

INTEGRITY CHALLENGES IN THE EU AND U.S. PROCUREMENT SYSTEMS*

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1. THE DIFFERENT SCOPE OF PUBLIC PROCUREMENT RULES IN THE EU AND THE US AND THE RELEVANCE OF INTEGRITY

It seems of interest to clarify the different perspectives concerning public procurement in the US and the EU in order to highlight the different scopes and effects of their regulations.

The EU Directives define procurement rules that apply to 28 different countries, with different legal systems and diverse cultural and social traditions. This is a horizontal challenge that the United States hasn't had to deal with, since its procurement system applies only to one country, the U.S.³ Secondly, the EU is dealing with a vertical challenge that the US avoids for constitutional reasons. From a US perspective, it looks impressive that EU procurement directives cover all levels of government, from national procurements to local procurements, including small municipalities. In the US there is a more-or-less uniform federal system, but it does not apply to the States; their procurement systems are legally and factually separate from the federal system. In the EU, the Public Procurement Directives can be seen as defining only a minimum common denominator for the 28 Member States that must implement them according to different legal systems, different languages and different approaches to procurement. The result is a degree of variation, even though the detailed provisions of EU Directives can become directly applicable to any above-threshold EU procurement. Most of the rules are mandatory and after the

³ *The U.S. acquisition system has a long history and is based on a detailed statutory and regulatory scheme. The roots of the federal procurement system can be traced back to the 19th century (and arguably back to the War of Independence in the 18th century). Today, the bedrock of the federal procurement laws is the Competition in Contracting Act of 1984, modified by reform legislation from the 1990s, and implemented through the very detailed Federal Acquisition Regulation (the FAR). CICA, as the 1984 statute is often called, was codified in several different parts of the United States Code: in section 2301 and the following sections of Title 10 for defence agencies; in section 251 and the following sections of Title 41 for civilian agencies; and in section 3551 and the following sections of Title 31 for the bid protest provisions). The definitive history of the U.S. federal procurement system is James F. Nagle's, *History of Government Contracting*, (2nd ed. 1999).*

implementation term become directly applicable, whenever not correctly implemented, according to a EU Court of Justice ruling.⁴

At the international level the GPA defines a “minimum minimum” common to both EU and US systems, a lowest common denominator among very different systems. Contrasted with UNCITRAL, the United Nation Commission on International Trade Law, whose aim is to create a model procurement law, the GPA does not include the level of detail that would be needed for a statute.⁵

The EU procurement Directives seem to be moving in the direction of constructing a detailed set of procurement rules, more like the UNCITRAL model law than the WTO GPA, which is an extraordinarily challenging task.⁶

⁴ The direct effect of European law has been enshrined by the Court of Justice in the judgement of *Van Gend en Loos* of 5 February 1963. The ECJ stated that European law not only engenders obligations for Member States, but also rights for individuals. Individuals may therefore take advantage of these rights and directly invoke EU acts before national and European courts. While an EU directive is an act addressed to Member States and must be transposed by them into their national laws, in certain cases the Court of Justice recognises the direct effect of directives in order to protect the rights of individuals. Therefore, the Court laid down in its case-law that a directive has direct effect when its provisions are unconditional and sufficiently clear and precise (ECJ, 4 December 1974, *Van Duyn*, in C-41/74). However, it can only have a direct vertical effect. That is, individuals can invoke a European provisions in a challenge to a Member State only if the State has not transposed before the deadline provided (ECJ, 5 April 1979, *Ratti* in C-148/78). ECJ, 10 November 2011, *Norma-A SIA - Dekom SIA v Latgales plānošanas reģions*, in C-348/10 concerning the Remedies Directive (EU Dir. No. 2007/66).

⁵ S. ARROWSMITH (Ed.) *Reform of the UNCITRAL Model Law on Procurement: Procurement Regulation for the 21st Century*, West Publishing, 2009; ID., *The Past and Future Evolution of EC Procurement Law: From Framework To Common Code?*, in *Public Contract Law Journal*, Vol. 35, No. 3, 2006, 337-384.

⁶ S. R. ACKERMAN, *International Actors and the Promises and Pitfalls of Anti-Corruption Reform*, in *Pennsylvania Journal of International Law*, 2013, 472. D. I. GORDON, *Anti-Corruption Internationally: Challenges In Procurement Markets Abroad—Part II: The Path Forward for Using Procurement Law to Help with Development and the Fight Against Corruption*, in *GW Legal Studies Research Paper*, No. 40, 2013, available at www.ssrn.com.

The first ‘whereas’ in the draft of the new Directive provides that: “*The award of public contracts by or on behalf of Member States authorities has to comply with the principles of the Treaty on the Functioning of the European Union, and in particular the free movement of goods, freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that these principles are given practical effect and public procurement is opened up to competition*”.⁷

Actually, harmonization of the European rules is less than one might expect: only 20% or so of public procurements (measured by value) fall within the scope of the directives.⁸ Nonetheless, according to the EU Court of Justice, all EU procurements should apply the Treaty principles, but those principles are not as demanding.

⁷ European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council on public procurement (COM(2011)0896 – C7-0006/2012 – 2011/0438(COD), 15 January 2014, Wh. No. 1. See before: ECJ, 7 December 2000, *Telaustria* in C-324/98, p.ti 60-62; ECJ, 21 July 2005, *Coname* in C-231/03, p.ti 16-19; ECJ 13 October 2005, *Parking Brixen* in C-458/03, p.ti 46-49; ECJ, 13 November 2008, *Coditel Brabant* in C-324/07, p.to 25. ECJ, III, 10 September 2009, *Wasser- und Abwasserzweckverband Gotha und Landkreisgemeinden (WAZV Gotha) v. Eurawasser Aufbereitungs- und Entsorgungsgesellschaft mbH*, p.to 44. See also: R. CAVALLO PERIN, *I principi come disciplina giuridica del pubblico servizio tra ordinamento interno e ordinamento europeo*, in *Dir. Amm.*, 2000, 60; R. CARANTA, *The Borders of EU Public Procurement Law*, in D. Dragos – R. Caranta (a cura di) *Outside the Procurement Directives - inside the Treaty?*, Copenhagen, 2012, 25 e ss.

⁸ EU Commission, *Evaluation Report Impact and Effectiveness of EU Public Procurement Legislation*, June 2011, 27; G. M. RACCA, *The Electronic Award and Execution of Public Procurement*, in *Ius Publicum Network Review*, 2012, accessible in http://www.ius-publicum.com/repository/uploads/17_05_2013_19_31-Racca_IT_IUS-PUBLICUM-EN.pdf and in Social Science Research Network - http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2229253.

The limited applicability of the EU Procurement Directives reduces their impact. In fact, cross-border procurement in the EU is rare. European efforts to construct a more uniform procurement system might have facilitated creation of national procurement markets where there were still internal barriers (e.g., between Northern and Southern Italy,⁹ or among German Laender¹⁰); however, only 1.6% of the public procurement contracts are won by an economic operator from another country.¹¹ One reason may be that the various EU member states' national procurement legal systems are still different and separate despite the efforts of the Directives: legal and language barriers produce a fragmentation of the public procurement marketplace that economic operators are quite used to.

Another reason for such fragmentation is related to the limits of EU Directives, which address the award phase, but not contract management. Contract management is completely left to the EU Member States, meaning that the EU has no control over the performance of contracts. Because performance can be significantly different from – and

⁹ G. M. RACCA, *Public Contracts – Italy*, in *Ius Publicum Network Review*, 2012, available at <http://www.ius-publicum.com/pagina.php?lang=it&pag=report&id=43>, 4; A. MASSERA, *Italie/Italy*, in R. Noguellou – U. Stelkens (eds. by) *Comparative Law on Public Contracts*, Bruxelles, 2010, 719-720.

¹⁰ M. BURGLI, *Public Procurement Law in the Federal Republic of Germany*, in *Ius Publicum Network Review*, 2012, available at <http://www.ius-publicum.com/pagina.php?lang=it&pag=report&id=43>, 6; U. STELKENS – H. SCHROEDER, *Allemagne/Germany*, in R. Noguellou – U. Stelkens (eds. by) *Comparative Law on Public Contracts*, Bruxelles, 2010, 320 et seq. A. RUBACH-LARSEN, *Selection and Award Criteria from a German Public Procurement Law Perspective*, in *Public Procurement Law Review*, 2009, 112.

¹¹ Rambøll Management, *Cross-border procurement above EU thresholds*, Rambøll study for the EU Commission, May 2011, 38. The study found that direct cross-border procurement accounts for 1.6% of awards or roughly 3.5% of the total value of contract awards published in OJ/TED during 2006-2009 and that 50% of contracts above EU thresholds are awarded within the distance of 100 km. The EU Commission refer to this data in the *Green Paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market* - COM(2011) 15 final, 27 January 2011, 4.

less than – what was promised, the result may be to undermine the meaningfulness of the competitive selection, which is the heart of the EU model.¹²

While the reason for the separation the Directives maintain between the award and execution of the procurement may be due to Member States not wanting to lose their sovereignty in the execution of public contracts, the result is considerable uncertainty for economic operators and a challenge to the procurement system's goal of achieving good performance for the benefit of EU citizens.

The failure to address contract execution at the EU level risks causing toleration of performance inferior to what was promised in the contract.¹³ In many EU countries this can happen due to incompetence or corruption.¹⁴ As in any country, in EU Member States

¹² EU Commission, *Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report*, COM(2014) 38 final, 3 February 2014, available at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/index_en.htm, 26-27; EU Commission, *Green Paper on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market*, 27 January 2011, COM(2011) 15 final, 25; G. M. RACCA – R. CAVALLO PERIN, *Material Amendments of Public Contracts during their Terms: From Violations of Competitions to Symptoms of Corruption*, in *European Procurement & Public Private Partnership Law Review*, 2013, 287-290.

¹³ G.M. RACCA - R. CAVALLO PERIN - G. L. ALBANO, *Competition in the execution phase of public procurement*, in *Pub. Cont. L. J.*, 2011, Vol. 41, n. 1, 90.

