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The safeguard of competition in the execution phase of public procurement: framework agreements as flexible competitive tools

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(Long) Abstract

Competition is usually regarded as a principle of the awarding phase of public procurement.[1] Yet, it is not taken into due account in the procurement process as a whole, particularly at the execution stage. The problem of a lack in competition, transparency and accountability after the award of a public procurement or of a master contract is widespread in any legal system (national, European, and international). It seems that it increases in the highly advanced procurement systems. Neither Government Procurement Agreement nor the UNICITRAL Model Law specifically address the performance phase, assuring that the promised quality will be delivered. This leaves a "black hole", hiding incompetence, inefficiency or lack of integrity. Also EU directives neglect the performance phase and fail to consider that improper behaviour at the execution stage may eventually end up undermining a possibly fairly competitive outcome at the awarding stage.

If the choice of the winner undertaking satisfies the public interest as it results being the best offer to meet the needs expressed in the contract documents, it must be performed precisely and completely.[2] Any violation, change[3], or worsening of the quality of the execution entail further profit for the winner, a loss for the public procurement entities and subsequently give rise to a change in the contractual equilibrium and in the conditions set in the award. This leads to violations of the competition principles in the awarding phase. In fact, the procurement entity accepts a worse performance than the one envisaged in the contract. The result of the tender could have been different had the conditions set in contract been different. This would have led to the award of the contract to another undertaking offering better conditions for the same subject matter of the contract.

A bidder has the right to obtain the evaluation of its offer in accordance with the fair competition principle. This right does not end with the award procedure but must be safeguarded in the subsequent phase as well. The winning undertaking will have the obligation to perform exactly what it included in its offer.

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[1] R. Cavallo Perin and G. M. Racca "La concorrenza nell'esecuzione dei contratti pubblici", (2010) *Diritto Amministrativo*, 325, incorporating the issues discussed during the symposium: *Consip e il sistema italiano di public procurement: concorrenza, regolazione e innovazione*, (Bologna - 15 June 2009).

[2] G. Napolitano and M. Abrescia, *Analisi economica del diritto pubblico* (Bologna: Il Mulino 2009), 59. significantly recalls that the "concorrenza per il mercato" "richiede il funzionamento di un sistema contrattuale in grado di..."tutelare adeguatamente l'interesse pubblico durante lo svolgimento del contratto".

[3] *Pressetext Nachrichtenagentur GmbH v Rupublik Österreich* (C-454/06) [2008] E.C.R. I-4401. concerning a contract for press agency services. An amendment to a public contract during its currency may be regarded as being material when it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted. A. Brown, "When Do Changes to an Existing Public Contract Amount to the Award of a New Contract for the Purposes of the EU Procurement Rules? Guidance at Last in Pressetext Nachrichtenagentur GmbH (Case C-454/06)" (2008) *Public Procurement Law Review*, NA 253 et seq. S. Treumer, The discretionary powers of contracting entities –towards a flexible approach in the recent case law of the European Court of Justice? (2006) *Public Procurement Law Review*, NA 3.

The rejected bidders should have the certainty that they lost because of the winner's better offer and its better execution of the contract. Should this not be the case, the fair competition principle would be undermined, as the winner may have obtained the contract with a minimum difference in its offer. If the execution of the contract differs from the conditions set in the offer of the winner, the whole equilibrium of the ranking of the bids, set in compliance of the equality treatment and competition is undermined.

Moreover, since those economic operators that participated in the competitive tendering have an in-depth knowledge of the field of the subject matter of the contract, they could be the ideal subjects to be involved in the control of the exact execution of the contract of the winning bidder. Allowing unsuccessful - that is, losing - bidders to play an active role in the control of the execution of contracts would serve as a further effective instrument to guarantee the winning bidder's compliance with contract conditions.

The use of more complex contractual models such as framework agreements (FAs) seems to provide a well suited environment in which public buyers may achieve a better coherence between the contractor(s)' promises and actual performance. FAs are generally meant to aggregate demand for goods/services stemming from one or more public agencies by *first* selecting on a competitive basis a subset of all potentially interested economic operators; and subsequently awarding specific contracts by using a *second* round of competition. Public agencies can potentially use two different sets of "watchdogs" in order to get a more effective contract execution: those economic operators with whom the FA is concluded (some of which may at the same time execute some contracts and control other contractors' performance); and the most highly ranked economic operators that could not succeed in entering the FA.

The control of the exact execution of the contract could also be enhanced by having end-users produce valuable feedback/information in the form of customer satisfaction surveys relying on both objective and subjective measures of contractors' performance. The increasing use of ICT tools, that is already simplifying and speeding up many of public procurement phases, may facilitate information gathering, aggregation and disclosure to anyone deemed to have a stake in the correct functioning of the procurement processes (taxpayers above all). Public entities would in principle be in a position to reduce the risk of infringements, thus better securing the principle of free competition and the quality of contractual performances, and that for the benefit of competition in the market as a whole and for attainment of the public interest and the quality of life of citizens.

1. Introduction

Government procurement is well known to have considerable economic relevance both at domestic and international level, accounting for approximately 16% of GDP in developed countries. Provisions on government procurement also have a central role in international trade agreements.

While policy makers and scholars alike claim that efficiency should be one of primary goals of every procurement system, many WTO Members still use their purchasing power to achieve domestic policy goals such as favoring local suppliers.[4] A closer look at national procurement markets reveals that governments often just keep their domestic market closed, without a clear and specific coordinated policy of their public procurement strategies.[5] Only recently, because of increasingly stringent fiscal policies, governments have fully realized the urgency to deliver a growing flow of services to citizens in spite of decreasing financial resources. They have also realized that competition may be instrumental to reconcile means and ends. Favouring inefficient national suppliers in public procurement and assuring them state aids is no longer sufficient to keep them on the market and it is too costly for public finance. Competition should be favoured and strengthened to select *only* efficient and innovative firms.[6] Open, transparent and non-discriminatory procurement becomes the best tool to achieve "value for money" as it spurs, when appropriately designed, the right degree of competition among suppliers.[7] This line of reasoning lead to the conclusion that the benefits for domestic and foreign stakeholders stemming from increased

