility to "(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing

the European Remedies Directive introduced a standstill period of at least ten days between the award and the signing of the contract, so as to prevent the consequences of an unlawful award from becoming irreversible.(13)

Moreover, the European Remedies Directive has resulted in increased litigation with regard to contracts awarded without competitive procedures. The EU remedies system, with its highly formalized and detailed implementation in many Member States, provides notice that any award procedure could be challenged or suspended and makes it possible to obtain the award of damages.

The gain attained by the unsuccessful tenderers could overcome that of the winning tenderer, who has to be able to cover performance risks.(14) Such deviation has recently been forbidden,(15) but excessive litigation is still present and often favours illicit agreements among suppliers or with the procurement official.

Problems related to modification of a contract during its execution arise in the U.S. as well and the conditions set out in the contract subsequent to a competitive procedure can be just as distorted as in the EU.(16) Nonetheless, from a U.S. perspective, unsuccessful tenderers take a different attitude to the litigation as they have no chance of receiving damages.(17)

2. Material changes in the EU and the U.S. Procurement system

The problem of changes during the execution of a contract is common to any procurement system and it seems worthwhile to compare the solutions and risks that may occur.

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further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority; (b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure; (c) award damages to persons harmed by an infringement". S. TREUMER – F. LICHÈRE (eds.), *Enforcement of EU Public Procurement Rules*, Copenhagen, 2011.

(13) Directive 2007/66/EC, 2a (2). C. H. BOVIS, *Legal Redress in Public Procurement Contracts*, in M. Trybus – R. Caranta – G. Edelstam (eds. by), *EU Public contract Law. Public Procurement and Beyond*, *cit.*, 387.

(14) S. L. SCHOONER – D. I. GORDON – J. L. CLARK, *Public Procurement Systems: Unpacking Stakeholder Aspirations and Expectations*, in *The George Washington University Law School – Working Paper*, 2008, 13-14.

(15) Legislative Decree No. 104 of 2010, Italian Code of Administrative Process, Artt. 120-125.

(16) OECD, *Integrity in Public Procurement. Good Practice from A to Z*, 2007, in *http://www.oecd.org/*, 25; United Nations Office on Drug and Crime (UNODC), *Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*, 2013, 23.

(17) D. I. GORDON, *Bid Protests: The Costs are Real, But the Benefits Outweigh Them*, in *GW Legal Studies Research Paper No. 2013/41*, 2013, 11 et seq.; ID., *Constructing a Bid Protest Process: The Choices That Every Procurement Challenge System Must Make*, in *PCLJ*, 2006, 427 et seq.

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 winner bidder.(18) In Europe, once in place any contract is considered "sacred", thus excluding all sorts of interferences from third parties (e.g. unsuccessful tenderers). For example, in some EU Member States, such as Italy and Germany, the jurisdictional competence in the awarding phase differs from the one in the execution phase.(19)

Nonetheless, contracts resulting from a competitive tendering procedure seem to be different from common contracts, even during the execution phase. Similar questions have arisen in both the EU and the U.S., as the problem relates to the fact that a contract that is signed subsequent to a competitive bidding procedure cannot be modified in the manner of a common private contract, even if the parties agree.

The U.S. Federal Government has the duty to procure goods, services and works through a competitive process, similar to the European Directives. U.S. agencies have to "obtain full and open competition through the use of competitive procedures".(20)

Unlike in the EU Directives, in the U.S. there is a strong attention on the whole procurement process cycle, and particularly on the contract management. The "delivered" quality should, in principle, coincide with what has been promised.

In both systems, the problems are not minimal changes, but rather significant changes during the management of the contract, as they can affect the competition principle in the selection and fair treatment of unsuccessful tenderers and also of other economic operators who might have been interested in the contract.

Until recently, EU Directives did not deal with this issue, as contract management was left up to the 28 national legal systems.(21) Nonetheless, in order to safeguard the principles of non-discrimination, transparency and competition, the EU Court of Justice limited the possibility of changing the terms of a

(18) R. D. ANDERSON – W. E. KOVACIC, *Competition policy and international trade liberalisation: essential complements to ensure good performance in public procurement markets*, in *PPLR*, 2009, 67; C. YUKINS, *Are IDIQs Inefficient? Sharing Lessons with European Framework Contracting*, in *PCLJ* 2008, 545.

(19) For Italian jurisdictional competence see: A. MASSERA – M. SIMONCINI, *Basics of Public contracts in Italy*, in *Ius-Publicum Network Review*, February 2011, available at *http://www.ius-publicum.com/repository/uploads/21_02_2011_14_41_Massera%20inglese.pdf*, 2 et seq.; G. M. RACCA, *Public contracts*, in *Ius-Publicum Network Review*, November 2010, available at *http://www.ius-publicum.com/repository/uploads/06_12_2010_10_17_Raccaeng.pdf,* 19 et seq. For German Jurisdictional competence see: U. STELKENS, *Allemagne/Germany*, in R. Noguellou & U. Stelkens (eds.) in R. Noguellou & U. Stelkens (eds.) *Droit comparé des contrats publics*, Bruylant, Bruxelles, 2010, 332 et seq.; M. BURGI, *Enforcement of EU Public Procurement Rules – A Report about the German Remedies System*, S. Treumer & F. Lichère (eds.), *Enforcement of EU Public Procurement Rules*, Copenhagen, 2011.

(20) Competition in Contracting Act of 1984 – CICA, 10 U.S.C. § 2304(a)(1)(A).

(21) M. TRYBUS, *Public contracts in European Union internal market law: foundations and requirements*, in R. Noguellou – U. Stelkens (eds. by) *Droit compare des Contrats Publics – Comparative Law on Public Contracts*, Bruxelles, 2010, 81-82.

contract after the award.(22) The ECJ maintained that material amendments are those modifications beyond the scope of the awarded contract that bidders could not have reasonably anticipated at the time of the original award when they joined the competition. Such material amendments to the subject matter of the contract might have led to a different participation (different set of bidders) and, possibly, to a different award (different winning bidder).(23) According to ECJ case law, material amendments to a contract during its currency are equivalent to the illegal direct award of a public contract, without a contract notice. This allows the ECJ to examine the performance of a public procurement process as amended (which would otherwise fall outside of EU competence) and to declare it ineffective in an endeavor "to restore competition and to create new business opportunities for those economic operators which have been deprived illegally of their opportunity to compete."(24)

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

U.S. public contract regulations seem to be more flexible regarding possible subsequent modifications: even when a contract has been signed, not only the Court but also some other authorities can step in and undo it, and normally no damages are provided.(25)

Material or cardinal changes should, in principle, not be admitted.(26) The contract contains the "changes clause"(27) that permits unilateral

(22) ECJ, 19 June 2008, *Pressetext Nachrichtenagentur GmbH* v *Republik Österreich* in Case C-454/06, ECR I-4401. A. Brown, *When Do Changes to an Existing Public Contract Amount to the Award of a New Contract for the Purposes of the EU Procurement Rules? Guidance at Last in Pressetext Nachrichtenagentur GmbH (Case C-454/06),* in *PPLR*, NA253, NA 255 (2008). See: P. Craig, *Specific Powers of Public Contractors*, in R. Noguellou – U. Stelkens (eds. by) *Droit compare des Contrats Publics – Comparative Law on Public Contracts*, *cit.*, 173 et seq.