¹⁴ O. BANDIERA – A. PRAT, - T. VALLETTI, *Active and Passive Waste in Government Spending: Evidence from a Policy Experiment*, 2009, in *American Economic Review*, 99(4): 1278-1308; PricewaterhouseCoopers study prepared for the European Anti-Fraud office (OLAF), *Identifying and Reducing Corruption in Public Procurement in the EU*, 2013, available in http://ec.europa.eu/anti_fraud/documents/anti-fraud-policy/research-and-studies/identifying_reducing_corruption_in_public_procurement_en.pdf, 253. S. R. ACKERMAN, *International Actors and the Promises and Pitfalls of Anti-Corruption Reform*, cit., 2013, 481 “Such reforms can both limit corrupt incentives and reduce other forms of waste and inefficiency” ID., *Corruption and government. causes, consequences and reform*, Cambridge, 1999, 59 “Bribes can not only determine who obtains a contract, but also the size and specifications of government purchases. Anti-corruption reforms should focus not just on reducing malfeasance but also on improving the efficiency of government purchasing decisions”.

integrity issues arise in public procurements, including, and perhaps especially, in the execution phase.¹⁵ The two phases of contracting are closely related, of course: it can be easy to win a tender by bidding a low price, if one knows that a much less costly level of performance will be accepted.¹⁶ Because the EU Procurement Directives do not cover the performance phase, no EU remedies can apply. Only recently the ECJ,¹⁷ and subsequently the draft of new Directive, provided that material amendments (significant changes) during execution may constitute the improper award of a new contract without the required public notice – although that situation typically applies to contracts whose scope is being increased through an amendment, rather than a decreasing of the contractual performance standards.¹⁸

To sum up, the EU Public Procurement market amount in 2011 reached 2,405.89 billion Euros, equal to 19% of the EU GDP, although only 425.44 billion Euros in contracts were published in TED, the EU database, as they are above threshold.

¹⁵ EU Parliament - Directorate General for Internal Policies, *Political and other forms of corruption in the attribution of public procurement contracts and allocation of EU funds: Extent of the phenomenon and overview of practices*, 2013, in <http://bookshop.europa.eu/en/political-and-other-forms-of-corruption-in-the-attribution-of-public-procurement-contracts-and-allocation-of-eu-funds-pbBA0313573/?CatalogCategoryID=yIMKABstfr0AAAEjypAY4e5L>, 12.

¹⁶ G.M. RACCA - R. CAVALLO PERIN - G. L. ALBANO, *Competition in the execution phase of public procurement*, cit., 98-100.

¹⁷ ECJ, *Pressetext Nachrichtenagentur GmbH v. Republik Österreich* (C-454/06) [2008] E.C.R. I-4401. See also ECJ, *EU Commission v. Federal Republic of Germany* (C-160/08) [2010]; ECJ, 13 April 2010, *Wall*, in C-91/08; ECJ, 25 March 2010, *Helmut Muller*, in C-451/08; ECJ, 4 June 2009, *Commission v. Greece*, in C-250/07.

¹⁸ European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council on public procurement, cit., art. 72. According to the new EU Directive the amendments of the contract shall be considered substantial when it makes the contract substantially different from the one initially concluded “in particular to the scope and content of the mutual rights and obligations of the parties, including the distribution of intellectual property rights” (see: Wh. No. 107).

In comparison, the US Federal government currently spends approximately \$500 billion in public procurements each year, an amount that increased during the Clinton and George W. Bush Administrations.¹⁹

The significant value of the public procurement market and the concern about reducing spending and increasing quality underscore the need for integrity in this sector, which is notoriously vulnerable to corruption.²⁰ Yet, somewhat surprisingly, the EU Directives do not meaningfully tackle integrity issues nor do they set up a common EU audit system, nor does the new Procurement Directive take the opportunity to fully address the problem through specific rules regarding integrity in EU procurement²¹, although it was admitted that Member States “are not fully equipped to tackle [such issues] on their own.”²²

¹⁹ The amount of money spent on public procurement increased significantly under the Clinton and Bush administrations. While a good part of the spending after 2001 was attributable to spending related to the wars in Iraq and Afghanistan, a great part of the increase from 1992 on was due to the dramatically expanded reliance on contractors to perform services “outsourced” to the private sector.

²⁰ Today, it is hard to overestimate the impact of corruption in the EU, at least as it is perceived. The European Commission estimates that four out of five EU citizens regard corruption as a serious problem in their Member State. An estimated 120 billion Euros per year, roughly 1% of EU GDP, is siphoned off by corrupt practices. See EU Commission, Communication from the Commission to the European Parliament, the Council and the Economic and Social Committee, *Fighting Corruption in the EU*, 6 June 2011. As reported in the Communication, the total economic costs of corruption cannot easily be calculated. The cited figure is based on estimates by specialized institutions and bodies, such as the International Chamber of Commerce, Transparency International, UN Global Compact, World Economic Forum, *Clean Business is Good Business*, 2009, which suggest that corruption amounts to 5% of GDP at world level.

²¹ The principle of integrity was introduced by the Council of the European Union in the compromise text of 24 July 2012 and listed in the wording of the art. 15 of the Proposal, but subsequently was eliminated. The rules provided that “Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner that avoids or remedies conflicts of interest and prevents corrupt practices”. This text is available at <http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=ST%2012878%202012%20INIT&r=http%3A%2F%2Fregister.consilium.europa.eu%2Fpd%2Fen%2F12%2Fst12878.en12.pdf>. There

In the new Directives the member States have refused to explicitly address the issue of fighting corruption in public procurement, although, as even more clearly confirmed recently by the Commission,²³ it is evident that such objective “cannot be sufficiently achieved by the Member States”²⁴ and will require an intervention at Union level.

On both sides of the Atlantic, the economic relevance of integrity issues in the public procurement sector is evident, but in the US they are addressed uniformly only on a federal level; no common rules cover all the states. While the EU rules in theory apply to

are some limited provisions on corruption e.g. on conflict of interest, art. 21 and on the exclusion of those criminally convicted for corruption in art. 55.

²² EU Commission, *Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report*, 21 et seq.; EU Commission, Communication from the Commission to the European Parliament, the Council and the Economic and Social Committee, *Fighting Corruption in the EU*, 6 June 2011, 3, in which is also cited art. 83(1) of the Treaty on the Functioning of the European Union that lists corruption among those crimes for which directives providing minimum rules on definition of criminal offences and sanctions may be established, since corruption often has implications across, and beyond, internal EU borders. Bribery across borders, but also other forms of corruption, such as corruption in the judiciary, may affect competition and investment flows.

²³ EU Commission, *Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report*, COM(2014) 38 final, 3 February 2014, 24, where is reported that “the proposal also included the setting up of oversight monitoring of the implementation of public procurement rules, red flagging and alert systems to detect fraud and corruption. However, Member States raised fundamental objections to such measures which were considered too cumbersome for their administrations”.

²⁴ Treaty of the European Union, art. 5, § 3: “Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality”.

all levels of government, in reality uniformity is much less widespread due to the limited scope of the Directives, with their focus on procurements above the threshold and only on the award phase even of those procurements.

2. FLEXIBILITY IN THE CHOICE OF PROCEDURES IN THE NEW EU PROCUREMENT DIRECTIVE AND IN THE U.S. FEDERAL PROCUREMENT SYSTEM

The US system has enormous flexibility regarding the choice of procedure. Since World War II, the use of non-price evaluation criteria and the conduct of “discussions” (the term used for negotiations between the contracting agency and the vendors) have become more and more common. Since the 1970s, procurement officials have been essentially free to choose whether to use negotiated procedures, allowing them to consider factors other than price and to conduct discussions, or to use the “sealed bidding,” under which bids are evaluated only to ensure “responsiveness,” that is, conformance with the tender document (called the solicitation), with the contract generally being awarded to the bidder submitting the lowest-price responsive bid, with discussions prohibited. The choice depends mainly on the subject matter of the contract: the higher the value of the contract, the greater the likelihood that the agency will choose to use negotiated procedures, as it permits considering technical criteria and past performance, in addition to price, as evaluation factors, and allows the government to negotiate with the vendors to discuss their proposals.²⁵ While conducting negotiations has advantages, it obviously is less transparent

²⁵ S. R. ACKERMAN, *Corruption and government. causes, consequences and reform*, cit., 60-63, that reports the procurement problem in U.S. in four stylized categories “purchases that require specialized research and development, such as newly designed military aircraft; purchases of complex, special purpose projects, such as dams or port facilities, that do not involve advances in technology but require managerial and organizational skills; purchases of standard products sold in private markets, such as motor vehicles or medical supplies; and customized versions of products sold privately, such as special purpose computer systems or fleets of police cars”.

than sealed bidding, where bids are opened publicly and no discussions with vendors are permitted.

The EU Public Procurement Directive currently in force provides that contracting authorities normally must use either open or restricted procedures. Other procedures, such as negotiation, are considered less transparent and may be used only in defined cases.²⁶ However, the general principles of non-discrimination, equal treatment and transparency apply to all procurement procedures, though in a different way.²⁷

It is also highlighted the Kelman's idea "that procurement officers should be given very specific instructions about the goals of procurement and be held accountable for the contractor's ability to fulfil them. They should, however, have considerable flexibility to determine the means", see S. KELMAN, *Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance*, Washington DC, 1990.

²⁶ EU Directive No. 2004/18, provides in art. 30 the cases justifying use of negotiated procedure with prior publication of a contract notice, and in art. 31 the cases justifying use of negotiated procedure without publication of a contract notice. The new EU Directive on Public Procurement provides the negotiated procedure (only without prior publication of a contract notice) in art. 32. See also Wh. No. 50 where it is stated that "*In view of the detrimental effects on competition, negotiated procedures without prior publication of a contract notice should only be used in very exceptional circumstances. This exception should be limited to cases where publication is either not possible, for reasons of extreme urgency brought about by events unforeseeable for and not attributable to the contracting authority, or where it is clear from the outset that publication would not trigger more competition or better procurement outcomes, not least because there is objectively only one economic operator that can perform the contract*". The directives apply only to major contracts, and there are no procedures designed for low-value purchases: for example, there is no equivalent to the "request for quotations" procedure found in the UNCITRAL Model Law on Public Procurement. See: EU Commission, Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report, COM(2014) 38 final, cit., 27, where is reported the risk of corrupt practices in case of unjustified use of negotiated procedures.