[4] World Trade organization, "Government Procurement", http://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm, accessed 29 August 2010. For a long time public procurement has been effectively excluded from the application of the main multilateral trade rules under the GATT and the WTO, because the governments wanted to pursue domestic aim, particularly to favour domestic suppliers. Over the years, GATT and WTO Members have therefore been seeking ways to address the issue of government procurement in the multilateral trading system and finally the multilateral Agreement on Government Procurement (GPA) entered in force in 1996. S. Arrowsmith, *Government Procurement in the WTO* (London: Kluwer Law International 2003), ch 1 and ch. 3.; R. Anderson, "Renewing the WTO Agreement on Government Procurement: Progress to Date and Ongoing Negotiations" (2007) Public Procurement Law Review, 255 et seq. For a recent analysis of GPA: R. D. Anderson, "Current Developments on Public Procurement in the WTO" (2006), Public Procurement Law Review, 6, NA 167-168. Agreement on Government Procurement (GPA): An Emerging Tool of Global Integration and Good Governance" (2010) speech on Public Procurement: Global Revolution V (Copenhagen, 8 - 9 September 2010). See also: R. D. Anderson, "Coverage of the GPA: gaps and challenges for the future" (2010) speech on Public Procurement: Global Revolution V (Copenhagen, 8 - 9 September 2010); R. D. Anderson and S. Arrowsmith (eds), *The WTO Regime on Government Procurement: Challenge and Reform*, (Cambridge: Cambridge University Press) forthcoming; P. Wang, R. Cavallo Perin, D. Casalini, "*The Coverage of Purchasing Arrangements between Public Sector Entities – What WTO can learn from EU's experience?*", in R. D. Anderson and S. Arrowsmith (eds), *The WTO Regime on Government Procurement: Challenge and Reform*, (Cambridge: Cambridge University Press) forthcoming.

[5] On fragmentation of procuring entities and the lack of specific strategies in procurement policies: G. M. Racca (2010) "Professional buying organizations, sustainability and competition in public procurement performance, 4th *International Public Procurement Conference* (IPPC 2010) – Seoul (Korea), forthcoming.

[6] Also in the case of SMEs: Commission (Ec) "Think Small First" A "Small Business Act" for Europe – COM(2008)394 final, June 25, 2008. R. Anderson and W. Kovacic, "Competition policy and international trade liberalisation: essential complements to ensure good performance in public procurement markets" (2009) *Public Procurement Law Review*, 67 et seq.

[7] S. Cassese, "Le droit tout Puissant et unique de la société. Paradossi del diritto amministrativo", (2009) *Riv. trim. dir. pubbl.* 893 et seq., now also in S. Cassese, *Il diritto amministrativo: storia e prospettive* (Milano: Giuffrè, 2010), 539 et seq.; S. L. Schooner, I. D. Gordon and J. L. Clark, "Public Procurement Systems: Unpacking Stakeholder Aspirations and Expectations" (2008) George Washington University Law School – Public Law and legal theory – Legal studies research paper no. 1133234, available on http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1133234 accessed 26 August 2010.

competition can be considerable.[8]Although competition is believed to enhance economic development and a fair quality-price ratio for goods and services for consumers, EU regulation aims mainly at safeguarding the rights of undertakings. This implies that the public administration has the obligation to provide undertakings participating in public competitions with fair treatment.[9]

Competition is normally regarded as a principle that defines the relations among undertakings providing public utilities. While it is commonly accepted that competition must be assured among suppliers of public utilities also beyond their access in the market,[10] the idea that the competition principle must be assured also in the public procurement of civil works, goods and services even *after* a contract is being awarded has not yet been considered.

An efficient government procurement system must attain value for money, assuring a fair and open competition in the selection of the bidders. However, if value for money is not to remain an abstract concept, the contractor's actual performance should coincide with what was promised at the competitive stage. Contract execution is very often neglected or, at its best, seen as a completely separate aspect of the procurement process. Sometimes, it is thought of as "private business" concerning the procuring entity and the contractor only, while losing suppliers are set aside and no longer considered in the execution phase. Awarding a public contract normally gives rise to a sort of (bilateral) "exclusive right", where the public entity is "locked in" with the winner bidder. That seems to exclude any role for losing bidders.

Nonetheless, any unchallenged breach of contract in the performance phase by the procuring entity - which is willing to accept partial or lower-than-promise performance -, can turn into an amendment to the subject matter of the contract, hence jeopardizing the main goal of the competitive process at the selection phase.

[8] S. Arrowsmith and C. Nicholas, "Regulation of Framework agreements/Task order contracts – Regultating framework agreements under the UNCITRAL Model Law" in S. Arrowsmith (ed.), *Public Procurement Regulation in the 21st Century: Reform of the UNCITRAL Model Law on Procurement* (2009; West), 95 et seq.

[9] S. Arrowsmith and P. Kunzlik, *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions*, (Cambridge: Cambridge University Press, 2009), 55 et seq.

[10] G. Napolitano and M. Abrescia, *Analisi economica del diritto pubblico* (Bologna: Il Mulino 2009), 95 et seq.

2. Competition principle in the public procurement process: from the choice of commencing a procurement procedure to the end of the performance phase

All the efforts to assure competition, transparency and objective criteria in decision-making, as fundamental principles and instruments to prevent corruption, must be assured in the entire cycle of the public procurement procedure, from the beginning of the procurement procedure to the conclusion of the performance phase. Otherwise, after the award, the procuring entity may accept a different and less costly performance in violation of free competition and equal treatment principle[11]. This can happen as a consequence of malice and corruption[12] (i.e. offering, living, receiving or soliciting, directly or indirectly anything of value to influence the action of a public official in the selection procedure and in the contract execution), but frequently it may be due to ineffective instruments in the performance phase that do not ensure the achievement of the public interest as defined in the contract conditions (incompetence[13]).

The enormous amount of waste linked to incompetence in the award procedure has already been pointed out, so it is rather challenging to estimate the waste of social resources for inappropriate contract management and enforcement. Two remarks are in order here. First, *ceteris paribus*, contract management-related problems are more likely to arise if the public authority awarding the contract does not coincide with that (or those) using the contract for making purchasing orders. This may occur when public procurement is centralized, at least to some extent, through a central procurement agency (a.k.a. Central Procurement Body - CPBs - in the European Directive 2004/18/CE), awarding framework agreements on behalf of other public authorities[14]. This separation of roles may generate low contract management efforts simply because of imperfect knowledge of contractual clauses. Second, the much debated phenomenon of "abnormally low bids" may occur as a "rational" choice of bidders anticipating their ability to recover the additional "investment" at the bidding stage but delivering lower-than-promised performance levels.