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

(24) Directive 2007/66/EC, Wh. No. 14.

(25) See FAR 33.102.

(26) 41 U.S.C. § 601 et seq. 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.

(27) F. T. Vom Baur, *The Origin of the Changes Clause in Naval Procurement*, in *PCLJ*, 1976, 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.

changes as long as the modifications fall "within the general scope of the contract".(28) 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 go on and 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.(29) 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.(30)

The lack of transparency and broad discretion of the procurement official might sometimes favour malicious agreements, as sometimes occurs in the EU.

The corrupt agreement can take place even before the award has been made, and favours attractive tenders getting the contract with an intent to improve the terms afterwards, to the benefit of the contractor in return for compensation for the procurement official.

In the EU, where there is often a lack of control of contract management, the agreement can be on a lower level of quality than promised, which is accepted by the contracting official in contrast with the contract provisions.

The symptoms of a lack of integrity emerge especially when the modifications are eagerly accepted by the contractor, as they are favourable.(31) The favour can also simply be that of obtaining a contract without competition at the proper conditions, or even at particularly favourable conditions.(32)

In such cases, the former unsuccessful tenderers and other potentially interested economic operators may challenge the contracting authority on the basis that a "full and open competition" had not been assured.

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(28) Market Facts, Inc., Comp. Gen. B-210226: May 28, 1985, available at *http://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.

(29) O. DEKEL, *Modification of a government contract awarded following a competitive procedure*, in *PCLJ*, 2009, 405 et seq.

(30) O. DEKEL, *Modification of a government contract awarded following a competitive procedure*, *cit.*, 405 et seq.

(31) J. CIBINIC – R. NASH – J. NAGLE, *Administration of government contracts*, 4th ed 2006, 382.

(32) United Nations Office on Drug and Crime (UNODC), *Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*, *cit.*, 23. "Due to an understanding between the contractor and a corrupt public official, deviations from what has been agreed to between the parties, such as poor quality or defective performance, may not result in any negative consequences. The same is true for unjustified change orders, that is, orders which increase the scope of goods or services and, at the same time, the costs of the contract, often through highly uncompetitive prices".

The U.S. federal procurement system assures equal treatment of bidders, although this is not the letter of the law.(33) It is explicit that, while all "contractors and prospective contractors shall be treated fairly and impartially", they "need not be treated the same."(34) In fact, many of the critical issues in U.S. procurement law – whether bidders with very low rankings, for example, should have the right to challenge an award – flow from the core problem that bidders are not equally treated.

This is an important issue that allows for a useful comparison with the EU principle of equal treatment in the award phase, which allows any tenderer to challenge the award decision. In the EU, some legal systems, such as in Italy, provide for the possibility of scrolling the ranking to the fifth position in the event of serious infringements, to replace the former winner. Such a rule seems to make it legitimate for the ranked tenderer to challenge, in the case of *inertia* on the part of the contract officer in terminating the contract following serious infringements during its execution.

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.(35) The regulations set out the procedure by which the contracting officer may act (the documents that must be completed, etc.)(36) but provide poor guidance as to the circumstances under which such modifications are to be deemed legitimate. From the U.S. perspective, the question is defined by the so-called "cardinal change doctrine," whereby an authority is not permitted to compel a contractor to perform work constituting a cardinal or material change to a contract. A cardinal or material change is construed to occur "when the government effects an alteration in the work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for".(37)

The issue of "cardinal change" has been applied for many years by the U.S. courts.(38) While they refer to it using different denominations ("*essential*";(39)

(33) C. R. YUKINS, *Editor's Note: a Response to Omer Dekel's "Legal Theory of Competitive Bidding*, in *PCLJ*,2008,

(34) FAR, Section 1.102-2.

(35) 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."

(36) FAR 43.101(a)(1).

(37) *AT&T Commc'ns, Inc.* v. *Wiltel, Inc.,* 1 F.3d 1201, 1205 (Fed. Cl. 1993) (quoting Allied Materials & Equip. v. United States, 569 F.2d 562, 563–64 (Ct. Cl. 1978)); see also *Mgmt. Solutions & Sys., Inc. v. United States*, 75 Fed. Cl. 820, 830 (2007); *Gen. Dynamics Corp. v. United States*, 585 F.2d 457, 462 (Ct. Cl. 1978); *Powell*, supra note 38, at 378.

(38) *Emergent BioSolutions Inc.*, B-402576, June 8, 2010; *Lasmer Industries, Inc.* B-400866.2, B-400916.2, B-401046, March 30, 2009; *Blackwater Lodge & Training ctr. Inc.,* B-311000.2, November 10, 2008; *Atlantic Coast Contracting, Inc, B-288969.4,* June 21, 2002; *Engineering & professional Services. Inc*., B-289331, Jan. 28, 2002; *MCI Telecomms. Corp*., B-276659.2, Sept. 29, 1997.

(39) *Atlantic Coast Contracting, Inc, B-288969.4,* June 21st, 2002.

"*material*";(40) "*beyond-the-scope*"(41)), they always address the same keypoint, that a modification which has substantially changed the original nature and purpose of a public contract requires a new award of the contract in order to avoid infringing competition among the bidders.

Nonetheless, 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.

In determining whether or not a modification constitutes a "cardinal change" that triggers 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 awarded(42) and as modified.(43) It is also necessary to consider whether the solicitation for the original contract adequately advised potential tenderers as to the type of change created by the modification, and thus whether the modification could have changed the field of competition.(44)

The timing of the change must also be taken into consideration. The more time that has elapsed since the signing of the contract, the stronger the case for allowing a modification.(45) When a request to change the terms of a contract is made close to the signing of the contract, there could be the suspicion that a corrupt agreement has been entered into.

Good practice includes the setting-up of an effective monitoring system regarding the verification of compliant contract performance, for both contract terms and specifications. Contract changes should be allowed only if this possibility is provided for in the contract or the law (e.g. by a clear and pre-established monetary cap on the contract's value), or if those changes do not substantially change the essence of the contract.(46)

With the same purpose, the introduction of a kind of "presumption of impermissibility" that could be rebutted only when the changes are necessary to

(40) *Lasmer Industries, Inc.* B-400866.2, B-400916.2, B-401046, March 30th, 2009.

(41) *Armed Forces Hospitality*, LLC, B-298978.2, October 1st, 2009.

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

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

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

(45) The Comptroller General has also criticized changes made immediately after the solicitation process has concluded. See United Tel. Co. of the Nw., Comp. Gen. B-246977, Apr. 20, 1992, 92-1 CPD 374, at 7–8; Midland Maint., Inc., Comp. Gen. B-184247, Aug. 5, 1976, 76-2 CPD 127, at 3–4; A & J Mfg. Co., Comp. Gen. B-178163, May 10, 1974, 74-1 CPD 240 at 3.