²⁷ ECJ, 12 December 2002, C-470/99, *Universale-Bau AG v. Entsorgungsbetriebe Siemmering GmbH* ("Universale-Bau"), 2002. E.C.R. I-11617.; S. ARROWSMITH, *The Past and Future Evolution of EC Procurement Law: From Framework to Common Code?*, in *Pub. Cont. L. J.*, 2006, 337.

The declared aim of simplifying and increasing flexibility in the new Procurement Directive can be tested by reading the new provisions for choice of award procedure and evaluation of tenders.

The new Directive on Public Procurement specifically addresses provisions to enhance efficiency of public administration, ensure additional flexibility and eliminate market barriers for SMEs.²⁸ It provides that Member States can use the competitive procedure with negotiation²⁹ or with competitive dialogue,³⁰ in various (exceptional) situations where open or restricted procedures without negotiation are unlikely to lead to

²⁸ Difficulties affecting market access across Europe reduce both the involvement of SMEs and cross-border bidding. Market barriers concern a mix of natural (e.g. language, geographic) and regulatory administrative barriers. See: EU Commission, *Commission Staff Working Paper Executive Summary Of the Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council on Public Procurement and the Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal sectors*, 20 December 2011, SEC(2011) 1586 final, where it is stated that “the share of SMEs winning PP contracts has not changed significantly since 2002, nor have cross-border participation rates improved. The most significant factor affecting SME participation is contract value — SMEs have problems bidding for or fulfilling contracts over €300.000”. Instruments that aim to facilitate access to EU PP markets concern the reduction of the evidentiary requirements for bidding. For the EU Commission “adopting the winning bidder approach to providing documentary evidence would reduce administrative costs by 80%”. The proposed Directive suggests the use of lots for contracts with a total value above certain thresholds. Also the improvement of eProcurement and IT tools will favour the access of SMEs to the Public Contracts Sector. Rambøll Management, *Cross-border procurement above EU thresholds*, cit., 87 where a survey reports that around 73% of firms, otherwise active in public procurement, said that they have not made any cross-border tenders in the last three years.

²⁹ European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council on public procurement, cit., Wh. No. 45. that the negotiations “*should aim at improving the tenders so as to allow contracting authorities to buy works, supplies and services perfectly adapted to their specific needs*” safeguarding the respect of EU principles. See also art. 29 of the new EU Directive on public procurement.

³⁰ European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council on public procurement, cit., art. 30.

satisfactory outcomes.³¹ In particular, this applies to cases of innovative projects, implementation of major integrated transport infrastructure projects, large computer networks or projects involving complex and structured financing. Problems might arise with the motivation of such choice and their possible challenges. Furthermore such procedures risk being implemented in such a complex manner in many EU Member States that they become unworkable and exposed to endless litigation, as happened with the competitive dialogue.³²

3. EU OBJECTIVITY VS. U.S. SUBJECTIVITY IN THE AWARD DECISION: INTEGRITY ISSUES

A significant difference between the EU and the US approach to evaluation of tenders concerns the relevance of past performance and the objectivity or subjectivity of the choice of the winning tender. The difference mainly concerns the EU's preference for objective, mechanically applied award criteria³³ and the American tolerance of subjectivity, both in the evaluation factors and in the tradeoff between price and non-price factors.

³¹ In a sense, the EU Directives are following the pattern of the U.S., in which negotiations were initially permitted only in defined circumstances, and then were allowed more widely, before becoming a free choice, as they are today.

³² See: S. ARROWSMITH – S. TREUMER (eds.) *Competitive Dialogue in EU Procurement*, Cambridge, 2012, and, in this book G. M. RACCA – D. CASALINI, *Competitive dialogue in Italy*, 458 on the complexity of Italian implementation. Concerning the innovation partnership see European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council on public procurement, cit., Wh. No. 47-49 and art. 31. Innovation Partnership will involve a competitive procedure with negotiation in order to get an innovative product not yet available on the market.

³³ EC Directive 2004/18, Wh. No. 46 provides: "Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which

3.1 Criteria for qualitative selection of tenderers in the EU and past performance in the US

From the EU viewpoint, pre-qualification along with evaluation of the tenderers' capabilities (quality requirements of the economic operators³⁴) is the first phase of the award procedure, completely separate from the evaluation of the tenders. In the EU, the choice has been to fix a minimum of economic and financial standing and technical and/or professional ability related and proportionate to the subject matter of the contract³⁵ in order for the bidder to be allowed to participate in the contract competition. Any economic operators that meet or exceed the minimum requirement threshold must be admitted.³⁶ The reason for such a rule was concern about the risk of discrimination in favor of national undertakings. This concern led to the EU Directive's excluding the possibility of rating past performance, and in particular, excluding the possibility of evaluating past performance with scores, rather than the pass/fail approach implicit in the EU approach to assessment of potential contractors' eligibility. The result, though, is that the EU neglects an important characteristic of contractors, their track record on prior contracts. The result is that

guarantee that tenders are assessed in conditions of effective competition". In the new EU Directive on public procurement see the Wh. No. 90.

³⁴ EC Directive 2004/18, artt. 45-52 for the criteria for qualitative selection of the tenderer. In the new EU Directive on public procurement see the artt. 57-64.

³⁵ EC Directive 2004/18, for the criteria for qualitative selection see articles 45 to 52. In particular art. 47 concerning economic and financial standing and art. 48 regarding technical and/or professional ability. In the new EU Directive on public procurement see the art. 48.

³⁶ In the restricted procedure the possible raising of the requirements permits the selection of only a limited number of tenderers. Nonetheless, once the new raised minimum is met, the quality of the tenderers will not be taken into account in the award criteria. EC Directive 2004/18, art. 44. See: European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council on public procurement, cit., art. 28.

companies with a poor record of performance will generally be allowed to compete for future contracts. While in theory the level of technical requirements could be raised in a way to exclude firms that have not performed well in the past, that risks being considered unjustified, as not proportional, and potentially discriminatory.³⁷ This lack of evaluation and the consequent impossibility to choose on the base of a better record of performance on prior contracts means that the apparent impartiality in the EU system translates into greater risks in the quality of spending and integrity.³⁸

In the US, the order of evaluation is reversed: first the tender is evaluated and only thereafter the tenderer, as part of the “responsibility” determination, which, like the EU system, is a pass/fail assessment (essentially asking whether the firm is one that the U.S. government is willing to do business with and one that the government believes is capable of performing the contract). That responsibility determination, however, is undertaken only with respect to one firm, the apparent winner of the competition. During the evaluation of tenders, however, the bidders’ past performance will be assessed, typically on a qualitative (not pass/fail) scale, so that a firm’s past performance might be rated “outstanding,” “very good,” or “acceptable.” In the evaluation of tenders in negotiated procurements valued above \$150,000, past performance is a mandatory evaluation criterion. From a U.S.

³⁷ UK Government, *Buying and managing government goods and services more efficiently and effectively*, published 20 February 2013, available at <https://www.gov.uk/government/policies/buying-and-managing-government-goods-and-services-more-efficiently-and-effectively>. EC Directive 2004/18, Wh. No. 39 “Verification of the suitability of tenderers, in open procedures, and of candidates, in restricted and negotiated procedures with publication of a contract notice and in the competitive dialogue, and the selection thereof, should be carried out in transparent conditions. For this purpose, non-discriminatory criteria should be indicated which the contracting authorities may use when selecting competitors and the means which economic operators may use to prove they have satisfied those criteria”. See: ECJ, 29 March 2012, *SAG ELV Slovensko and Others* in C-599/10; ECJ, 12 November 2009, *Commission v Greece* in C-199/07; ECJ, 24 January 2008, *Lianakis v Dimos Alexandroupolis* in C-532/06; ECJ, 3 March 2005, *Fabricom SA v Belgian State*, in joined cases C-21/03 and C-34/03.

³⁸ EU Commission, *Green Paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market*, cit., 18.

perspective, the EU pre-qualification of bidders seems both anti-competitive and inefficient, since it requires the contracting authority to judge all firms on a pass/fail basis and allows the contracting authority to eliminate firms from the competition before they have had the opportunity to submit a tender.³⁹ Assessing past performance might ensure performance quality and a fair competition based on the effective quality of public spending, thus reducing the opportunities for corruption. In the EU, difficulties arise also because there is no uniformity in the contract management and thus it seems particularly challenging to define a common standard of evaluation of past performance.

3.2 European objectivity vs. American subjectivity

The US approach to award of public contracts was historically focused on selection based on the lowest price. However, during and after World War II, there was growing recognition of the acceptability of taking into account non-price factors as well, although doing so was long viewed as exceptional. In addition, negotiation with bidders came to be viewed as helpful – although initially, again, only in exceptional circumstances. Finally, in 1984, with enactment of the Competition in Contracting Act, both use of non-price factors (in addition to price, of course) and the conduct of negotiations (called “discussions”) with bidders came to be viewed as ordinary options for the conduct of a procurement.

The US now routinely allows ‘tradeoff’ contracting decisions (often called ‘best value’ decisions), in which contracting officers are allowed to make subjective selection among competing tenders, rather than selecting based only on price. That said, US government agencies are permitted to use price as the sole criterion in selecting among

³⁹ S. R. ACKERMAN, *Corruption and government. causes, consequences and reform*, cit., 62. On the issue related to past performance “the use of past performance as a factor in awarding new contracts has proved difficult to implement because there is no generally accepted technique for evaluating performance”.

acceptable tenders, and they sometimes do so. It is not only that non-price selection criteria are permitted. What is noteworthy is the subjective way that the US system permits those non-price criteria to be assessed and then used.

First, there is an element of subjectivity in the assessment of non-price factors that would not be permitted in many other procurement systems. Thus, tenderers' past performance is a widely used, and often required, evaluation criterion, and the past performance rating that a bidder receives can be assigned by a contracting official on a judgmental basis,⁴⁰ without objective criteria. Only in the case of sealed bidding, where price is the sole award criterion, is there no evaluation of past performance. In the 1990s, the assessment of past performance was often based solely on prior work identified by the bidders in their tenders. In their submission, they were required to disclose their "relevant" prior contracts, so that their performance under those contracts could be checked. A past performance database was set up some years ago and despite some difficulties, it is intended to allow the government officials to identify prior contracts without reliance on the tenderer, thus reducing the risk of disclosure of only contracts where past performance was good.⁴¹

⁴⁰ In a recent protest decision, GAO stated, as the standard legal framework for its review of a challenge to an agency's evaluation of a firm's past performance, "An agency's evaluation of past performance, including its consideration of the relevance, scope, and significance of an tenderer's performance history, is a matter of discretion which we will not disturb unless the assessments are unreasonable or inconsistent with the solicitation criteria." *Phoenix Management, Inc.*, B-405980.7 *et al.*, May 1, 2012.