[11] R. Cavallo Perin and- G. M. Racca, " La concorrenza nell'esecuzione dei contratti pubblici", (2010) *Diritto Amministrativo*, 325 et seq.

[12] R. H. Garcia, *International public procurement: a guide to best practice*, (London: Globe Law and Business 2009);: T. M. Arnaiz "EU Directives as Anticorruption Measures: Excluding Corruption-Convicted Tenderers from Public Procurement Contracts" in K.V. Thai (ed.), *International Handbook of Public Procurement* (CRC Press 2008), 105 et seq.; E. Auriol, "Corruption in procurement and public purchase" (2006) *International Journal of Industrial Organization*, 867– 885; Transparency International – the global coalition against corruption (2006), Handbook for Curbing Corruption in Public Procurement, Transparency International Handbook, "Curbing Corruption in Public Procurement", (2007) available at <http://www.transparency.org/global_priorities/public_contracting/tools_public_contracting/>. See also OECD, *Fighting Corruption and Promoting integrity in Public Procurement*, (OECD Publishing 2005), available on <http://browse.oecdbookshop.org/oecd/pdfs/browseit/2805081E.pdf>.

[13] About the waste linked with incompetence in the awarding phase: O. Bandiera, A. Prat and T. Valletti , "Active and passive waste in government spending: Evidence from a policy experiment" (2009) *American Economic Review*.

[14] C. Yukins, "Are idiqs inefficient? sharing lessons with European framework contracting" (2008) *Public Contract Law Journal*, 546 et seq.; O. Soudry, *A Principal-Agent Analysis of Accountability in Public Procurement*, (International Public Procurement Book, 2008), 433 et seq.

Only recently, at an international level, the United Nations Commission on International Trade Law has started emphasizing the relevance of problems in public procurement "beyond the selection of suppliers".[15] In this perspective the importance of considering the entire procurement cycle: from the planning and budgeting prior to commencing a procurement procedure up to the contract administration is being underlined.[16] Typically, procurement systems focus on the second phase of the procurement process, the "selection" that leads to the award of a procurement contract. Nonetheless, Transparency International, among others, has recently pointed out that the other two phases of "planning and budgeting" and "contract administration" are "increasingly exposed to corruption" and are neither duly addressed[17] nor sufficiently monitored.

More specifically, the UNCITRAL Model Law, similarly to many other procurement systems, addresses the "procedures to be used by procuring entities in selecting the supplier or contractor".[18] Yet, more significantly, it does not address the terms of contract for a procurement, the contract performance or implementation phase.

Thus the drafting and adoption of standard documents to be used during the whole procurement process including standard contract and guarantee of due performance seem of the utmost importance. This would favour effective competition in the selection phase thanks to the improved transparency of the procurement system during the whole procurement process.

[15] United Nations Commission on International Trade Law, "*United Nations Convention against Corruption: implementing procurement-related aspects*", (2008 Second session, Nusa Dua, Indonesia, 28 January-1 February 2008) http://www.uncitral.org/uncitral/en/index.html, 14 et seq.

[16] The UNCITRAL Model Law, in common with many procurement regimes, notes that its provisions address the "*procedures to be used by procuring entities in selecting the supplier or contractor with whom to enter into a given procurement contract*". Its Guide to Enactment states that the Model Law does not address the terms of contract for a procurement, the contract performance or implementation phase (*Introduction*, paragraph 12), including resolution of contract disputes, and by implication, the procurement planning phase.

[17] Transparency International – the global coalition against corruption (2006), *Handbook for Curbing Corruption in Public Procurement*, <http://www.transparency.org/global_priorities/public_contracting/tools_public_contracting> P. Gherson, "Review of Civil Procurement in Central Government" (1999), http://archive.treasury.gov.uk/docs/1999/pgfinalr.html accessed 27 august 2010; , National Audit Office, United Kingdom, available at <http://www.nao.org.uk/publications>. United Nations Convention against Corruption (UNCAC) article 9 (2), provides that a procurement system must ensure adequate internal control and risk management. Article 9 (2): "*2. Each State Party shall, in accordance with the fundamental principles of its* legal system, take appropriate measures to promote transparency and accountability in the management of public finances. Such measures shall encompass, inter alia: … (d) Effective and *efficient systems of risk management and internal control* …".The regulation of non-selection phases of procurement may thus be addressed within the general governance system in a State party: for the reasons, it is vital that they are integrated into the procurement system itself. S. L. Schooner, "Desiderata: objectives for a system of government contract law" (2002) *Public Procurement Law Review*, 103 et seq. In that article, Schooner outlined nine objectives, or desiderata, of public procurement systems: competition, integrity, transparency, efficiency, customer satisfaction, best value, wealth distribution, risk avoidance, and uniformity.

[18] S. Arrowsmith (ed.), *Public Procurement Regulation in the 21st Century: Reform of the UNCITRAL Model Law on Procurement* (2009; West). For the UNCITRAL Model Law see also: Caroline Nicholas, "Reforms to the UNCITRAL Model Law" (2010) speech at "Public Procurement: Global Revolution V" (Copenhagen, 8 September 2010).

Particularly, a specific oversight on contract implementation becomes necessary. In this regard it is worth underlining that losing suppliers have been considered as "good watchdogs" to implement a functioning review or a challenge mechanism[19].

In accordance with openness, competition, transparency, accountability principles, any bidder has the right to obtain the evaluation of its offer and this right does not end with the award but must be safeguarded in the subsequent phase as well. The winning undertaking will have the obligation to perform exactly according what stated in its offer and evaluated as the best offer in accordance with the award criteria.

Losing bidders ought to be reassured that they lost because the selected contractor did not only submit the best "promised" value for money, but will in fact deliver the best value-for-money performance. Were this not be the case the main goal of the competitive mechanism would be undermined, thus distorting competition for the market of public contracts[20]. Only fair behaviour at the execution stage, namely the overall compliance with contract conditions set at the awarding stage, ensures a real and effective competition in the entire cycle of public procurement.