(46) United Nations Office on Drug and Crime (UNODC), *Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*, *cit.*, 23.

the successful implementation of the contract, has also been proposed.(47) The contracting entity should justify the exception to the presumption of impermissibility on a case-by-case basis.

3. The limits to admitted changes and the respect of fair competition

Following ECJ case law in this regard, the reform of the current procurement Directives raised the question of the limits to the material amendments that can be admitted during the execution of the contract.(48) The New Directive(49) describes five different circumstances under which the contracts or framework agreements may be modified without a new award procedure.

From a U.S. point of view, the question always relates to the limits of changes "within the scope of the contract" provided in the public interest and at proper conditions. The fundamental issue is whether or not a modification of the contract, or the issuance of a task or delivery order under a framework agreement, circumvents the general statutory requirement that agencies obtain a full and open competition through the use of competitive procedures when procuring their requirements.(50)

The new Directive includes a provision on material changes to contracts – what U.S. courts have traditionally called "cardinal" changes – that provides a somewhat formalistic structure around a very economically-based decision of the EU Court of Justice. When new conditions introduce new terms which would have brought other bidders into the original competition, the amendments to the original contract are material, and should trigger a new competition.(51) Courts also play pivotal roles in shaping procurement rules,(52) as the new directive points out.

3.1. A new award procedure is not required where the modifications "have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses". Contracting authorities have to clarify such

(47) O. DEKEL, *Modification of a government contract awarded following a competitive procedure*, cit., 405 et seq.

(48) Directive 2014/24/EU, Art. 72.

(49) Directive 2014/24/EU, Art. 72.

(50) See 10 U.S.C. § 2304(a)(1)(A); *Lasmer Indus., Inc.*, Comp. Gen. B-401046 *et al.*, 2009 CPD 77 (2009).

(51) C. R. YUKINS, *The European Procurement Directives and the Transatlantic Trade & Investment Partnership (T-TIP): Advancing U.S. – European Trade And Cooperation in Procurement*, forthcoming.

(52) ECJ, *Pressetext Nachrichtenagentur GmbH* v *Republik Österreich* (C-454/06) *cit.* An amendment to a public contract during its currency may be regarded as being material when it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted. G. M. RACCA – R. CAVALLO PERIN – G. L. ALBANO, *Competition in the Execution Phase of Public Procurement,* in *PCLJ*, 2011, 89.

clauses in the procurement 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".(53) An extension of the contract, as a consequence of an objectively evaluated high quality performance, whenever provided, might be possible.(54) 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.(55) The Directive admits such modifications of the original contract, "irrespective of their monetary value". Nonetheless, the contract documents must set out the maximum value of the contract in order to enable the economic operators to know the possible value of the contract in advance. The discretionary power to modify the value and terms of the contract is limited by the exclusion of the alteration to the overall nature of the contract or the framework agreement.(56)

As mentioned above, from a U.S. perspective, the contract itself is a source that empowers the procuring official to make modifications because the procurement regulations require that a government contract contain a

(53) Directive 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".

(54) K. HARTLEV – M. WAHL LILJENBØL, *Changes to Existing Contracts Under the EU Public Procurement Rules and the Drafting of Review clauses to Avoid the Need for a New Tender*, in *PPLR*, 2013, 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*, in *PPLR*, 2012, 179.

(55) United Nations Office on Drug and Crime (UNODC), *Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*, *cit.*, 23.

(56) ECJ, 29 April 2004, *EC Commission* v *CAS Succhi di Frutta SpA* in Case C-496/99 P, para. 118. The ECJ state that "the contracting authority wish, for specific reasons, to be able to amend some conditions of the invitation to tender, after the successful tenderer has been selected, it is required expressly to provide for that possibility, as well as for the relevant detailed rules, in the notice of invitation to tender which has been drawn up by the authority itself and defines the framework within which the procedure must be carried out, so that all the undertakings interested in taking part in the procurement procedure are aware of that possibility from the outset and are therefore on an equal footing when formulating their respective tenders". ECJ, *Pressetext Nachrichtenagentur GmbH* v *Republik Österreich* (C-454/06), *cit.*, para. 57. The *Pressetext* case law state that "the changeover to the euro, an existing contract is changed in the sense that the prices initially expressed in national currency are converted into euros, it is not a material contractual amendment but only an adjustment of the contract, provided that the amounts in euros are rounded off in accordance with the provisions in force, including those of Council Regulation (EC) No. 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro". According to ECJ "Where the rounding off of the prices converted into euros exceeds the amount authorised by the relevant provisions, that is an amendment to the intrinsic amount of the prices provided for in the initial contract". "Nevertheless, the conversion of contract prices into euros during the course of the contract may be accompanied by an adjustment of their intrinsic amount without giving rise to a new award of a contract, provided the adjustment is minimal and objectively justified; this is so where it tends to facilitate the performance of the contract, for example, by simplifying billing procedures". ECJ, April 22th, 2010, *EU Commission* v. *Kingdom of Spain*, in Case C-423/07, concerning the extension of the subject matter of a works concession for the construction, maintenance and operation of a motorway.

"changes clause"(57) granting the discretion to introduce unilateral changes, as long as the modification falls "within the general scope of the contract".(58)

The text of this clause provides that if the contractor objects to the nature of the modificiation, it must perform the changed work and may only request proper compensation for the change that has been made. Whenever the monetary demand exceeds the appropriate amount, as evaluated by the procuring official, and the parties are unsuccessful in resolving this issue, the dispute resolution mechanism, as laid down in the contract, will govern its resolution. The contractor is obliged to implement the modification requested by the agency even if the parties disagree on the price owed to the contractor for the modification.(59) The "changes clause" does not contain any instructions as to when a modification of a contract is legitimate and proper and when it is not.(60)

In U.S. case 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".(61) 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

(57) *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.

(58) 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).

(59) FAR 52.243-1(e). The Federal Court reverses a decision of the General Services Administration Board of Contract Appeals. See *AT & T Communications, Inc.* v. *Wiltel, Inc.*, 1 F.3d 1201 (Fed. Cir. 1992); *Wiltel, Inc.* v. *General Services Administration*, GSBCA No. 11857-P, Aug. 4, 1992, 93-1 BCA 25,314. The GSBCA held that a modification adding dedicated telecommunication services was outside the scope of the original competition, and was therefore a new service requiring a new competition. The Federal Circuit held that the GSBCA had erred in its reading of the Services Improvements clause, and that the this clause allowed the contractors to offer "any service advantage". The GSBCA had looked to a long line of General Accounting Office (GAO) decisions to decide whether T3 service was outside the scope of the original competition. While the GSBCA recognized that the FTS2000 contracts include a "Service Improvements" clause allowing the contractors to propose improvements to offered services or features, the GSBCA concluded that T3 service was a new or additional service, and not an improvement. The Federal Circuit recognizes that the Competition in Contracting Act of 1984 offers no guidance to decide when a modification of a contract requires a new competition, else falls within the scope of the original competitive procurement. The Federal Circuit looked to a previous GSBCA decision on modifications within the scope of the FTS2000 contracts, MCI Telecommunications Corp., GSBCA No. 10450-P, Feb. 28, 1990, 90-2 BCA 22,735, and noting the GSBCA's conclusion there that "all of the offerors believed that the successful vendors would provide virtually all commercially available attercity telecommunications services," held that the GSBCA should have similarly concluded in Wiltel that the offerors would also have believed T3 service to be within the scope of the contract.