⁴¹ The evaluation and any contractor response comprise the past performance information that is stored in government databases (e.g., Past Performance Information Retrieval System (PPIRS), Federal Awardee Performance and Integrity Information System (FAPIIS)) and may be used in future source selection decisions. See: KATE M. MANUEL, Congressional Research Service Report for Congress, *Evaluating the "Past Performance" of Federal Contractors: Legal Requirements and Issues*, 4 February 2013, in <http://www.fas.org/sgp/crs/misc/R41562.pdf>.

Second, the US system allows the tradeoffs between price and non-price factors to be subjective. The acceptability of subjective tradeoffs has been recognized at least as far back as the 1970s, when GAO declared that contracting officers had discretion in making tradeoffs among competing bids, as long as their decision was consistent with the publicly announced evaluation criteria and met the test of rationality.⁴² That means, for example, that, where a solicitation advised that the government will weight price and past performance equally, two contracting officials could reach different – but both permissible – tradeoff decisions between competing bids. Thus, one contracting officer could decide that bidder A, with an “outstanding” past performance record but offering a price of \$10 million, should receive the contract, rather than bidder B’s \$9 million offer, because bidder B had only “good” past performance. Another contracting officer, faced with the identical facts, could decide that it wasn’t worth the government’s money to spend that extra \$1 million to obtain the benefit of working with a firm with a track record of outstanding performance. That degree of subjectivity can open the system to problems, including problems potentially related to corruption, since it decreases transparency (in the sense that it is not so clear why the government chose the winner). Nonetheless, the problem is subject to multiple accountability mechanisms, in the form of bid protests as well as audits. The system thus provides, or at least attempts to provide, a balance between allowing contracting officials to exercise their discretion and judgment in spending public funds, on the one hand, and ensuring the integrity of public procurement through effective accountability, on the other.⁴³

⁴² The seminal GAO decision establishing this principle was *Grey Advertising, Inc.*, 55 Comp. Gen. 1111 (1976), 76-1 CPD 325.

⁴³ D. DELLA PORTA – A. VANNUCCI, *Corrupt exchanges: Empirical themes in the politics and political economy of corruption*, paper prepared for conference, Bielefeld, 2001, they rank discretion as follows: “(i) When public demand and preferences are precisely defined with respect to both qualities and price structure. The award is automatic, and the public agent exercises no discretionary power. (ii) While public demand is precisely defined, general criteria for prices describe the public preferences. Discretionary intervention is necessary. (iii) Public demand is not defined with precision. Public preferences are described by general criteria for both price and

From the EU viewpoint, award of a contract should be objective⁴⁴ in order to ensure nondiscrimination among economic operators of different Member States.⁴⁵ Such a choice can be implemented with the simplest and most objective award criterion, lowest price. The problem the EU faces is to ensure the objectivity of an evaluation of any other criteria, particularly when their use normally require a subjective assessment.

Selection based on ‘the most economically advantageous tender’ is permitted, as long as the evaluation of quantifiable and nonquantifiable quality elements is done through an objective evaluation, including publicly disclosed “relative weightings” of any element.

This commitment to objectivity remains challenging. For example, apart from the case of quantifiable elements (e.g., delivery to be measured in days, distance between the supplier's warehouse and place of delivery to be measured in kilometers, saving energy to

quality. The public official has the power to assign weight to the various offers, according to general criteria. (iv) The demand and the public preferences are precisely defined during a bilateral bargaining process, delegated to the public agent. S/he is choosing the private part, while price and other contract conditions are the result of the negotiation process”. This classification is reported by T. SØREIDE, *Corruption in public Procurement Causes, consequences and cures*, 2002, 13. The author observe that “This way of classifying public procurement into various degrees of discretionary authority, or objectivity, is important to understand the inclination to corruption in different situations”. S. R. ACKERMAN, *Corruption and government. causes, consequences and reform*, cit., 18. “Whenever regulatory officials have discretion, an incentive for bribery exists”.

⁴⁴ EC Directive 2004/18, Wh. No. 46, “*Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. (...) In order to guarantee equal treatment, the criteria for the award of the contract should enable tenders to be compared and assessed objectively.*” See European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council on public procurement, cit., Wh. No. 90, “*Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment, with a view to ensuring an objective comparison of the relative value of the tenders in order to determine, in conditions of effective competition, which tender is the most economically advantageous tender.*”

⁴⁵ C. H. BOVIS, *EU Public Procurement Law*, Cheltnham, 2007, 63-80.

be gauged in Kw/h), the EU system also permits the use of non-quantifiable elements, such as technical merit and aesthetic characteristics. In the evaluation of these qualitative elements, the contracting entities have discretionary power, and their evaluation retains a large subjective component, even when expressed in objective sounding numerical scores.⁴⁶ The fact is that subjectively assigned scores, however precisely presented and whatever complex formula is used, do not lead to an objective evaluation. Moreover, even when the assessment of non-price factors is objective (such as assigning points based on the number of days needed for delivery), the tradeoff between those factors and price is inherently subjective: if one tender would have the goods delivered in 15 days and the other would take 20 days, how many euros extra should the contracting authority be willing to pay for the earlier delivery? Of course, in such cases, the ‘monetization’ of non-price factors can be disclosed in the tender documents (for example, each day shorter than 30 days will be translated into an evaluated price credit of 100 euros), so that an objective formula and transparency are preserved.

The goal of objectivity and the reduction of the discretion available to evaluation committees (juries) and contracting authorities has induced some Member States⁴⁷ to provide for the use of mathematical formulae in the award of public contracts.⁴⁸ That is, the contracting authority is to determine a mathematical formula for both the assessment of the different criteria and the relative weightings used to determine the most economically

⁴⁶ J. SCHULTZ – T. SØREIDE, *Corruption in Emergency Procurement*, in *U4 Anti-Corruption Resource Centre - Issue Paper*, 2006, Corruption “can take place through violations of ordinary procurement rules or through misuse of legal authorisation for discretionary decisions”.

⁴⁷ The Italian Public Procurement Code: Law No 163 of 2006, art. 83, § 5, where in the specification of the rules concerning the most economically advantageous tender, the use of a method that permits identifying the most advantageous offer with a single numeric parameter is provided for. See also: the Government regulation enforcing the IPPC (d.P.R. 5 October 2010, n. 207), Annex P.

⁴⁸ F. DINI, R. PACINI, T. VALLETTI, *Scoring rules*, in N. Dimitri – G. Piga – G. Spagnolo (eds.) *Handbook of procurement*, cit., 304 et seq.

advantageous tender.⁴⁹ While the mathematical formula translates the scores given by the evaluation committee (jury) into a ranking, the problem often remains that the scores themselves are subjective, and they can tilt the award in favor of one tenderer or another. The jury's assessment thus continues to have a discretionary content, and the mathematical formulas serve mainly to give a semblance of objectivity to a subjective evaluation.⁵⁰

Both the jury's discretionary power of technical assessment and that of the contracting authorities in the evaluation of tenders' qualitative elements must ensure reasonableness, consistency and logic in order to avoid discrimination. Yet, for the reasons explained above, objectivity is only apparent. Moreover, the cost paid for the goal of objectivity can be significant: it may force the contracting authority to make a selection based on a score difference that is minimal – essentially irrelevant, especially when the way the score is developed is taken into account - a higher score of 0.1, with no meaningful evaluation of promised quality, may compel a contracting authority to pick one tender over the other.

The limited evaluation of past performance and the complex scoring schemes in the European system can lead to an award that seems random/irrational, and can raise serious integrity and performance risks. Such risks can arise also when the award is decided

⁴⁹ P. S. STILGER *Formulas for Choosing the Most Economically Advantageous Tender - a Comparative Study*, 2011, available at <http://igitur-archive.library.uu.nl/student-theses/2012-0327-200536/StilgerPSMA2011Part%20I.pdf>.

⁵⁰ Italian Cons. Stato, VI, 2 March 2004, No. 926, concerning an awarding procedure carried out by Consip S.p.A. for substitute services for canteen meal vouchers. Regarding this case, see also the investigation activity provided by the Italian Competition Authority in <http://www.agcm.it/component/domino/open/41256297003874BD934143B3AF9C783AC125705F002CBAF3.html>. See: Italian Authority for the Supervision of Public Contracts for works, services and supplies, Determinazione, 24 November 2011, n. 7, in http://www.avcp.it/portal/public/classic/AttivitaAutorita/AttiDellAutorita/_Atto?ca=4846; F. DINI, R. PACINI, T. VALLETTI, *Scoring rules*, in N. Dimitri – G. Piga – G. Spagnolo (eds.) *Handbook of procurement*, cit., 309-310.

at the lowest price if the subject matter and contract conditions are not precisely defined in the contract notice, as often happens in work procurements.⁵¹

The new EU provision for publication on the OJUE of material modification of contracts and the new limits imposed to material changes aim to ensure the respect of the competitive selection process. Material changes to an existing contract will require a new procurement procedure.⁵² The material change could lower the level of required performance, thus giving an economic advantage to the winner, and undermining the meaningfulness of the competition. A significant price increase during contract performance could also be considered a material change. In the EU experience the modification after the award are quite widespread and not always justified, as they could be symptoms of inefficiency or of corruption.⁵³ The EU Court of Justice defined the limits to such amendments to existing contracts and the new Directive provides a very detailed list of limits to the modification of contracts during their terms, and the forms of publicity.⁵⁴

⁵¹ G. M. RACCA, *Collaborative procurement and contract performance in the Italian healthcare sector: illustration of a common problem in European procurement*, in *Public Procurement Law Review*, 2010, 119-133; G.M. RACCA - R. CAVALLO PERIN - G. L. ALBANO, *Competition in the execution phase of public procurement*, in *Pub. Cont. L. J.*, 2011, 89 -108.

⁵² European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council on public procurement (COM(2011)0896 – C7-0006/2012 – 2011/0438(COD)), 15 January 2014, art. 72, § 5, where is required a new award procedure for all the modifications of a public contracts or a framework agreement not admitted by the par. 1 and 2 of this article. For the ineffectiveness see also the EU Directive No. 2007/66, art. 2(d).