As already mentioned, this key issue has not been sufficiently pointed out neither at a national, European nor international level. At European level, all the attention is focused on the award procedure where binding principles are fixed while the performance phase is nearly forgotten. This limits the choice of undertakings taking part in public procurement procedures and drains public confidence in public procurement fairness. If the winner has the possibility of not performing coherently with what promised, without being subject to claims, the idea that procuring procedures are "arranged" or "compromised"[21] in favour of cartel or other cooperating groups will spread further. For the above reasons, starting from the Italian experience, but within a wider perspective, we will lay out a possible solution to this problem[22].

The "exclusive right" that follows the awarding of a contract is not always combined with effective provisions to safeguard and to effectively monitor the exact execution of the contract.

[19] United Nations Commission on International Trade Law, "United Nations Convention against Corruption: implementing procurement-related aspects", (2008 Second session, Nusa Dua, Indonesia, 28 January-1 February 2008), http://www.uncitral.org/uncitral/en/index.html, 14 et seq.

[20] G. Napolitano and M. Abrescia, *Analisi economica del diritto pubblico* (Bologna: Il Mulino, 2009), 95.

[21] R. H. Garcia, *International public procurement: a guide to best practice*, (London: Globe Law and Business 2009).

[22] The idea is also discussed in R. Cavallo Perin and- G. M. Racca, "La concorrenza nell'esecuzione dei contratti pubblici", (2010) *Diritto Amministrativo*, 325 et seq.

In Italy, for example, there are few effective instruments to ensure the achievement of the public interest as defined in the contract documents. Therefore the contractual "equilibrium" might be distorted after the awarding of the contract, thereby undermining the principle of free competition. Serious infringements can be tolerated by the public authorities that do not apply the penalties or do not state the termination of the contract.

In practice, very often especially in Italy, at the end of the execution phase, the execution differs from the content of the contract[23]. This can be due to modified contract conditions - with the prior agreement of both parties - during the execution, thus changing contracting equilibrium defined at the awarding stage. On the other hand, the procuring entity may accept partial or severe violations of contract conditions, without imposing penalties or terminating the contract. Undertakings may also accept considerable delays in payments (sometimes up to 700 days!) which may balance, somehow, the acceptance of a *minor* quality and therefore a less costly performance of the contract. This is often linked to the inadequate drafting of the contract documents that leaves the officials disarmed when infringements arise. The tender documents must specify the conditions that allow not only the selection of the best bidder but, especially the achievement of the *promised* quality standards.

In Italy, both the theory and the practice of public contracts have traditionally overlooked the relevance of contract management. Only recently the regulation on our public contract code has introduced a specific "procurement execution director"[24] in charge of the management and monitoring of the execution of goods and services procurement.

Quality "shirking" at the execution stage undermines the fairness of the competition previously in place during the awarding phase. All the bidders present an offer which defines a price/quality ratio of the performance they bind themselves to carry out. Once accepted by the procuring entity such conditions should not be modified nor amendable.

[23] G. M. Racca, "Collaborative procurement and contract performance in the Italian healthcare sector: illustration of a common problem in European procurement" (2010) *Public Procurement Law Review*, 119 et seq. G. M. Racca, "La professionalità nei contratti pubblici della sanità: centrali di committenza e accordi quadro" (2010) forthcoming in *Foro amministrativo* - C.d.S.

[24] Regulation implementing the Code of public contracts, under approval: Schema di d.P.R. recante regolamento di esecuzione del decreto legislativo 12 aprile 2006, n. 163, concernente codice dei contratti pubblici relativi a lavori, servizi, forniture, in attuazione delle direttive 2004/17/CE e 2004/18/CE (version of 14 June 2010), artt. 299-301.

In consideration of the ranking of the offers, if the winning bidder modifies the contract conditions during contract execution, its offer may result being (ex post) worse than the second-highest ranked bidder that emerged at the awarding stage. Europe's strict award procedure imposes the objective selection of the best winner, by means of an objective comparison of competing bids. Such objective evaluation, carried out by assigning points in accordance with the awarding criteria, and carefully weighted sub-criteria, is aimed at selecting the best offer. Offers in the ranking may differ slightly in the points assigned, nevertheless, the objective award criteria entail the selection of the objectively best offer, even if only slightly better than the others in the ranking.

When serious infringements are tolerated by public procuring entities with no application of penalties or termination of the contract,[25] a violation of the competition principle takes place, as another bidder could have assured not only a better tender but a (possibly) better *concrete* performance. This entails a violation of the competition principle as one of fundamentals[26] of public procurement. For this reason, the performance phase must be well monitored in order to prevent infringements that can nullify the entire complex and objective awarding phase of public procurement.

Losing bidders also have a specific right to be safeguarded. In Italy, for instance, the highest rejected bidder (or, equivalently, the high losing bidder) has the right to replace the winner in case of serious infringement of the contract.[27]

For these reasons, unlike private law contracts, third parties can provide evidence on the infringement of some of those procurement conditions set in the contract, since they participated in an award procedure that must safeguard the principles of non- discrimination, equal treatment, transparency and effective competition. In Italy, the contract notice can provide that termination of the contract signed with the winner bidder may result in awarding the same contract at the same conditions to the lower-ranked bidders (not beyond the fifh-ranked bidder though).[28]

[25] G. L. Albano, F. Dini and G. Spagnolo, "Strumenti a sostegno della qualità negli acquisti pubblici" (2008) *I Quaderni Consip*, available on <www.consip.it>.

[26] R. H. Garcia, *International public procurement: a guide to best practice*, (London: Globe Law and Business 2009).

[27] L. Fertitta, "La figura del secondo classificato nell'aggiudicazione degli appalti pubblici" (2005) *Rivista trimestrale degli appalti*, 431-442; V. Palmieri, "Scorrimento della graduatoria e tutela della concorrenza nell'esecuzione degli appalti pubblici" (2008) *Foro amministrativo – C.d.S.*, 868 et seq.