(60) O. DEKEL, *Modification of a government contract awarded following a competitive procedure*, *cit.*, 414.

(61) FAR 17.207(f).

original scope of the contract: a substantial price increase alone – as long as it refers to additional services carried out by the same contractor and in relation to the original contract – does not establish that the modification is beyond the scope of the contract.

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.(62)

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.(63)

3.2. An "impossible change of contractor" occurs whenever additional works, services or supplies must be provided for "economic or technical reasons",(64) or whenever such a change "would cause significant inconvenience or substantial duplication of costs".(65) This provision defines cases in which it could be possible to use the negotiated procedure without prior publication. The proposal provides a quantification of the admitted contract modifications. Any increase in price may not be higher than 50% of the value of the original contract.(66) 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".(67) Consecutive modifications are admitted, always according to the same principle.(68)

In the case of several successive modifications, the limitations attached to the increase in price shall apply to "each modification". Obviously, any modification, and in particular subsequent modifications, shall not be aimed at circumventing the Directive.

As previously noted, from a U.S. perspective, there are situations where adjusting the terms of a contract to meet actual circumstances is considered

(62) *Atlantic Coast Contracting Inc.*, B-288969.4, June 21, 2002, 2.

(63) 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, June 8, 2010, 14.

(64) Directive 2014/24/EU, Art. 72(1)(b)(i).

(65) Directive 2014/24/EU, Art.72(1)(b)(ii).

(66) Directive 2014/24/EU, Art. 72(1)(b).

(67) Directive 2014/24/EU, Art.72(3).

(68) 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.

to be more efficient than a new solicitation of tenders or continuing to follow the original terms of the contract. 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.(69) 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.(70) Modifications are considered to be legitimate if related to a situation in which the failure to modify a contract will cause the contractor to suffer such heavy losses as to be unable to complete the project or supply the product, with the result that national security may be threatened.(71) A situation in which the contractor suffers a loss as a result of an act committed by the administrative body itself can permit the required amendments.(72)

3.3. "Unpredictable circumstances" can justify contract amendments whenever they could not have been foreseen by a diligent contracting authority, provided that they do not "alter the overall nature of the contract".(73) 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, when modifications are motivated by unforeseeable circumstances, the tendency is to admit them. 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. The need for modifications may arise during the performance of a long-term contract for health, educational, or social services, where the needs change. The unexpected discovery of an archaeological site or a mineral quarry in the middle of paving a new highway could also justify modifications.(74) The contracts should be amended in order to accommodate a new set of circumstances, as continuing the implementation of the original contract would not only be highly impractical but also clearly harmful to the public interest. Contracts for construction or demolition may contain a clause addressing "differing site conditions",(75) which provides a remedy for two types of

(69) O. DEKEL, *Modification of a government contract awarded following a competitive procedure*, *cit.*, 407.
(70) FAR 50.301.
(71) FAR 50.302-1(a).
(72) FAR 50.302-1(b). FAR 50.302-2.
(73) As provided in Directive 2014/24/EU, Art. 72(1)(c)(ii).
(74) O. DEKEL, *Modification of a government contract awarded following a competitive procedure*, *cit.*, 405-406.
(75) FAR 52.236-2.

condition changes: "subsurface or latent physical conditions at the site which differ materially from those indicated in the contract" and "unknown physical conditions *(...)* which differ materially from those ordinarily encountered" in this type of work and in the geographical area where the project is located. If the requirements contained in this FAR clause are satisfied, the contracting officer may equitably adjust the contract price and duration.

The foreseeability test also applies to bidders, and is one of the main criteria that courts apply to decide upon the legitimacy of a modification.(76)

Integrity issues could arise whenever the need to amend a contract derives not from circumstances that were unforeseeable or outside the procuring agency's control, but from faulty assessments made by the contracting agency: erroneous design estimates discovered in the middle of a construction project that necessitate more excavation than the amount specified in the contract, or a long-term contract for the supply of computerization work that fails to provide for changes in technology that were foreseeable at the time at which the bid was solicited.(77) The question could relate to whether or not the faulty assessment was due only to incompetence or to corruption. Nonetheless, modifications in such cases require a higher degree of inquiry on the part of the authorizing body to ensure that the modification resulted from an unintended error and not from an ulterior motive. There is the risk that allowing the modification could send the wrong message that "negligence pays".(78)

A step forward toward integrity in Europe can be seen in the provision that, within the EU, the "impossibility of changing the contractor" and the "unpredictable circumstances" require the publication of a notice in the OJEU.(79) The aim of this publicity is to assure external control over respect of the provided limits by the other economic operators who participated in the original tender and by all the economic operators of the relevant sector, as well as by associations, citizens and any stakeholder of the procurement system. In such situations, transparency can promote integrity, by preventing possible abuses.

3.4. A modification may also concern a change of contractor by which a new supplier replaces the original awardee.(80) In ECJ case law,(81) a change of

(76) *Makro Janitorial Servs., Inc.*, Comp Gen. B-282690, Aug. 18, 1999, 99-2 CPD 39, at 3; *MCI Telecomms. Corp., Comp. Gen.* B-276659, Sept. 29, 1997, 97-2 CPD 90, at 8 Am. Air Filter Co., Comp. Gen. B-188408, June 19, 1978, 78-1 CPD 443, at 9–10.

(77) O. DEKEL, *Modification of a government contract awarded following a competitive procedure*, *cit.*, 406.

(78) O. DEKEL, *Modification of a government contract awarded following a competitive procedure*, *cit.*, 406.

(79) Directive 2014/24/EU, Art.72 (1).

(80) Directive 2014/24/EU, Art.72(1)(d).

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

contractor was considered as a substantial amendment to an essential contractual term, unless this replacement is permitted by the initial contract. This decision raised some concerns as the case is not infrequent, especially in work procurement.(82) 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 subcontracting".(83) In that case, the ECJ distinguished a simple internal reorganisation of an economic operator(84) from cases where a transfer of shares during the currency of the contract(85) is made, or where the "transfer of shares in the subsidiary to a third party was already provided for at the time of transfer of the activities to the subsidiary".(86) 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".(87) 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".(88)

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

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

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

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

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

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

(88) "The terms 'awarding' and 'awarded' (…) must be interpreted as not covering a situation, such as, where services supplied to the contracting authority by the initial service provider are transferred to another service provider established as a limited liability company, the sole shareholder of which is the initial service provider, controlling the new service provider and giving it instructions, provided that the initial service provider continues to assume responsibility for compliance with the contractual

A change of subcontractor, even if the possibility of a change is provided for in the contract, 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 particular characteristics of the services concerned, a "decisive factor in concluding the contract, which is in any event for the referring court to ascertain".(89)

According to the new Directive, a modification of the contractor is permitted whenever it is provided by a review clause or option in the procurement documents or in case of "corporate reconstruction, merger, acquisition or insolvency".(90) Obviously, the new contractor has to fulfil all the qualitative criteria provided in the initial award procedure.