⁵³ G. M. RACCA – R. CAVALLO PERIN, *Material Amendments of Public Contracts during their Terms: From Violations of Competitions to Symptoms of Corruption*, in *European Procurement & Public Private Partnership Law Review*, 2013, 287-290.

⁵⁴ European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council on public procurement, cit., art. 72 and 73. In ECJ case law see: ECJ, 19 June 2008, *Pressetext Nachrichtenagentur GmbH Österreich* in Case C-454/06, I-4401; ECJ, 29 April 2004, *Commission v CAS Succhi*

Unsuccessful tenderers will have an interest in learning of later modification of the contract, because they may have the right (e.g., in Italy⁵⁵) to get the contract in case of termination for serious infringements, or to compete in a new procurement procedure if a material modification is required. Unsuccessful tenderers and potential competitors could complain if they are not afforded an adequate opportunity to compete in these situations. Third parties could also have an interest whenever a contractor performs below the standards called for in the contract (which may be due to collusion with the procurement official in charge of contract management). . The possibility of action by third parties might serve to deter improper or unjustified modifications to contract terms. Relying too heavily on competitors as a backstop against corruption (or incompetence) during the contract performance can be risky, however; for any number of reasons competitors may lose interest in a requirement, or may simply run out of resources, and so may not provide the healthy check that might be otherwise be expected.

Developments in EU law in this area track the long-standing rule in the United States. The US approach is that a modification that the original bidders, at the time they competed for the contract, could not have foreseen is “outside the scope” of the contract

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.

⁵⁵ Italian code of public contracts, art. 140. In case of serious infringement, contracting authorities can replace the selected contractor by “scrolling down” the initial ranking until the fifth bidder (except the original contractor). The award is made under the same conditions already proposed by the original contractor. See: G. M. RACCA, *Public Contracts – Italy*, 32 et seq.; G.M. RACCA - R. CAVALLO PERIN - G. L. ALBANO, *Competition in the execution phase of public procurement*, in *Pub. Cont. L. J.*, 2011, 92 et seq.; C. R. YUKINS, *A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model*, in *Pub. Cont. L. J.*, 2011, 63 et seq.

and therefore must be procured separately. That has been the rule in the US for decades, and it appears to be fully consistent with the newer rule in the EU.⁵⁶

The use of electronic means – ‘e-procurement’ – can increase transparency and predictability, but, if it relies on an unwisely arbitrary system for assessing tenders, it will not make that system more sensible. As the Americans are fond of saying about the use of computers, ‘garbage in, garbage out’. An e-procurement system could, however, facilitate the sharing of information about upcoming or recent procurements with economic operators, and it could make it easier for them to submit their tenders and receive feedback on the, all of which could improve the procurement system and its efficiency.

Reverse auctions are commonly used in US Federal procurements, and there is an open discussion on the need of a further regulation.⁵⁷ The Federal Acquisition Regulation does not provide rules on reverse auctions and some negative effects of the absence of guidelines have been noted in a recent report issued by the US Government Accountability Office (GAO).⁵⁸ According to the data in that report, five US agencies conducted about 70

⁵⁶ *AT&T Commc'ns, Inc., v. Witel, Inc.*, 1 F.3d 1201, 1205 (Fed. Cir. 1993), quoted in O. DEKEL, *Modification of a government contract awarded following a competitive procedure*, in 38 Pub. Cont. L. J., 401, 416 (2009).

⁵⁷ B. ROBINSON, *DHS Moves Forward with Reverse Auctions*, 2006, available at <http://fcw.com/articles/2006/10/12/dhs-moves-forward-with-reverse-auctions.aspx>, where it is reported that “The State Department recently said it had conducted 4,700 reverse auctions worth \$169 million, with a savings of close to \$18 million on what it had expected to pay for the items”. See also: C. R. YUKINS, *Use and Regulation of Electronic Reverse Auctions in the United States*, in S. Arrowsmith (ed. by) *Reform of the UNCITRAL Model Law on Procurement: Procurement Regulation for the 21st Century*, Danvers, 2009, 471 et seq.; C. R. YUKINS - DON WALLACE JR., *UNCITRAL Considers Electronic Reverse Auctions, as Comparative Public Procurement Comes of Age in the United States*, in *Public Procurement Law Review*, 2005, 183, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=711847.

⁵⁸ Government Accountability Office, *Reverse Auctions: Guidance Is Needed to Maximize Competition and Achieve cost Savings*, December 2013 (henceforth “2013 GAO Report”), available at <http://www.gao.gov/products/GAO-14-108>.

percent of the federal government's reverse auctions and many auctions were run without effective competition.⁵⁹ Moreover, GAO noted the lack of data on the largest auctions,⁶⁰ the performance (by the service provider) of "open market" auctions outside the procurement system⁶¹ and the change of the award criteria during the award procedure.⁶²

In the EU e-procurement is considered a way to improve the internal market of Public Procurement, potentially ensuring a greater participation and objectivity of the evaluation.⁶³ Nonetheless, it is not yet widespread. IT tools need to become strategic in order to better enforce non-discrimination and transparency principles and favour cross-border participation. Correctly addressed, e-procurement and the dynamic purchasing systems⁶⁴ might improve participation and an open comparison of prices and contract conditions for the benefit of competition, efficiency and integrity.

⁵⁹ 2013 GAO Report at 21-22. The report explain that 27% of the auctions involved only one vendor in fiscal year 2012. The amount of fees paid to the private-sector operator for running these auctions was \$ 3.9 million.

⁶⁰ 2013 GAO Report at 2.

⁶¹ 2013 GAO Report at 16.

⁶² 2013 GAO Report at 19-20. The report states that during the procedure in one-quarter of cases studied non-price factors were used in the evaluation of bids.

⁶³ G. M. RACCA, *The Electronic Award and Execution of Public Procurement*, cit., 13-22; S. ARROWSMITH, (ed. by) *EU Public Procurement Law: an Introduction*, available at <http://www.nottingham.ac.uk>, 248.

⁶⁴ EC Directive 2004/18, art. 33. The new EU Directive on public procurement includes dynamic purchasing systems among the *techniques and instruments for electronic and aggregated procurement* in the art. 34. See: EU Commission, *Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report*, COM(2014) 38 final, cit., 31-32; EU Commission, *Evaluation Report Impact and Effectiveness of EU Public Procurement Legislation*, cit., 24; G. M. RACCA, *The role of IT solutions in the award and execution of public procurement below threshold and list B services: overcoming e-barriers*, in D. Dragos – R. Caranta (eds. by) *Outside the Procurement Directives - inside the Treaty?*, Copenhagen, 2012, 385-389.

4. THE US EXPERIENCE IN AGGREGATION: RISKS TO AVOID IN THE EU

In the EU system, techniques for joint procurement among government buyers were developed in different EU Member States even before they were called out as an option in the 2004 Directive.⁶⁵ According to the Directive, a Central Purchasing Body (CPB) can operate either as a wholesaler that buys in order to sell to other contracting authorities, or as an intermediary in charge of the award procedures, providing a catalogue of framework contracts which contracting authorities can use to purchase directly from the supplier.⁶⁶ Aggregate purchasing⁶⁷ has taken place on the basis of voluntary cooperation among several contracting authorities, or through contractual cooperation models such as alliances, consortia or corporate models.⁶⁸ Member States are free to define whether CPBs can operate only in specific sectors, or in predetermined product categories. The provision in the EC Directive 2004/18 referring to CPBs was designed to overcome barriers to cross-border procurement and to modernize and improve procurement systems for the purposes of efficiency and functionality.⁶⁹ Nonetheless the amount of aggregated procurement in the

⁶⁵ EC Directive 2004/18, Wh. No. 15. S. ARROWSMITH, *The Past and Future Evolution of EC Procurement Law: From Framework to Common Code?*, cit., 369. C. R. YUKINS, *Are IDIQs Inefficient? Sharing Lessons with European Framework Contracting*, in *Pub. Cont. L. J.*, 2008, 554.

⁶⁶ EC Directive 2004/18, art. 1, § 10; European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council on public procurement, cit., art. 2, § 14.

⁶⁷ European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council on public procurement, cit., Wh. No. 24b.

⁶⁸ G. M. RACCA, *Collaborative procurement and contract performance in the Italian healthcare sector: illustration of a common problem in European procurement*, cit., 119-133.

⁶⁹ Ec directive 2004/18, wh. No. 15. CPBs would improve the professionalizing of procurements as they would have the specialised skills and expertise in running procurement transactions. CPBs are also better resourced to carry out procurement involving pursuit of strategic objectives (e.g. CPBs would have the expertise to evaluate complex or sophisticated tenders regarding new, innovative or eco-innovative products and services). A cpb can

EU remains extremely varied among Member States. In many Member States there is market closure not only on a national level, but often even on a regional or sub-regional level. This is true, even though it seems inefficient, from a transaction cost viewpoint, to conduct hundreds of thousands of low-value contracts, possibly resulting in a large variation of prices for very similar products (particularly for standardized commodities). This becomes evident whenever the number of economic operators active in a market is very limited. There may be little benefit in running thousands of competitions in which fewer than ten economic operators participate. From an integrity perspective, it would be hard to justify significant price differences of the same item, especially when the higher price paradoxically is paid by the large hospital that buys a bigger quantity in comparison with a small hospital that buys less and pay less.⁷⁰ A new approach for a complete and

also use instruments for the digitalization of procuring documents and particularly to implement new procedures of selecting bidders such as e-auctions and framework agreements and can build archives of awarding data. S. ARROWSMITH, *Modernising the European Union's Public Procurement Regime: a Blueprint for Real Simplicity and Flexibility*, in *Public Procurement Law Review*, 2012, 71.