[28] Art. 140, Legislative Decree n. 163 of April 12, 2006 (Italian contract code). Cons. St., Sect. VI, January 11, 2010, no. 20, available on the official website <http://www.giustizia-amministrativa.it>.

This establishes losing bidders' right to claim the appropriate supervision by the procuring entity over the correct performance of the contract *and* to participate in such supervision. It is the effectiveness of such a monitoring strategy that makes the "right to scroll the list" possible, thus determining a new contractor.

Losing bidders have therefore a "right to fairness and competition" according to the European and national rules that are mandatory and whose infringement can determine the ineffectiveness of the contract.

3. The links between a correct award procedure and the quality of the performance

The competition principle is applied in the award procedure in which the choice of the winner is carried out by means of parallel negotiations between the public administration and each bidder. Unlike normal private market bargaining, such negotiations are formalized by the mandatory rules set in the contract documents. The contract notice sets a call for tenders. The bidder thus presents a binding offer, in accordance with the requirements set in the contract documents. The offer is binding for a limited time (180 days in the Italian case[29]) and cannot be withdrawn. In application of the award criteria, the procuring entities will accept the best offer, and will have to withdraw from the negotiation with the other competing bidders. Such withdrawal will be fair insomuch as it will be in compliance with the award criteria. If the bidders find any faults or contradictions, they are entitled to file claims and ask the procuring entity to review its final decision.

With the recent implementation of the remedy directives[30], the EU aims to facilitate the correction of the award procedure before the signing of the contract, in order to award the execution of the contract the to best bidder, and not to any bidder chosen unfairly or with a faulty application of the award criteria. The procuring entity thus is not obliged to pay both the execution to the illegitimate winner and the award of damages to another undertaking which was entitled to win, as it happened quite frequently in Italy.

The "crowded" first phase in which many bidders can compete to present the best offer and then have the possibility to claim (bid protests) appears in stark contrast with the subsequent execution phase where the outcome of the performance remains a secret between the two parties that are "locked" in the contractual relationship.

The winner, in fact, after the possible litigation subsequent to the award, performs the contract as a single entity without any further control by unsuccessful bidders. During the negotiation phase the latter compete fiercely for every detail and evaluation criteria applied to each element of their offer, and they examine in-depth the other bidders' proposals. Nonetheless, after the award and possible claims thereof,

[29] Art. 75, para. 5, Legislative Decree n. 163 of April 12, 2006, concerning the guarantees in support of supply.

[30] Directive 2007/66/EC of the European Parliament and of the Council of December 11, 2007 (amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts) that was implemented by Legislative Decree n. 53, March 20, 2010. See: C. Nicholas, "Remedies for breaches of procurement rules and the UNCITRAL model law in procurement" (2009) *Public Procurement Law Review*, NA151. For an EU Directives analysis see: J. Golding and P. Henty, "The new remedies directive of the EC: standstill and ineffectivness", (2008) *Public Procurement Law Review*, 146 e ss. For an interesting french perspective: J. Arnould, "Ineffectivness of contracts under the new Remedies Directive in the Uk and in the EC" (2010) speech on *Public Procurement: Global Revolution IV* (19 April 2010). For an UK law perspective: P. Henty, "U.K.: public procurement remedies directive – an update on the implementation process", (2010) *Public Procurement Law Review*, and P. Henty, "Remedies directive implemented into Uk law", (2010) *Public Procurement Law Review*.

they are left aside from the following phase of the execution of the contract and often they are not aware of the effective compliance of the winner with the contract conditions.

Unsuccessful bidders can file a claim[31] on the procuring entity's evaluation of another bidder's offer even on the basis of minimum differences in the points assigned to an element of the bid, this can be a key factor for the award of the contract, thus overturning the result of the award itself.

The evaluation of certain elements during the negotiation phase and the subsequent award of the contract, can be undermined and distorted if such elements are not fully performed in the execution phase, thus non-complying with the contract conditions. By way of example, let's consider a likely situation in which bidder A offers post-sales technical assistance in 24 hours thus being assigned 8 points, and bidder B offers the same assistance in 36 hours thus receiving 5 points: in the overall evaluation of the bid these point can be decisive for the award of the contract to bidder A. Nonetheless, during the execution of the contract the winner may infringe the contract conditions by offering delayed assistance, within 48 hours. Such unfair execution is in contrast with the procuring entities' choice of the best offer.

The second bidder in the list would have had the right to win the award, had it really performed the 36-hour post-sales assistance. If the procuring entity tolerates such infringements, the competition principle that should allow the best bidder to win is undermined. This implies a relation between the winner and the procuring entity which must guarantee the correct execution. Anyhow, there must be a relation between the winner and the other bidders to check the effective execution of the conditions offered in the winning bid, and set in the contract.

Suffice it to say that the procuring entity should police the exact contract performance but it does not always do so. This can be due to disorganization, inertia, incapacity or, else, to malice and bribery. On one hand the procuring entity may not be able to contrast duly the unexpected violation; on the other hand, there can be a prior "agreement" between it and the winner so as to entail no claims against a faulty and less costly performance. The latter may arise when the procurement contract comprises several performance dimensions.[32] Consider for instance, a service contract for day-to-day cleaning and

[31] B. Marchetti, "Il Sistema di Risoluzione delle Bid Disputes nel Modello Federale Statunitense di Public Procurement" (2009), Riv. Trim. Dir. Pub., 963 at seq.

[32] The Italian Code of Public Contracts (Legislative Decree n. 163 of April 16, 2006) defines a "global service" as a contract consisting in a bundle of integrated services for the ordinary maintenance of buildings.

maintenance of a building. If the maintenance of the elevator is not performed as stated in the contract, the contracting authority may find asking the contractor an "in-kind" compensation more profitable - such as, repairing a series of broken windows – rather than pursuing a costly and rather uncertain legal procedure, thus entering a form of renegotiation, which is, though, different from the one occurring during the execution of civil works.[33]

It follows that the performance of the contract and the quality really delivered should be much more monitored to assure the full compliance with the contract conditions defined in acceptance of the best offer. Suffice it to say, the result of the objective competition is thwarted by any change in the contract conditions. This is due to the fact that in Europe, competitive dialogue with bidders is not allowed, except in limited cases, in the awarding phase, nor in the subsequent execution phase with the winning bidder.