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".(91) Such a provision seems to recall provisions in French law that admit the extension to the awarding authority of liability towards subcontractors, for the contractual relationships among the contractor and its subcontractors.(92)

3.5. 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.(93) The listing of the cases of material amendment that make the contract modification ineffective clarifies the limits set to the discretion of the contracting authorities for the benefit of transparency and competition among economic operators. A further specification concerns modifications below the amount of the EU thresholds and that do not exceed 15% of the initial contract value for works contracts and 10% for service and supply contracts.(94) The risk to be prevented is the illicit fragmentation of the contract value in the initial award procedure and its increase with successive modifications.

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obligations". See also: ECJ, *Pressetext Nachrichtenagentur GmbH* v *Republik Österreich* (C-454/06), *cit.*, para. 52.

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

(90) Directive No. 2014/24/EU, Art.72 (1)(d)(ii).

(91) Directive No. 2014/24/EU, Art. 72(1)(d)(iii).

(92) R. Noguellou, *France*, *cit.*, 691.

(93) Directive No. 2014/24/EU, Art. 72(1)(e).

(94) Directive No. 2014/24/EU, Art. 72(2). A. Giannelli, *Performance and renegotiation of public contracts*, in *Ius Publicum Network Review*, 2013, available at *www.ius-publicum.com/pagina.php?lang=en&pag=report&id=44*. See also Law No. 127 dated 8 February 1995, Art. 8, establishing that any proposed amendment to a public contract involving a price increase of at least 5% of the original price should be subjected to a mandatory but non-binding opinion by the tender commission who had decreed the assignment.

4. Substantial modifications that require a new award procedure

Amendments to the contract shall be considered to be substantial and thus ineffective whenever the contract or the framework agreement is "materially different in character from the one initially concluded".(95) The EU Directive draws on the ECJ case law regarding the definition of forbidden "substantial modifications" of the contract.

The principle of transparency is essentially intended to preclude any risk of conflicts of interest, favoritism or arbitrariness on the part of the contracting authority.(96) 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.(97)

Therefore, although any tender which does not comply with the specified conditions must obviously be rejected, "the contracting authority nevertheless may not alter the general scheme of the invitation to tender by subsequently proceeding unilaterally to amend one of the essential conditions for the award, in particular if it is a condition which, had it been included in the notice of invitation to tender, would have made it possible for tenderers to submit a substantially different tender".(98)

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

(95) Directive No. 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.

(96) S. Rose-Ackerman, *Corruption and conflicts of interest*, in J.-B. Auby – E. Breen – T. Perroud (eds. by), *Corruption And Conflicts Of Interest. A Comparative Law Approach*, Edward Elgar Publishing, 2014, 4 et seq.

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

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

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.

The recent provision qualifies as substantial a modification that "changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement". This change would undermine fair competition, as the award is decided through the evaluation of the tenders and, in the EU, through a precise ranking subsequent to an objective evaluation. Significantly changing the economic balance means that the winner is favoured and the previous competitive selection is thwarted.(99)

Even when the award procedure has been carried out in strict respect of the principles of fairness and transparency, the contractor's infringements or non-compliance with contractual clauses might modify the economic balance and, thereby distorting bids ranking *a posteriori*, thwart the competitive selection process.(100) In such cases, opportunism in the contract execution has a retrospective impact on competition at the award stage. Consequently, losing tenderers should have legal means to act at the execution stage as they can file claims and complaints. Indeed, throughout the award phase, and by extension during the execution of the contract, unsuccessful tenderers enjoy a « right to fairness and competition » according to European and national rules. These rights are mandatory and their infringement can lead to the ineffectiveness of the contract at stake.(101) Similarly, material amendments outside the scope

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

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

(101) Directive No. 2007/66/EC, Art. 1, *Amendments to Directive 89/665/EEC*, Art. 2(d), Ineffectiveness: "1. Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting authority or that its ineffectiveness is the result of a decision of such a review body in any of the following cases: (a) if the contracting authority has awarded a contract without prior publication of a contract notice in the Official Journal of the European Union without this being permissible in accordance with Directive 2004/18/EC; (b) in case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) of this Directive, if this infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies where such an infringement is combined with an infringement of Directive 2004/18/EC, if that infringement has affected the chances of the tenderer applying for a review to obtain the contract; (c) in the cases referred to in the second subparagraph of Article 2b(c) of this Directive, if Member States have invoked the derogation from the standstill period for contracts based on a framework agreement and a dynamic purchasing system". For the Italian System see the Administrative process code: Legislative Decree July 2, 2010, No. 104, Art. 121.

of the contract preclude other undertakings from taking part in competitions for the award of a new, different contract. In accordance with the Remedies Directive,(102) in such cases the contract becomes ineffective and void.

Oversight on the part of third parties in relation to contract performance could prevent corruptive pacts between the contractor and the procurement agent which undermine the ability to provide quality goods and services to the citizens.

The competition principle must be safeguarded until the end of the performance so that "promised quality" (as identified in the competitive award) does in fact coincide with "delivered quality".(103) This is important with respect to the competition principle but also for the integrity of the system as the main cases of corruption recently reported in the EU occurred during the execution phase.(104) As the correction of the award for the benefit of the best tenderer is provided, there should also be the possibility to assure a correct execution for the benefit of citizens.

As previously noted, in the U.S. federal procurement system, the main goal is to obtain successful completion of contract performance. Moreover, unlike in Europe, when the award is subsequent to a competitive negotiation there is no precise ranking of the tenderers and so there may not be a second best with an interest in replacing the defaulting winner.

Restricting the power of the Government to make changes to a contract awarded after competitive bidding may cause frustration and dissatisfaction among procurement officials. The competitive bidding mechanism could be considered too rigid to act efficiently, and may lead to a distrust of the competitive procedure altogether. Due to the ambiguity of the regulations, the courts have developed case law(105) in an attempt to define the situations in which a modification of a procurement contract is legitimate.

(102) Directive No. 2007/66/EC of (amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts) that was implemented by Italian Legislative Decree March 20, 2010, No. 53.

(103) G. M. Racca – R. Cavallo Perin, *Material Amendments of Public Contracts during their Terms: From violations of Competitions to Symptoms of Corruption*, in *EPPPL*, 2013, 291-292. Some problems about the execution of the contracts are raised also in the recent Green Paper *on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market*, *supra* note 12, § 2.5.