⁷⁰ Such an improper situation can be considered as a red flag for integrity of the agents involved (purchasers, politicians, etc.) The solution can be an effort to match contract prices to prices that have been determined to be justified, by the just started Italian spending review. The Italian Law Decree 6 July 2011, n. 98, art. 17, (converted in Law 15 July 2011, No. 111) concerning the rationalization of health expenditure, confers on the Italian Observatory of public contracts (in the Italian Authority for the Supervision of Public Contracts) the task of publishing, from July 1, 2012, reference prices for medical devices, drugs for hospital services, with the greatest impact on health care costs overall. See: http://www.avcp.it/portal/public/classic/Comunicazione/Pubblicazioni/StudiRicerche/_prezziAmbitoSanitario. The same law provides that, if significant differences emerge between the reference price and the awarded price, there is an obligation to "renegotiate" the contract prices to align them with the reference prices. The rules identify as "significant differences" those greater than 20% from the reference price. See also Law Decree, 13 September 2012, No. 158 (converted in Law 8 November 2012, No. 189), on the modality to calculate the reference prices and Law 24 December 2012, No. 228 that, from the 1st January 2013, provided for the identification of medical devices. The subsequent case-law annulled the methods used for the identification of standard prices. See: T.A.R. Roma, III, 2 May 2013, No. 4399, 4401 and 4404. Recently a spending review Commissioner has been appointed, according to Italian Law Decree 21 June 2013, N. 69, converted in Law 9 August 2013, No. 98, see: http://www.mef.gov.it/ufficio-stampa/comunicati/2013/comunicato_0173.html.

comprehensive vision of possible strategies for collaborative procuring policies is definitively needed.

Joint procurement and particularly CPBs can play a substantial role through market analysis and procurement strategies, changing the scale of the procurements envisioned and leading to significant savings in terms of administrative effort and the prices paid with public funds.⁷¹ The new EU Directive observes “*a strong trend emerging across Union Public Procurement markets towards the aggregation of demand by public purchasers, with a view to obtaining scale economies, including lower prices and transaction costs, and to improving and professionalizing procurement management. This can be achieved by concentrating purchases either by the number of contracting authorities involved or by volume and value over time. However, aggregation and centralization of purchases should be carefully monitored in order to avoid excessive concentration of purchasing power and collusion, and to preserve transparency and competition, as well as market access opportunities for small and medium-sized enterprises*”.⁷² Moreover it is provided that “a Member State shall not prohibit its contracting authorities from using centralised purchasing activities offered by central purchasing bodies located in another Member State”.⁷³ Such provision open new perspective for EU joint procurement.

In the EU, the path towards aggregation in many Member States has just begun. The four-year limit of framework agreements and the trend favoring a second step of mini-

⁷¹ OECD, *Centralised Purchasing Systems in the EU*, 11 January 2011, available at www.oecd-ilibrary.org/governance/centralised-purchasing-systems-in-the-european-union_5kgkgqv703xw-en; G. L. ALBANO – M. SPARRO, *Flexible Strategies for Centralized Public Procurement*, in *Review of Economics and Institutions*, 2010, 4-7.

⁷² European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council on public procurement, cit., Wh. No. 59.

⁷³ European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council on public procurement, cit., art. 39, § 2.

competition among economic operators inside the framework could limit some of the abuse that occurred in the US, at least in the 1990s and the first years of this century, with the US equivalent of framework contracts.⁷⁴ Apart from the UK experience, the benefit and risks of aggregation in the EU are still unknown. Significant progress might be attained through building networks among EU CPBs that could effectively open new markets in specific sectors in the EU or at least part of it.⁷⁵ Notably, the new Directive says that “Member States shall not prohibit” their contracting authorities from taking advantage of other States’ CPBs’ activities.⁷⁶

The chance to overcome national barriers could foster the fight against unsound procedures and corruption, defining benchmarks and appropriate prices.⁷⁷ The ‘Europe

⁷⁴ C. R. YUKINS, *Are IDIQS Inefficient? Sharing Lessons With European Framework Contracting*, in *Public Contract Law Journal*, 2008, vol. 37, 561 et seq.

⁷⁵ Collaborative procurement in the EU through a network of CPBs is the object of the *Healthy Ageing and Public Procurement of Innovation* (HAPPI) project funded by the EU Commission (DG Enterprises) - rif. call ENT/CIP/11/C/N02C011 - within the framework of the Competitiveness and Innovation Programme (CIP).. The project concern the EU joint procurement system in Healthcare. see: <http://www.happi-project.eu/>.

⁷⁶ European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council on public procurement, cit., art. 39, § 2, where in regard to the issue of the Procurement implicating contracting authorities from different Member States the proposal Directive states that “A Member State shall not prohibit its contracting authorities from using centralised purchasing activities offered by central purchasing bodies established in another Member State”.

⁷⁷ S. R. ACKERMAN, *International Actors and the Promises and Pitfalls of Anti-Corruption Reform*, cit., 2013, 467, “Objective cross-country information about the possible results of corruption and inefficiency can help spur reforms in individual countries. International bodies could compile benchmark data on the cost and performance of public projects to alert potential whistleblowers and to provide ammunition to reformers”. J. DUGARD, *Corruption: Is there a Need for a New Convention?*, in R. S. Ackerman – P. Carrington (ed. by) *Anti-Corruption Policy. Can International Actors Play a Constructive Role?*, Carolina Academic Press, 2013, 159. “Corruption creates obstacles to the realization of social and economic rights and violates civil and political rights by weakening and sometimes destroying the political and judicial institutions that underpin democracy and the rule of law”.

2020' strategy requires that public procurement policy ensure 'the most efficient use of public funds and that procurement markets must be kept open EU wide.' Obtaining 'optimal' procurement outcomes, generally reflected in the term 'value for money', through efficient procedures is of crucial importance in the context of the severe budgetary constraints and economic difficulties currently experienced by many EU Member States. The new Public Procurement Directive contains a Chapter on "*Techniques and instruments for electronic and aggregated procurement*". The approval of such rules could open new perspectives of cooperation and joint procurement among contracting authorities of different member States,⁷⁸ particularly among CPBs, consortia or alliances of procuring entities (rather than individual contracting authorities).⁷⁹ The promotion of value achieved through forms of joint procurement and professionalism in buying organizations would change the perspective on public procurement, providing a more meaningful picture of the market and offering the possibility of promoting innovation and sustainability policies.⁸⁰

The rules provided in the new EU Directive encourage forms of public-to-public cooperation among contracting authorities, favoring the use of tools provided by the EU

⁷⁸ European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council on public procurement, cit., art. 39. The article requires that this kind of cooperation will be based on a international agreement concluded between the Member States concerned. G. M. RACCA, *Collaborative procurement and contract performance in the Italian healthcare sector: illustration of a common problem in European procurement*, in *Public Procurement Law Review*, 2010, 119.

⁷⁹ The EU founded projects especially for the public procurement of innovation favor such cooperation. See, for example, the call - rif. call ENT/CIP/11/C/N02C011 within the framework of the Competitivity and Innovation Programme (CIP): the HAPPY project that provides EU networks of CPBs and joint procurement in the sector of "ageing well" and health innovative products and services (G. M. Racca) (<http://www.happy-project.eu/>).

⁸⁰ S. R. ACKERMAN, *International Actors and the Promises and Pitfalls of Anti-Corruption Reform*, cit., 2013, 470. Where it is highlighted the relevance of professional networks to share ideas and to establish code of ethics, but also in. the training of public officials.

legal framework, like the European Groupings of Territorial Cooperation (EGTC).⁸¹ In all cases of public-to-public cooperation (even between contracting authorities of different Member States) or occasionally joint procurement, the new EU Directive also clarifies the national law applicable and identifies the single contracting authority responsible for the contract activity covered by the cooperation.⁸² The goals of efficiency and greater market opening are also linked to the increased use of electronic tools. The new Directive identifies CPBs as entities that can promote and encourage the use of electronic means in the Internal Market of Public Procurement, providing that "all procurement procedures conducted by a central purchasing body shall be performed using electronic means of communication".⁸³

In this regard, the US experience is quite interesting. After World War II, the US government created an agency, the *General Services Administration* (GSA), to buy commodities, such as office furniture, for all federal agencies. Use of GSA was mandatory, so that federal agencies were required to buy the covered supplies through GSA; they were not allowed to conduct their own procurements. GSA, being a monopoly, was widely viewed as not caring enough about what its customers (the agencies) really wanted, and complaints grew that GSA was offering poor service supplying low-quality products at high prices. The criticism increased when computer-related supplies came into use: if GSA was seen as doing a poor job providing high-quality office furniture at good prices, it was viewed as doing an even worse job providing computer-related goods. The legal

⁸¹ European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council on public procurement, cit., art. 39, § 5. About the European Groupings of Territorial Cooperation see EU Regulation 5 July 2006, No. 1082 and the amendments provided with the EU Regulation 17 December 2013, No. 1302.

⁸² Concerning *centralised purchasing activities and central purchasing bodies* see art. 35, § 3, for the *occasional joint procurement* see art. 37, § 2; for *Procurement implicating contracting authorities from different Member States* see art. 39, § 4.

⁸³ European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council on public procurement, cit., art. 35, § 3.

framework allowed GSA to ‘delegate’ to agencies its authority for purchasing computer-related goods, but that only tended to reduce GSA’s importance. While some federal agencies may have been enthusiastic about this, the result was the disaggregation of public procurements in the important information technology (IT) arena. The 1990’s procurement reform encouraged agencies to create and use their own framework agreements, typically awarded to more than one economic operator; those contracts were called ‘multiple-award indefinite-delivery, indefinite-quantity’ contracts. Moreover, GSA lost its role as the mandatory source of supply, even for office supplies and other commodities. Instead, GSA was forced to compete with other agencies, in terms of both price and convenience, in the purchase of goods and services under its own framework contracts, the ‘Federal Supply Schedule’ (FSS). The FSS had its own regulation with special rules, special procedures and special issues. GSA focused on increasing the scope of items available on the FSS, vastly expanding the goods and services as well as the number of FSS contractors. Moreover, GSA began advertising, and worked hard to improve the service provided to other agencies, thus presumably earning the fee charged for using the FSS (which eventually dropped from one percent to 0.75 percent). The result was that in the years since 1994, the total sales under the FSS have increased from less than \$5 billion to close to \$40 billion.