As public procurement review procedures are intended to provide effective conflict management for aggrieved tenderers, it must be noticed that the winning tender should not abuse of its "dominant position" and infringe contract conditions.

The procuring entity itself should not allow any violations of this kind and should adopt and enforce all possible means to avoid contract infringements of the winner. If the procuring entity does not do so, it is violating the equal treatment toward all bidders also if the award took place years before. When the object of the contract is modified, competition is thwarted as it was put in place with reference to a different contract matter compared to the one that is carried out – in practice - by the winning firm.

The key issue of changes applied to contract conditions is widespread and particularly significant in public works contracts, but regulations are starting to be implemented in order to limit such abuse at various levels.

Extensions of awarded contracts often preclude other undertakings from taking part in competitions for the award of the subject matters of contract extensions which can also be of considerable value. Regulations limits to public contract extensions are foreseen precisely to avoid limitation to competition that such extensions entail.

[33] Renegotiation in civil works normally arises because of unforseen contingencies – that is, event that were unpredictable when the winning bid was submitted *and* that escape the contractor's control - raising significantly production costs.

The exclusion of works or services or supplies from the procurements award procedures restrict competition such as the amendments at the execution stage violate the contractual conditions set in the award.

Extensions, in fact, if not foreseen in the initial contract notice, entail the same competition violation effect as the award of a contract without prior publication of a contract notice.[34]

In accordance with the new remedies directive,[35] this is one of the cases sanctioned with ineffectiveness of the contract.

Since unsuccessful tenderers harmed by an unlawful award of the contract have access to remedies, they should have access to remedies too if they can provide evidence that the execution of the contract does not correspond to what was defined in the award.[36]

Even if the award procedure had been carried out in complete fairness and transparent competition, if the winner, during the term of the contract, does not perform exactly the object of the contract, the competition put in place in the selection phase will be distorted and the evaluation of the bids obviously thwarted and fruitless.

Such effects in undermining the competition must be evidenced and the role of unsuccessful bidders strengthened, if compared with their power to file claims during the award procedure that now in Europe can determine also the ineffectiveness of the contract.[37]

[34] Directive 2007/66/EC of the European Parliament and of the Council of December 11, 2007, whereas n.13, "Illegal direct award of contracts" is the "most serious breach of Community law in the field of public procurement". The extension of the scope of the contract above limits allowed has been regarded as being material: Pressetext Nachrichtenagentur GmbH v Republik Österreich (C-454/06) [2008] E. C. R. I-4401; EU Commission v Federal Republic of Germany (C-160/08) [2010]; Wall AG v Stadt Frankfurt am Main (C-91/08) [2010].

[35] Directive 2007/66/EC of the European Parliament and of the Council of December 11, 2007 (amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts) that was implemented by Legislative Decree n. 53, March 20, 2010.

[36] J.-B. Auby, "L'internationalisation du droit des contrats publics" (2003) *Droit Administratif*, 5 et seq.

[37] *Pressetext Nachrichtenagentur GmbH v Rupublik Österreich* (C-454/06) [2008] E.C.R. I-4401. 34 e seq., an amendment to the initial contract may be regarded as being material when it extends the scope of the contract considerably to encompass services not initially covered. This latter interpretation is confirmed in the provisions that impose restrictions on the extent to which contracting authorities may use the negotiated procedure for awarding services in addition to those covered by an initial contract. An amendment may also be regarded as being material when it changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract. The same principle is established in EU Commission v Federal Republic of Germany (C-160/08) [2010]; Wall AG v Stadt Frankfurt am Main (C-91/08) [2010]. G. M. Racca, "Collaborative procurement and contract performance in the Italian healthcare sector: illustration of a common problem in European procurement" (2010) *Public Procurement Law Review*, 119 et seq.

As already mentioned the losing bidders can consider having a "right to fairness and competition" according to the European and national rules that are mandatory and whose infringement can determine the ineffectiveness of the contract.

The idea of using the non-winning bidder to monitor winners' performance becomes essential. In fact, unsuccessful bidders have an in-depth knowledge of the subject matter of the contract and are endowed with the suitable professional skills to monitor the winner's performance. This might help soothe the moral hazard problem arising at the execution stage that affects procuring entity's welfare.[38]

This monitoring task could be assigned to them by the procuring entity itself as defined in the contract documents and could be linked to their right to substitute the winner in case of termination of the contract. This provision should be carefully defined in order to prevent colluding strategies that would resemble those that arise in a second-lowest bid competitive mechanism.[39] It would be necessary, for instance, to provide that the subsequent bidder in the ranking must accept to perform at the same conditions fixed in the terminated contract[40].

[38] G. Napolitano and M. Abrescia, Analisi economica del diritto pubblico (Bologna: Il Mulino 2009), 95, although the authors seem to consider almost exclusively the role of informational asymmetries on the subject matter of the procurement contract.

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

[40] European Commission note 2007/2309/C, January 30, 2008 containing observations on art. 140, Legislative Decree n. 163 of April 12, 2006.

4. Framework agreements as tools to improve competition during the execution of a public contract

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

The main goal of the current section is to highlight that there exists in fact a class of purchasing arrangements, although differently regulated in Europe and the US, that provide a suitable legal framework to implement the broad idea of competition in the execution of public contracts. Such purchasing arrangements are commonly known as Framework Agreements (FAs). These are anticipated arrangements for the delivery of goods and services over a certain period of time. According to both international practices and regulation, three broad definitions of FAs can be identified:

- The European Union, in the procurement 2004 Directive, (EU) defines framework agreements as "agreements between one/more contracting agencies and economic operator(s) … to establish the terms governing contracts to be awarded during a given period … with regard to price and … the quantities envisaged."[41]
- The United States of America have adopted different options such as: Government-Wide Acquisition Contracts (GWAC), Indefinite Delivery/Indefinite Quantity (IDIQ) contracts and Multiple Award Schedules (MAS) that imply multiple standing contracts with subsequent competition for task or delivery orders.
- The United Nations Commission on International Trade Law (UNCITRAL) defines a framework agreement as a transaction to secure the supply of a product or service over a period of time (periodic/recurrent purchase arrangement, periodic requirements arrangement, periodic supply vehicle).