(104) EU Commission, *Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report*, COM(2014) 38 final, in *http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_france_chapter_en.pdf*, 27 et seq.

(105) The issue of legitimacy of a modification to a procurement contract was developed by rulings in two separate court systems. The first is the U.S. Court of Federal Claims, which is authorized, inter alia, to hear cases of infringement of the duty to hold a competitive bidding procedure established in CICA. The second is the Comptroller General, who acts by virtue of the Competition in Contracting Act.

The European tradition of a "sacred" contract which, after it is signed, becomes an exclusive matter between parties and national regulations is overcome by the provision of the European Court of Justice and the new Directive concerning limits to "material amendments".(106) Whenever they occur during the execution phase, "material amendments" are in breach of EU law either if they are added to the original contract (extensions), or if they take the form of a worse-than-promised performance.(107) This encroachment into contract law is necessary to protect competitors against potential violations of the principle of transparency and fair competition in the award of the public procurement.

5. *The role of unsuccessful tenderers after the signing of the contract*

The failure to monitor the contractor's performance and a lack of supervision over the quality and timing of the process is one of the principal risks in public contracts.(108) The monitoring of contract management assumes a strategic role to ensure the correct performance of public contracts.(109) 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. This is also a way to protect the integrity and correctness of the choices made by the contracting authority and to detect unlawful decisions or errors of assessment.

A rigorous oversight of contract implementation is therefore of paramount importance. In that regard, it seems increasingly necessary for unsuccessful tenderers to act as diligent "watchdogs", verifying that the review process functions appropriately, and challenging infringements. This however requires a certain level of transparency in the management of the contract.(110) Unsuc-

(106) ECJ, *Pressetext Nachrichtenagentur GmbH* v *Republik Österreich*, *cit.*, an amendment to the initial contract may be regarded as being material when it extends the scope of the contract considerably to encompass services not initially covered. This latter interpretation is confirmed in the provisions that impose restrictions on the extent to which contracting authorities may use the negotiated procedure for awarding services in addition to those covered by an initial contract. An amendment may also be regarded as being material when it changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract. The same principle is established in G.M. Racca – R. Cavallo Perin – G. L. Albano, *Competition in the execution phase of public procurement*, *cit.*, 105.

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

(108) OECD, *Implementing the OECD Principles for Integrity in Public Procurement*, *cit.*, 81.

(109) OECD, *OECD Principles for Integrity in Public Procurement*, 2009, available at *www.oecd.org/gov/ethics/48994520.pdf*, 69 et seq.

(110) S. L. Schooner – D. I. Gordon – J. L. Clark, *Public Procurement Systems: Unpacking Stakeholder Aspirations and Expectations*, *cit.*, 2008, 13-14; United Nations Commission on International Trade Law, United Nations Convention against Corruption: implementing procurement-related aspects (Second session, Nusa Dua, Indonesia, 28 January-1 February 2008), available at *www.uncitral.org/uncitral/en/index.html*.

cessful tenderers ought to be assured 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 behavior 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.(111)

The recent EU provision on the publication of information relating to the modification of awarded contracts in the OJEU(112) might strengthen the monitoring of unsuccessful tenderers, other economic operators and civil society. In this perspective, associations, taxpayers or users may also be interested in surveying the modifications and any possible misconduct or failure that may occur in the performance of a public contract.

In Europe, regulations on public procurement set fairly strict and (presumed) objective criteria for the award of public contracts. Competing tenders are evaluated according to how many of the announced points(113) they score for (both technical and financial) criteria and sub-criteria.(114) Despite the fact that tenders have to be evaluated objectively, or perhaps for this reason, competition is frequently fierce. Tenderers tend to scrutinize each other and,

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

(112) Directive No. 2014/24/EU, Art. 72 (1).

(113) Directive No. 2004/18/EC of Art. 23 for the technical specifications and Art. 53(1), for the awarding criteria, where is provided that "when the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject-matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost effectiveness, after sales service and technical assistance, delivery date and delivery period or period of completion". The most recurrent scales are Sh = [0,100] and St = [0,1000]. For instance, if the adopted scale is S_h and quality has a weight of 60%, then up to 60 points are awarded to a tender's technical specifications while up to 40 points are awarded to the price. It is worth mentioning though that public procurement regulations in the US moved away from a numerical comparison of tenders.

(114) Directive No. 2004/18/EC, Art. 53(2), where is provided that "Without prejudice to the provisions of the third subparagraph, in the case referred to in paragraph 1(a) the contracting authority shall specify in the contract notice or in the contract documents or, in the case of a competitive dialogue, in the descriptive document, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender. Those weightings can be expressed by providing for a range with an appropriate maximum spread. Where, in the opinion of the contracting authority, weighting is not possible for demonstrable reasons, the contracting authority shall indicate in the contract notice or contract documents or, in the case of a competitive dialogue, in the descriptive document, the criteria in descending order of importance". See: ECJ, June 14, 2007, *Medipac-Kazantzidis AE* v *Venizeleio-Pananeio* in Case C-6/05.

most importantly, control how the procuring entity makes use of those objective awarding criteria. Unsuccessful tenderers can file a claim(115) on the procuring entity's evaluation of another tenderer's offer even on the basis of minimum differences in the points assigned to an element of the tender. This can be a key factor for the award of the contract, thus overturning the result of the award itself. According to the European Directives, the ranking can be modified in favor of the protesting tenderer.(116)

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. However, in a close competition, a tenderer included in the ranking might assure the more effective contract oversight. If, for instance, the highest-ranked tender were 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. This is why, in Italy, it is also possible to provide that the second-highest tender has the right to replace the winner in the case of termination of the contract due to serious infringements.(117)

Since losing tenderers have the right to a fair competition throughout the *whole* cycle of the procurement process and therefore even during the execution phase, they are entitled to provide evidence on the infringement of the selection procedure rules and could also be active in the monitoring of the subsequent execution phase.(118)

(115) H. Schröder – U. Stelkens, *EU Public Contract Litigation*, in M. Trybus – R. Caranta – G. Edelstam (eds. by), *EU Public Contract Law Public Procurement and Beyond*, *cit.*, 443 et seq.; B. Marchetti, *Il sistema di risoluzione delle bid disputes nel modello federale statunitense di public procurement*, in *Riv. Trim. Dir. Pubb.*, 2009, 963.

(116) See generally: Directive No. 2007/66/EC, Wh. No. 13 and 14.

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

(118) 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.

Relying on non-winning tenderers to monitor winners' performance might be useful as the former have an in-depth knowledge of the subject matter of the contract and are endowed with the suitable professional skills to monitor the winner's performance. This might help alleviate the moral hazard problem arising at the execution stage in relation to the contracting authority.(119)

This monitoring task could be assigned to them by the procuring entity itself through precise clauses listed in the contract documents and could be linked to the provision of their right to substitute the winner in the event of a termination of the contract. Also, "integrity pacts" could be ueful instruments for setting transparency and monitoring provisions.(120) Such provisions should be carefully defined in order to prevent colluding strategies resembling those that arise in a second-lowest bid competitive mechanism.(121) It would be necessary, for instance, to provide that the subsequent tenderer in the ranking must accept the same conditions as those set in the terminated contract.(122)

What is more, 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 contracting agency was infringing upon the duty imposed on it(123) to award procurement contracts through a full and open competition.