In theory, GSA’s ability to offer low prices derives from the “Price Reduction” clause.⁸⁴ The clause, at least in principle, guarantees that the U.S. government will be

⁸⁴ The “price reduction” clause works by establishing a relationship (such as “equal to” or “lower than”) between a select group of schedule contractors’ commercial customers called the “basis of award.” Thereafter, when contractors lower their basis of award prices, they must correspondingly reduce their schedule price--although commercial transactions above a certain negotiated threshold called the “maximum order threshold” are exempt from the price reductions clause”. In a report regarding implementation of an Obama administration Executive Order ordering agencies to conduct an analysis of existing regulations in search of rules that may be obsolete or excessively burdensome, GSA wrote that the clause was a necessary mechanism. About this see: <http://www.fiercegovernment.com/story/gsa-changing-price-reduction-clause-not-feasible/2011-08-29>; General Services Administration, *Final Plan for Retrospective Analysis of Existing Rules*, August 18, 2011, available at: <http://www.whitehouse.gov/sites/default/files/other/2011-regulatory-action-plans/generalservicesadministrationregulatoryreformplanaugust2011.pdf>. In US case law see: U.S. Court of

getting the best price offered by the contractor to any of the defined class of costumers. In practice, its impact is far more limited, for reasons that go beyond the scope of this discussion. While the clause can ensnare contractors in difficult situations, including allegations of overcharging and even criminal fraud, the FSS continues to be criticized for not offering particularly low prices. There has also been widespread criticism that GSA's employees do not possess the skills needed to obtain good deals for the federal government, thus denying the agencies an expected benefit of a CPB.

Studying the U.S. experience can be useful to people outside the US, suggesting the risk of enforcing aggregation through provisions making purchase through a CPB mandatory. On the other hand, the U.S. experience does suggest the benefit of a CPB, since it avoids the need for a large number of transactions for the purchase of commodities. In addition, the U.S. experience, both with GSA's FSS and the multiple-contractor ID/IQ contracts⁸⁵, underscores the importance of a second-step competition among the undertakings holding framework contracts, at least when a large purchase is planned.

Appeals for the First Circuit, *U.S. v. Data Translation, Inc.*, No. 92-1496, available at http://www.leagle.com/decision/19922240984F2d1256_12007. In this judgment the Court analyses the literal language of the "discount disclosure" clause. See also: <http://www.fedmarket.com/contractors/GSA-Schedule-Price-Reduction-Clause>.

⁸⁵ C. R. YUKINS, *Are IDIQs Inefficient? Sharing Lessons with European Framework Contracting*, in *Pub. Cont. L. J.*, 2008, 545 et seq.

5. INTEGRITY AS THE KEY TO ANY PROCUREMENT SYSTEM: HOW TO PROVIDE TRANSPARENCY AND ACCOUNTABILITY

Public procurement requires managing conflicting interests among stakeholders to achieve common goals, and it is very political by its nature. Buyers want to buy high-quality goods and services at the lowest price. Sellers want to sell goods at as high a price as possible, and elected “public officials” want successful completion of highly visible programs to help reelection. Citizens want quality public spending.⁸⁶ Government procurement might reflect more or less of any one of these interests depending on the political direction of the country; the US federal government procurement system functions as a policy tool. Every procurement system has its “desiderata”⁸⁷: nevertheless, these tasks and objectives are often in conflict. For example, efficiency and accountability can be at odds with one another, since the former requires that procurement work quickly and the latter tends to slow things down.

Sometimes, the use of the right tool can help reconcile these competing goals: for instance, when an agency competes and awards framework agreements, time may not be

⁸⁶ P. TREPTE, *Transparency and Accountability as Tools for Promoting Integrity and Preventing Corruption in Procurement: Possibilities and Limitations*, 2005, available in http://www.oecd-ilibrary.org/economics/transparency-and-accountability-as-tools-for-promoting-integrity-and-preventing-corruption-in-procurement_oecd_papers-v5-art34-en. See also: OECD, *Implementing the OECD Principles for Integrity in Public Procurement*, 2013, available in http://www.oecd-ilibrary.org/governance/implementing-the-oecd-principles-for-integrity-in-public-procurement_9789264201385-en;jsessionid=chfilhfgn6ktoh.x-oecd-live-02,24. The report highlights that weak governance in public procurement hinders market competition and raises the price paid by the administration for goods and services, directly impacting public expenditures and therefore taxpayers’ resources, and points out that clean and effective procurement is key for sound stewardship of public funds.

⁸⁷ S. L. SCHOONER, *Desiderata: Objectives for a System of Government Contract Law*, in *Public Procurement Law Review*, 2002, 103 et seq., where the author introduces nine goals frequently identified for government procurement systems: (1) competition; (2) integrity; (3) transparency; (4) efficiency; (5) customer satisfaction; (6) best value; (7) wealth distribution; (8) risk avoidance; and (9) uniformity.

critical; but it may become critical when the orders are to be let, and the limited number of framework agreement holders can facilitate quick action at that stage.

Transparency is another significant goal, and challenge, in any public procurement system.⁸⁸ Transparency has been a core requirement of the US system for much more than a century: public opening of bids, for example, has been required since the 18th century. Today, except for small purchases, all upcoming procurements and all contract awards must be publicly posted on the single point of entry website, *www.fedbizopps.gov*.⁸⁹ However, a uniform system of public procurement records is still absent in the US, thus limiting effective transparency. A complete and easily accessible database system which would enable every citizen to access all the information related to a specific contract remains an elusive – and costly – goal. To a certain extent, the US system compensates for the weaknesses in transparency through the strength of its bid-protest complaint mechanism, in a sense providing transparency through the accountability system.

The principle of accountability in the US public procurement system has deep roots, going back at least to the 19th century. A central role has been played by the agency founded as the General Accounting Office (GAO), under the Budget and Accounting in 1921 (although its name changed in 2004 to the Government Accountability Office, the acronym is unchanged). Originally comprised basically of accountants and budget specialists watching over the federal accounts and books, its staffing and focus have

⁸⁸ OECD, *Bribery in Public Procurement. Methods, Actors and Counter-Measures*, 2007, available at <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/44956834.pdf>, 55 et seq.

⁸⁹ The detailed rules for publicizing contract actions are set out in Part 5 of the FAR.

changed, and it now concentrates on the efficiency and effectiveness of federal programs and activities.⁹⁰ .

The GAO has also long played a role in providing accountability and transparency in the federal procurement system. Since the mid-1920s, dissatisfied bidders can file complaints, called ‘bid protests,’ at GAO, which can lead to a decision by GAO on whether the contracting agency complied with procurement law and regulation. Today, bid protests can also be filed at a semi-specialized court in Washington called the Court of Federal Claims (COFC). (Over the years, different systems have been tried out, including allowing protesters to go to regular federal courts.)

Both the GAO and the COFC focus on whether the contracting agency followed the law, and both have expertise in procurement law. At both the GAO and the Court of Federal Claims, protests may be filed either pre-award or post-award. Pre-award protests generally focus on whether a procurement is being conducted in a way that improperly restricts competition. Examples of improper restrictions on competition include an unduly short period for bidders to submit their tenders as well as specifications that unjustifiably exclude some firms from trying to meet the government’s needs. Post-award protests typically focus on whether the contracting agency, in selecting the winning tender, followed the criteria, weighting, and other rules set out in the solicitation.

It may be viewed as surprising that the bid protest mechanism, which represents the primary accountability mechanism for procurement in the US system, rarely uncovers cases of corruption. Dozens of times each year the GAO and the COFC, find that contracting agencies have violated procurement statutes or regulations – but they virtually never point to corruption (which would be referred to the Department of Justice for

⁹⁰ Now GAO reviews almost anything that the federal government does, whether domestically or overseas. It may examine the efficiency and effectiveness of national parks, just as it examines war expenditures by the military in Afghanistan, or the federal healthcare systems, or the space agency (NASA).

prosecution, in any event, rather than being addressed in a bid protest). Instead, a ruling against a contracting agency is generally based on the fact that the agency is not following the rules –for example, by weighting cost or other evaluation criteria differently from the weighting scheme called for in the solicitation. When the GAO or the COFC rules against a contracting agency, they will call for corrective action, which typically means going back to the stage in the procurement when the error occurred, fixing the error, and then re-doing the balance of the procurement. Neither forum will call for damages to be paid – the focus is on fixing the procurement, not compensating the bidder. It should be noted that an improperly awarded contract can be terminated in the U.S. system, and most protests are filed after the contract has been signed.

Corruption in the federal procurement system does seem to be relatively rare, when compared with reported corruption in other systems and even in local governments in the US.. The one case that American procurement experts might cite as an example of corruption being considered in a GAO bid protest decision is exceptional in every sense: the Darleen Druyun case. Druyun, the highest level civil servant handling procurements for the U.S. Air Force, was accused of improperly turning to a senior official from the Boeing Company – a firm competing for Air Force contracts – to obtain a job for her daughter, her daughter’s boyfriend and, ultimately, herself.⁹¹ That was clearly a case of corruption, and Druyun confessed to it as part of a plea bargain in court, before a protest came to GAO. Whether Druyun had actually steered any contracts to Boeing was, however, much harder to prove, partly because of the subjective nature of trade-offs in the U.S. procurement system, where Druyun, the official deciding which company’s bid was to be selected for award, had considerable discretion to exercise her judgment.⁹² Lockheed Martin filed a

⁹¹ See the congressional testimony on the matter, presented by the author in his role as a GAO official, *Air Force Procurement: Protests Challenging Role of Biased Official Sustained*, GAO-05-436T, Apr. 14, 2005.

⁹² Perhaps alluding to the difficulty of determining the influence of subjective factors, Druyun stated, in what was essentially her confession, that she “believes that an objective selection authority may not have selected Boeing.” *Lockheed Martin Aeronautics Co. et al.*, B-295401 et al., Feb. 24, 2005, at 4.

protest at the GAO alleging that, in one particular competition, Druyun's selection of Boeing should be overturned. While the GAO never explicitly found that Druyun had acted improperly in selecting Boeing over Lockheed Martin, it did conclude that she was actively involved in the selection of the contractor and that the taint of a corrupt official involved in a procurement was intolerable in terms of the harm it caused to the federal procurement's system image of integrity; therefore, the GAO ruled in favor of Lockheed Martin.⁹³

Nonetheless, the overall picture is one of limited corruption in the U.S. federal procurement system. Credit for that does not go primarily to the rules regarding conflicts of interest, but rather to the characteristics set out above. The U.S. has a long tradition of the rule of law – statutes and regulations – governing procurements; the existence of a professional acquisition corps means there are officials with training enforcing the rules, and any improper action requires cooperation from both those officials and others involved, thus complicating the task of anyone trying to corrupt the procurement process; the preference for competition and the requirement for transparency make it legally and practically difficult to direct awards to favored firms; and the extensive and open accountability mechanisms make hiding corrupt actions difficult.