The three families are linked by two common traits: the aggregation of demand for goods and services to be delivered/provided at different points in time; the adoption of a two-stage procurement process.[42] These features seem to depict a competitive environment that may result in an enhanced contract management by procuring authorities.

[41] Directive 2004/18/EC of the European Parliament and of the Council of March 31, 2004, art. 1, para. 5 and art. 32 of the Directive is devoted to Framework Agreements.

[42] An interesting analysis of differences and common traits between the adoption of framework arrangements in Europe and in the US is provided in C. Yukins, "Are idiqs inefficient? sharing lessons with European framework contracting" (2008) *Public Contract Law Journal*, 546 et seq.

In Europe, the evolution of regulation on public procurement in the last few years – together with a series of interpretations[43] of the same regulation issued by the European Commission itself – has led procurement officers and scholars alike to classify FAs according to two major dimensions: i) the degree of completeness of the master contract; and ii) the number of economic operators with whom a FA is concluded. This would almost naturally lead to four classes of FAs as described in the table below.

• Complete (all conditions established in the master contract) • One economic operator	• Incomplete (not all conditions established in the master contract) • One economic operator
• Complete (all conditions established in the master contract) • More than one economic operator (at least 3 in Europe)	• Incomplete (not all conditions established in the master contract) • More than one economic operator (at least 3 in Europe)

4.1 Framework Agreements: The benefits of flexibility

Despite the formal classification into different "families", most public procurement practitioners tend to think of FAs by implicitly referring to the "incomplete" FAs concluded with more than one economic operator. It is unsurprising, then, that they are identified by the Explanatory Note[44] of the Directive issued by the European Commission as Framework Agreements *strictu sensu*.

In principle, multi-award incomplete FAs (or FAs *strictu sensu*) may cover any solution of aggregation of public demand in between the two extremes, namely complete centralization implemented by one single contract with fixed conditions awarded to a single economic operator (a.k.a. *frame contract*); and separate purchasing contracts awarded by several contracting authorities independently of each other. It can be argued[45] that frame contracts allow public buyer(s) to reap most the most "intuitive" benefits of demand aggregation, namely tough competition, efficient use of specialization and knowledge sharing among procurement officials, and minimization of effort and process costs by the purchasing unit(s). On the other hand, "simple" purchasing contracts concluded through distinct and autonomous awarding procedures,

[43] European Commission, "Explanatory Note – Framework Agreements – Classic Directive (CC/2005/03)", (2005) available on <http://ec.europa.eu/internal_market/publicprocurement/docs/explan-notes/classic-dir-framework_en.pdf>

[44] European Commission, "Explanatory Note – Framework Agreements – Classic Directive (CC/2005/03)", (2005) available on <http://ec.europa.eu/internal_market/publicprocurement/docs/explan-notes/classic-dir-framework_en.pdf>

[45] See, for instance, the discussion in G. L. Albano, A. Ballarin and M. Sparro, "Framework Agreements and Repeated Purchases: The Basic Economics and a Case Study on the Acquisition of IT Services" (2010) *International Public Procurement Conference* (Seoul, 26- 28 August 2010).

while giving up such benefits, provide the contracting authorities with the maximum flexibility and possibility of customization and reduce the uncertainty faced by the competitors. Ideally, simple contracts also ensure allocative efficiency, in the sense that each contract will be likely to carried by the most "suitable" supplier.[46]

We are then lead to conclude that (an appropriate design of) incomplete FAs could solve the trade-off between demand aggregation and process efficiency on the one hand; and customization, flexibility and allocative efficiency on the other one[47]. In other words, the main goal of incomplete FAs is to streamline the process for repeated purchases by providing a large amount of the overall required effort in the first selection round, while leaving some space for customization and *further competition* at the second stage, when the actual procurement needs arise and their specific features (quantities, delivery conditions, specific tasks to be undertaken, requested customizations etc.) become better known.

Such a mechanism typically turns out to be very useful in the case of a central purchasing agency concluding the agreement in order to define the basic qualitative features as well as upper-bound price conditions for contracts to be awarded by different and heterogeneous contracting authorities. This is the case, for instance, of the GSA Schedules in the US (accessible by all US Federal Government agencies), of the Framework Agreements concluded by OGC Buying Solutions in the UK, and Hansel in Finland.

4.2 Why reopening competition matters

If the contracting authority's needs and/or the preferences are somehow unknown or heterogeneous with respect to relevant aspects of the contracts to be awarded, it this then optimal to let these aspects be defined through a second round of selection.[48] As soon as the specific need arises, so that the uncertainty about the characteristics of a single purchasing decision (call-off) is considerably reduced, the selection

[46] A bit of economic jargon might be useful here. Allocative efficiency is reached whenever resources are allocated so as to maximise social welfare. In a simple procurement contract, allocative efficiency requires the project to be undertaken by the most efficient firm, that is, the one bearing the lowest production cost.

[47] The trade-off between competition and efficiency in incomplete FAs is analyzed more formally by G. L. Albano and M. Sparro, "A simple model of framework agreements: competition and efficiency" (2008) *Journal of Public Procurement*, 356 et seq., capturing the most relevant qualitative features of a FA by using a stylized two-stage (strategic) model with horizontal differentiation.

[48] C. Yukins, "Are IDIQs inefficient? sharing lessons with European framework contracting" (2008) *Public Contract Law Journal*, 560 et ss., where the Author analyzes the comments of Steve Kelman (then the head of the Office of Federal Procurement Policy) who encouraged to avoid a second round of competition.

is reopened and the operators that are part of the agreement are invited to submit a new tender, making "more precise" the conditions set at the first stage. Thus, unlike a frame contract, the two-stage procurement process consists of two distinct rounds of competition.

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

4.3 Framework Agreements as a tool to enhance competition at the execution stage

Demand aggregation through FAs may reduce transaction costs until the awarding stage of each specific contract, but may also provide an appropriate environment to enhance contract enforcement. This effect is greater the lower of number of contracting authorities awarding specific contract within the same FA. Whenever a FA is used by only one contracting authority aggregating its own demand (possibly arising at different points in time) for similar goods/services, the pool of selected economic operators at the first stage may have strong incentives in reinforcing the contracting authority's contract management efforts.