The decisions mainly confirm that a modification to the terms of a contract executed following a competitive bidding procedure was considered to be

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GINTER – N. PARREST – M. A. SIMOVART, *Access to the content of public procurement contracts: the case for a general EU-law duty of disclosure*, in *PPLR*, 2013, 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 treatment are fundamental principles of procurement law and in fact inherent to exercise of public powers in general. These principles do not cease to apply after a procurement procedure ends".

(119) G. NAPOLITANO – M. ABRESCIA, *Analisi economica del diritto pubblico*, *cit.*, although the authors seem to consider almost exclusively the role of informational asymmetries on the subject matter of the contract.

(120) EU Commission, *Report from the Commission to the Council and the European Parliament*, *EU Anti-Corruption Report*, *cit.*, 31. Transparency International, *The integrity pact. The Concept, the Model and the Present Applications: a Status Report*, 31 December 2002, 12.

(121) A second-lowest bid is the buying equivalent of a Vickrey auction. Assuming that the procuring entity is interested in the financial dimension(s) only, the second-lowest bid mechanism awards the contract to the lowest bidder that will receive an amount of money equal to the second-lowest bid. When the number of bidders is small (only two) there exists a strong incentive to collude. One bidder will submit a very low price, while the second will submit a very high one. The former will get the contract at potentially extremely favorable conditions, and split the "collusive" payoff with the loser: G. M. RACCA – R. CAVALLO PERIN – G. L. ALBANO, *Competition in the execution phase of public procurement, cit.*, 105.

(122) EU Commission, note 2007/2309/C, January 30, 2008 containing observations on the Italian Legislative Decree April 12, 2006, No. 163, Art. 140.

(123) By CICA (Competition in contracting Act - 1984).

legitimate if it fell within the "scope of the contract" and was not considered to be legitimate if it departed from such scope. Thus, one could argue that if the modification falls outside the scope of the contract, a new bidding procedure is required, and that forcing the contractor to make the changes would constitute a breach of the contract.(124) As previously noted, the problem relates to determining whether or not a modification falls within the scope of the contract.(125) The OECD report on Federal Public Procurement in the U.S. suggested that the Government ensure a better integration among its e-procurement systems, so as to generate better quality data and promote performance analysis.(126)

The availability of clear and accurate data can also facilitate the monitoring of civil society, media, companies, NGOs and academia.(127) "Civil society, therefore, frequently generates pressure against corruption in public procurement, leading to the penalization of corrupt actors".(128)

Correct and adequate monitoring activities can result in the availability of data on how economic operators run the performance. From such data, blacklisting, debarment(129) and cross-debarment(130) forms may be created, both

(124) O. DEKEL, *Modification of a government contract awarded following a competitive procedure*, *cit.*, 2009, 414-415.

(125) *Lasmer Indus., Inc.*, Comp. Gen. B-401046 *et al.*, 2009 CPD 77

(126) OECD, *Public Procurement for Sustainable and Inclusive Growth. Enabling reform through evidence and peer review*. available at *http://www.oecd.org*, 15; OECD, *Implementing the OECD Principles for Integrity in Public Procurement*, *cit.*, 13. Gov't Accountability Office, GAO, *The National Flood Insurance Program: Progress Made on Contract Management but Monitoring and Reporting Could Be Improved,* January 15, 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

(127) OECD, *Implementing the OECD Principles for Integrity in Public Procurement*, *cit.*, 119, the principle No. 10 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 public in monitoring high-value or complex procurements that entail significant risks of mismanagement and corruption". D. SORACE – A. TORRICELLI, *Monitoring and Guidance in the Administration of Public Contracts*, in R. Noguellou – U. Stelkens (eds. by) *Droit compare des Contrats Publics – Comparative Law on Public Contracts*, *cit.*, 205 - 208. In the same book see also: S. BOYRON – A. C. L. DAVIES, *Accountability and Public Contracts*, 221-225.

(128) United Nations Office on Drug and Crime (UNODC), *Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*, *cit.*, 26-27.

(129) S. Gov't Accountability Office, GAO Report, *Suspension and Debarment*, September 2012, available at: *www.gao.gov/assets/650/648577.pdf*. See also: S. L. SCHOONER – S. COLLINS – R. J. BEDNAR – S. A. SHAW – D. BRIAN – J. J. MCCULLOUGH – J. S. PACHTER – M. G. MADSEN – C. R. YUKINS – J. S. ZUCKER – A. J. PAFFORD, *Suspension and Debarment: Emerging Issues in Law and Policy*, in *PPLR*, 2004.

(130) C. R. YUKINS, *Cross-Debarment: A Stakeholder Analysis*, GW Law Faculty Publications, 2013.

as anti-corruption initiatives and so as to be able to evaluate the past performance of economic operators in the award procedure.

6. *Material amendments and Integrity Issues*

The level of quality promised in the contract that was signed after the competitive tendering process is often not delivered during the execution phase and the procuring entities may accept a different and worse-than-promised performance.(131) The infringement of the contract can lead to a material amendment, 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 can be considered to be the symptom of a lack of integrity, conflicts of interest, collusion or corruption.(132)

This situation may arise as a consequence of malice and corruption,(133) that is, offering, giving, receiving, or soliciting, directly or indirectly, anything of value to influence the action of a public official during the selection procedure or the contract execution. However, poor contractor performance may also be due to poorly drafted contract requirements that leave public officials unarmed when problems arise.(134)

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

(132) R. Hernandez Garcia (ed. by) *International Public Procurement: A Guide to Best Practice*, London, 2009; T. M. Arnaiz, *EU Directives as Anticorruption Measures: Excluding Corruption-Convicted Tenderers from Public Procurement Contracts,* in K. V. Thai (ed. by) International Handbook of Public Procurement, 105; E. Auriol, *Corruption in procurement and public purchase*, in *International Journal of Industrial Organization*, 2006, 885; Transparency International, *Curbing Corruption in Public Procurement*, *cit.*; 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 J.-B. Auby – E. Breen – T. Perroud, *Corruption And Conflicts Of Interest. A Comparative Law Approach*, *cit.*, 46 - 52. See also: OECD, *Fighting Corruption and Promoting integrity in Public Procurement*, 2005, available at *http://browse.oecdbookshop.org/*.

(133) See C. R. Yukins, *A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model*, *cit.*, 70; R. Hernandez Garcia, *Introduction: The Global Challenges of International Public Procurement*, in R. Hernandez Garcia (ed. by) *International Public Procurement: A Guide to Best Practice*, London, 2009, 11; T. Maria Arnáiz, *EU Directives as Anticorruption Measures: Excluding Corruption-Convicted Tenderers from Public Procurement Contracts*, in Khi V. Thai (Ed.) *International Handbook of Public Procurement*, 2008, 106; E. Auriol, *Corruption in Procurement and Public Purchase*, in *Int. J. Indus. Org.*, 2006, 867; Transparency International, *Handbook for Curbing Corruption in Public Procurement*, 2006, 18-19, available at *www.transparency.org/content/download/12496/120034*.