That said, federal employees are covered by a complicated set of rules intended to address conflicts of interest and various other areas of concern. While the rules cover a range of subjects as diverse as the use of government property and restrictions on publishing written material, they are focused largely on ensuring that federal officials do not use their public positions for private gain and that governmental actions are not affected by the personal interests of federal employees. Violation of the many legal rules can trigger both criminal and civil penalties; the key statute in this area is the Ethics in Government Act of 1978, as amended.⁹⁴ Under that Act and the implementing regulations, which are

⁹³ *Lockheed Martin Aeronautics Co. et al.*, B-295401 et al., Feb. 24, 2005, at 13-14.

⁹⁴ Public Law 95-521, codified in various parts of the United States Code.

issued by the Office of Government Ethics (OGE), certain employees whose responsibilities include the exercise of discretion in areas considered sensitive, and that may include procurement, are required to file financial disclosure forms.⁹⁵

It should be recognized that the U.S. allows actions that many would view as at least close to corruption. In particular, lobbying and contributions to political campaigns mean that large amounts of money pass between private actors and government officials. In the Supreme Court's decision in *Citizen United v. Federal Election Commission*, 558 U.S. 310 (2010), the Court struck down monetary limits on political expenditures by corporations, which only reinforced the culture of spending in the political arena by entities with economic interests at stake.

In the EU, accountability of public officials is left to national rules and there is no common European audit system.⁹⁶ With respect to the procurement system, the EU Remedies Directive has played an important role in ensuring that each Member State has a remedy mechanism for the undertakings to challenge procurement actions by contracting authorities. Nonetheless, the systems are neither uniform nor always appreciated. A common complaint is that the remedy systems often force the public to pay twice: once to the contractor providing the goods or services, and once to the unsuccessful tenderer that submitted a successful protest.⁹⁷ Critics argue that the Remedies Directive has led to a huge

⁹⁵ 5 U.S.C. app. 4 §§ 101-111; 5 C.F.R. part 2634.

⁹⁶ EU Parliament - Directorate General for Internal Policies, *Political and other forms of corruption in the attribution of public procurement contracts and allocation of EU funds: Extent of the phenomenon and overview of practices*, cit., 31.

⁹⁷ S. TREUMER, *Damages for Breach of the EC Public Procurement Rule-Changes in European Regulation and Practice*, in *Public Procurement Law Review*, 2006, 159. See also other articles in the same issue of P.P.L.R. relating to national experience (France, Germany, United Kingdom, Sweden and Norway). After the implementation of the EC Directive No. 2007/66 see: S. TREUMER - F. LICHÈRE (eds. by), *Enforcement of the EU Public Procurement Rules*, Copenhagen, DJØF Publishing, 2011 and D. FAIRGRIEVE - F. LICHÈRE, *Damages as an Effective Remedy*, Oxford, Hart Publishing, 2011; H.-J. PRIESS – P. FRITON, *Designing Effective Challenge*

increase of litigation, with little improvement in how procurements are actually carried out.⁹⁸

A particularly challenging provision in the Remedy Directive is the requirement for a mandatory standstill period from the award decision to the signing of the contract.⁹⁹ The purpose of provision is clear: once a contract has been signed, in most countries (unlike in the U.S.) it is generally too late to rescind it, so that a complaint mechanism cannot lead to the problem being fixed. Yet that laudable goal conflicts with the goal of efficiency, because it requires that every European procurement above the threshold must wait, for a minimum of 10 days, before it can move forward, in case someone wants to file a complaint.¹⁰⁰ The varying EU implementation means that in some countries, like the UK, this is a 10-day period, the minimum provided in the Directive, while in others, such as

Procedures: the EU's Experience with Remedies, in S. Arrowsmith - R.D. Anderson (eds. by), *The WTO Regime on Government Procurement: Challenge and Reform*, Cambridge, CUP, 2011, 511 et seq.

⁹⁸ G. M. RACCA, *Derogations from the standstill period, ineffectiveness and remedies in the new tendering procedures: efficiency gains vs. risks of increasing litigation*, in S. Treumer, F. Lichere (eds. by), Djof, 2011, 99. In the same book see: M. TRYBUS, *An Overview of the United Kingdom Public Procurement Review and Remedies System with an emphasis on England and Wales*, 232-233 and R. CARANTA, *Many Different Paths, but Are They All Leading to Effectiveness?*, 90-92.

⁹⁹ EU Directive 2007/66 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, art. 2a, where a standstill period is provided to allow an effective review of the contract award decisions taken by contracting authorities; ECJ, VI, 28 October 1999, *Alcatel Austria AG v. Bundesministerium für Wissenschaft und Verkehr* decision in C-81/98.

¹⁰⁰ EU Directive 2007/66, art. 2a, § 2. See also Wh. No. 5, where it is stated that “The duration of the minimum standstill period should take into account different means of communication. If rapid means of communication are used, a shorter period can be provided for than if other means of communication are used”, and Wh. No. 6, “The standstill period should give the tenderers concerned sufficient time to examine the contract award decision and to assess whether it is appropriate to initiate a review procedure”.

Italy, it is 35 days.¹⁰¹ The result is that a huge number of procurements are blocked in order to allow redress of the few where errors may have occurred. Moreover, often the correction is not undertaken and further litigation occurs, with further delays.

The EU Remedy Directive underscores the importance of combating illegal direct awarding of contracts and award of contracts concluded in breach of the standstill period, which the Court of Justice of the European Union has defined as “the most serious breach of Community law in the field of public procurement on the part of a contracting authority.” The intent was to introduce effective, proportionate and dissuasive sanctions to address these problems.¹⁰² The Directive provides for declaring a contract ineffective if it is the result of an illegal direct award and alternative penalties like fining the contracting authority or shortening the contract duration.¹⁰³ The Directive gives priority to correcting award procedures and admits compensation for damages only when it is no longer possible to award the contract to the economic operator who should have been entitled.¹⁰⁴

The US experience of, on the one hand, excluding any possibility of awarding damages, and, on the other hand, providing that any unlawfully awarded contract can be terminated, could lead Europe towards a discussion on the question of finding a better way to address tenderers’ complaints. Ultimately, a solution more like the U.S. one could reduce wasteful spending through damage awards, while better protecting the integrity of the public procurement system.

¹⁰¹ Italian Public Procurement Code, d.lgs. 12 April 2006, No. 163, art. 11, c. X.

¹⁰² EU Directive 2007/66, Wh. No. 13.

¹⁰³ EU Directive 2007/66, art. 2e, § 2.

¹⁰⁴ EU Directive 2007/66, art. 2e, § 2, third subparagraph.

6. CONCLUSIONS

The scarcity of public resources requires joint efforts to obtain quality and improve public procurement performance. This is the common challenge of any public procurement system.

Procurement should be considered a strategic function of governments, promoting efficiency throughout the entire cycle from the need assessment, the tendering process and until the final payment.¹⁰⁵ Transparency, efficiency and accountability are the assumptions for integrity and a deeper understanding of the different procurement systems permits to highlight the criticalities and the diverse possible solutions.

The European experience of detailed Directives covering only the award phase, with a focus on maximizing objectivity, while understandable, has demonstrated weaknesses. The level of crossborder procurement remains low, and the objectivity of the award, while made cumbersome by the Directives' procedures, remains hard to ensure and often is overcome by the subjectivity of the scores. Moreover, both the focus on objectivity and the detailed nature of the Directives' rules betray a lack of confidence in public officials and in their integrity. In effect, integrity issues in the EU often arise behind the curtain of objectivity, which apparently frees the public official of any liability in the "objective" choice. This apparently objective choice turns into both a lack of accountability in the execution phase and the tolerance of infringements. Often, behind such results there is simply incompetence, but sometimes also malice and corruption. The result for the citizens is in any case a waste of public funds and performance of poor quality.

¹⁰⁵ OECD, *Recommendation of the Council on Enhancing Integrity in Public Procurement*, C(2008)105, 2008, available in <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=131&InstrumentPID=127&Lang=en&Book=>, "the Recommendation provides policy makers with Principles for enhancing integrity throughout the entire public procurement cycle, taking into account international laws, as well as national laws and organisational structures of Member countries".

The EU approach of awarding damages in case of illicit award, presumably to overcome market closure and foster competition, has not proved effective. The procurement remedies system may thus be providing the worst of both worlds: increased litigation with the taxpayers footing the bill, without ensuring effective competition or the quality of spending. A strong political commitment to attaining efficient and sound procedures in the EU is still necessary, especially when implementing the new Directives. The different models of joint procurement could ensure improvement of efficiency and of professionalism that should enhance quality of spending and integrity. The US federal procurement system places heavy emphasis on competition, transparency, and accountability. The US has a long tradition of citizen skepticism about government and its merit and, perhaps due to that, it has an equally long tradition of insisting on openness in procurement.¹⁰⁶ Yet the US system struggles to provide better quality data on procurement and performance analysis that could improve transparency and effective oversight.¹⁰⁷

The integrity of the public procurement system is related to the qualities of the people involved, either politicians or agents from the public sector, as well as economic operators from the private sector. The compliance systems for the private sphere and the audit and remedy/protest system for the public sphere seem to be the main instruments for pursuing integrity and efficiency. While public procurement systems in both the EU and the US have improved and been modernized over the past quarter century, all the stakeholders, and above all the citizens, have the right to insist on a procurement system that is transparent and efficient, with modern tools, and that delivers high-quality,

¹⁰⁶ For examples of 18th century public requests for proposals, see JAMES F. NAGLE, *History of Government Contracting* (2nd ed. 1999). See: D. I. GORDON, *Bid Protests: The Costs are Real, but the Benefits Outweigh Them*, in *Pub. Cont. L. J.*, 2013, accessible also in http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2228748. and the Report of GAO, *Bid Protests: Trends and Analysis*, August 9, 2013, at <http://www.fas.org/sgp/crs/misc/R40227.pdf>, where some interesting data are reported concerning the trend of bid protest in the US federal system.

¹⁰⁷ OECD, *Implementing the OECD Principles for Integrity in Public Procurement*, 2013, cit., 46.

reasonably priced goods and services to fulfill the government's obligations. Citizens in every country deserve a system that not only functions with integrity, but is seen to do so.