First, when specific contracts are similar to each other - that is, the degree of incompleteness of the master contract is low – then each single economic operator can use its own know-how to assess any other competing firm's performance (*know-how scale economies*). Second, when the number of specific contracts for a given value of the FA is high or, alternatively, the value of the latter is high for a given number of contracts, there are (ex ante[49]) high chances for each economic operator to "step in" if a contract is terminated prematurely.

However, the repeated nature of interactions within a given FA may give rise to perverse incentives resulting in any losing bidder for a specific contract rationally deciding not to monitor the contractor so as to engender a similar low-effort when the contractor today becomes a losing bidder tomorrow.

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

Thus when the risk of collusion among economic operators in a given FA is deemed to be high[50], the "suitable" pool of losing bidders is unlikely to be those selected at the first stage.

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

Because they have cut off from competing for specific contracts, first-round losers of any FA do have conflicting interests with those firms that are part of the agreement. Because FAs aggregate demand over time, unsuccessful bidders cannot benefit from the opportunity of competing for a *stream* of contracts. However, it is exactly the potentially high value of the stakes involved that provide first-round losers with a strong incentive to provide any evidence concerning the discrepancy between *submitted* quality standards by successful firms either at the first-stage or any stage of competition for specific contracts and *delivered* ones.

This incentive is higher the higher the (estimated) value of the framework agreement, that is, the higher the degree of demand aggregation; the monitoring task that might be performed by losing bidders is easier the more homogeneous the stream of specific contracts, which generally involves a more complete a master contract (i.e., with most performance dimensions laid down at the first stage).

Are *all* losing bidders on an equal ground in performing such a socially valuable activity? In other words, are all losing bidders' interests aligned with contracting authorities'? If, say, 50 firms competed for entering a FA that is to be concluded with ten of them by a meticulous and publicly announced ranking algorithm, then it can be argued that "marginal losers" are those with the highest incentive to get a further chance to be part of the agreement. The top ranked losing firm is most likely to have the highest incentive, although there may exist circumstances under which contracting authorities would be willing to consider more losing bidders.[51]

[50] This might be caused, say, by a low number of firms which are parts of FA relatively to the overall number of competing firms at the first stage.

[51] Suppose that the twentieth-ranked firm was awarded 50 points on a [0,100] scale. There may exist 5 top-ranked losing bidders with a score close enough - say, between 46 and 49 - to the lowest-ranked winner to be worth considering.

In order to become an effective tool for monitoring actual performances throughout the duration of the FA, losing bidder(s) have to get a reward. The discussion in the early part of this work has pointed out that, at least in Italy, contracting authorities can "scroll down" the ranking to replace the current contractor in case of serious contract infringement. The most natural way to extend such a provision would then be to *reopen* a framework agreement at a later stage by replacing the first contractor that seriously underperformed during the execution of a specific contractor with the highest-ranked losing bidder, the second underperforming contractor with the second-highest losing bidder and so on.

The final question then becomes to what extent it is possible to reopen a framework agreement after it has been concluded. Directive 2004/18/CE already defines (art. a two-stage, entirely electronic, purchasing arrangement – the Dynamic Purchasing System (DPS)- that in concluded with an initially closed set of firms, but remain opens throughout the entire period of the DPS. While the prevailing interpretation of framework agreements as defined in articles 1.5 and 32 of Directive 2004/18/CE is that of a *closed system*, it would seem, at least from an ex post efficiency viewpoint[52], welfare enhancing to list a well defined set of circumstances under which a framework agreement becomes "open" just to replace one existing firm with one of the most highly ranked losing bidders.

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

5. Conclusions (lessons learned)

A current "Global Disorder" in public procurement is acknowledged under many aspects. Our work aimed at pointing out some existing limitations in the provisions about competition as one of the fundamental principles of public procurement.

Since the competition principle is emphasized in the selection phase but is somehow forgotten in the execution phase, we further assessed the lack of discipline and monitoring of the execution phase of the contracts at any level, international, European and national. In the "black hole" of the performance phase a lack of transparency, incompetence, collusion or corruption can undermine the result of public procurement policy. We have discussed some of the most relevant consequences, risks and wastes that such a state of affairs entails. When competition is not assured throughout the cycle of procurement process and delivered quality is shattered, transparency and non-discrimination principles are betrayed since the incorrect execution undermines the competition principle put in place among the bidders in the selection phase.

The strict procedure for contractor selection with all its principles must be followed by an equivalent strict execution of the performance promised in the winning bid and set in the contract conditions. Amendments of contractual conditions between private subjects due to contractor's underperformance affect involved parties only, whereas in public procurement the former exert consequences on non-winning bidders as well. Since any contractor has to be chosen in application of the competition principle, owing to the use of public funds, compliance with the competition principle - in fact - does not and should not end at the awarding stage. Unsuccessful bidders should be enabled to report infringements to challenge the winner's lower-than-promise performance of a contract they might have otherwise won.
As a consequence, they would exercise their right to fair competition and, if properly ranked, the subsequent bidder in the ranking could have the right to replace the winner.

This can be obtained with the adoption of innovative contracting arrangements such as framework agreements. Because framework agreements are generally used to aggregate multiple purchasing decisions by using a two-stage competitive process, losing bidders have stronger incentives to report contractor(s)' misbehaviour relative to a single competitive tendering. However, a simple line of reasoning has revealed that contracting authorities should rely on (possibly some of) the losing bidders at the time when a framework agreement is concluded. Such bidders would be willing to invest resources to gather evidence of any (specific) contract infringement if this were compensated with a replacement of an underperforming contractor with the "marginal" losing firm. Thus some form of openness ought to be envisaged.

In conclusion, the synergy between end-users - the recipients of goods, works and services resulting from public procurement - and unsuccessful bidders would allow further monitoring of the delivered quality and the correct use of public funds. Public bodies would not be led to accept contractual infringements and there would a wider public awareness and monitoring also by means of widespread access to electronic archives. Thus, the principle of free competition and the quality of public procurement performance would be further safeguarded, for the benefit of public interest, competition in the market and to improve the quality of life of citizens and taxpayers, "the true stakeholders in any procurement system"[53].

[53] R. H. Garcia, *International public procurement: a guide to best practice*, (London: Globe Law and Business 2009).

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