(134) 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. *See* Decreto Presidente della Repubblica, 5 October 2010, No. 207, Artt. 299, 300 and 301. For the aspects related to the contract execution see *Modernisation Green paper*, supra, note 6, at 24.

Integrity "beyond the selection of suppliers"(135) is required from the definition of needs to the contract administration phase as both the needs assessment and the contract management are "increasingly exposed to corruption"(136) and are neither duly addressed nor sufficiently monitored.

Adequate efforts in favour of competition, transparency and objective criteria in decision-making as fundamental principles and instruments to prevent corruption are necessary throughout the entire cycle of the public procurement process, from the beginning of the procedure to the conclusion of the performance phase. Otherwise, after the award, the procuring entity may have to accept a different and below cost, potentially subpar performance in violation of free competition and equal treatment principle.(137) This may be due to the lack of effective instruments for achieving the public interest as defined in the contract conditions (incompetence).(138) Moreover, the much debated phenomenon of "abnormally low bids" may occur because of tenderers' decision to recover their additional « investment » (i.e. lower mark-ups).

An improper (malicious) agreement between one of the tenderers and the procurement officer allows the former to bid aggressively and win the contract as he/she already knows that he/she will not be obliged to perform properly.(139) By underperforming, the winner will obtain additional profits, to be shared with the procurement officer. If the delivered quality differs from the quality that was promised in the award, the whole equilibrium of the ranking of the tenders is undermined and the economic balance of the contract is modified in favour of the winner.

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(135) United Nations Comm'n on Int'l Trade Law, *United Nations Convections Against Corruption: Implementing Procurement Related-Aspect*, 14. The *procedures to be used by procuring entities in selecting the supplier or contractor with whom to enter into a given procurement contract*". Its Guide to Enactment states that the Model Law does not address the terms of contract for a procurement, the contract performance or implementation phase, including resolution of contract disputes, and by implication, the procurement planning phase. United Nations Comm'n on Int'l Trade Law, *UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment*, 1994, available at *www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf*.

(136) Transparency Int'l, *supra* note7, at p. 20; *see also* C. R. Yukins, *A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model*, *cit.*, 83-88; United Nations Office on Drugs & Crime, *United Nations Convention against Corruption*, Art. 9(2), provides that a procurement system must ensure adequate internal control and risk management. Art. 9(2): "2. Each State Party shall, in accordance with the fundamental principles of its legal system, take appropriate measures to promote transparency and accountability in the management of public finances. Such measures shall encompass, *inter alia*: … (d) Effective and efficient systems of risk management and internal control …". The regulation of non-selection phases of procurement may thus be addressed within the general governance system in a State party: for the reasons, it is vital that they are integrated into the procurement system itself.

(137) R. Cavallo Perin – G. M. Racca, *La concorrenza nell'esecuzione dei contratti pubblici*, *cit.*, 325.

(138) O. Bandiera – A. Prat – T. Valletti, *Active and passive waste in government spending: Evidence from a policy experiment, cit.*, 1278.

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

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.(140) 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.

7. Conclusions

The principles of transparency and competition play a key role in the awarding phase of a public procurement, but they seem to vanish during the contract management. This seems to be a prevailing feature of public contract regulation worldwide.(141) In this "black hole" of contract management, lack of transparency, incompetence, collusion and corruption might undermine the multiple objectives of public procurement systems.

The award and the execution of public contracts should not be affected by factors that harm the impartiality and the fairness of the decision (public officials' incompatibilities and transparency rules are means to guarantee it). Avoiding the interference of political or external bodies would appear to constitute another key issue for preventing the distortion of the public contract market and favouring the implementation of best practices in the award of public contracts and in the subsequent monitoring of the performance phase.

Whenever delivered quality is shattered by opportunistic behaviour at the execution stage, the principles of transparency and non-discrimination are betrayed, since an incorrect execution undermines the competition principle put in place among competing bidders during the selection phase. In public contracts, unlike in private contracts, any amendment to the contractual conditions due to the contractor's underperformance affects third parties, namely, but not exclusively,(142) unsuccessful tenderers. By having a substantive stake in the adherence of the contractor's performance to that which was committed at the award stage, losing tenderers should be permitted to report infringements to challenge the contractor's lower-than-promised performance as set forth in a contract they might have otherwise won. As a consequence,

(140) OECD, *OECD Principles for Integrity in Public Procurement*, *cit.*, 69, on the common risks to integrity in the post-tendering phase.

(141) United Nations Office on Drug and Crime (UNODC), *Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*, *cit.*, 20 et seq.

(142) H. Schröder – U. Stelkens, *EU Public Contract Litigation*, in M. Trybus – R. Caranta – G. Edelstam (eds. by), *EU Public Contract Law, Public Procurement and Beyond*, *cit.*, 443 et seq.

they would exercise their right to fair competition and, if properly ranked, the subsequent bidder in the ranking could have the right to replace the winner.

The ability to collect and interpret information during the execution can make losing tenderers, together with the procuring authority, the most effective "supervisors" of the contractor's compliance with contractual clauses. Since they are competitors in the same market, losing tenderers are in a potentially ideal situation for establishing which dimensions of performance are most vulnerable to opportunism. A precise evaluation of the limits for admitted "material amendments" during the execution phase is required in order to avoid thwarting competition. The idea of having losing tenderers that "cooperate" with the procuring authority might, in principle, be stretched to other crucial phases of the procurement process such as the evaluation of seemingly abnormally low tenders, especially in the case of somewhat complex public contracts where both quality and price matter. Allowing for such proactive initiatives by losing tenderers ought to be carefully defined by the procuring authority in order to fully exploit the potential benefits while limiting the risk of making the overall public procurement system even more adversarial or pro-collusive.

The monitoring of the performance of the contract by unsuccessful tenderers, and/or by third parties such as other economic operators, final users, NGOs and civil society, is a way of ensuring respect for EU principles or, in general, the competition principles that rule the award procedures. However, monitoring the correct implementation of the contract may be a useful tool to prevent potential illegal or collusive conduct among economic operators and better ensure competition throughout the entire public procurement cycle and in the procurement sector.

The U.S. experience brings to light a different perspective, wherein the lack of a precise ranking in the award of the contract after the "negotiation" stage limits the possibility of providing incentives for such monitoring activities. Ensuring respect for the principle of competition during the performance phase also seems to be a requirement for ensuring it is respected during the award phase. Any misconduct during the performance phase constitutes a distortion of competition and in the EU can result in the ineffectiveness of the contract. In any procurement system, only a deep and effective monitoring of the performance phase can stave off the risks of corruption and waste of taxpayers money.