



## Brief 29

### Public Procurement

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# Detecting and Correcting Common Errors in Public Procurement

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## What is an error in public procurement?

For the purposes of this Brief, errors in public procurement are understood as infringements of public procurement rules (principles), regardless of the stage of the procedure or of their consequences for the public purse.

Errors in public procurement may be committed:

- **Before** the formal launch of a procurement procedure in the planning phase of a specific procurement: for example, during the process of estimating the value of the procurement or taking a decision about the application of a specific procedure. Decisions taken before the formal procurement procedure undoubtedly have an impact on the course of action taken by the contracting authority.
- **During the course of** a procurement procedure: for example, incorrect evaluation of the qualifications of the economic operator, misapplication of the rules on the selection of economic operators, or erroneous evaluation of offers.
- **After** the procedure has been conducted and the contract awarded: for example, failure to publish a Contract Award Notice, illegal modification of an already concluded contract, or award of additional works or services without the conditions having been fulfilled.

## How are errors in public procurement detected?

Errors in public procurement are usually detected and dealt with by means of the following mechanisms (procedures):

- **Review procedures**, triggered by appeals of economic operators against decisions of contracting authorities. Such appeals may initiate a review by the court or by another independent review body.
- **Audits** conducted by state audit offices (external audits) and audits conducted by a specialised unit within the organisation (internal audits).
- **Checks** (inspections) performed by a specialised body: for example, the public procurement office, the ministry of finance, or another competent oversight body on request, pursuant to complaints of relevant parties, or *ex officio* on their own initiative.
- **Controls** performed by other administrative or financial inspections and law enforcement agencies.

## Classification of errors and their impact on the results of a public procurement procedure

Various types of error can be identified in the process of public procurement, depending on the criteria applied. For the purposes of this Brief, the distinction between errors has been based on the criterion of the **impact of the error on the results of the procurement procedure**. Errors may thus be classified as either (1) **significant** (material) errors or (2) **insignificant** (trivial) errors.

The auditors of the European Court of Auditors (ECA) make the same distinction. In its brochure entitled “*Definition & Treatment of DAS<sup>1</sup> Errors*”, the ECA indicates that errors are relevant for the purposes of DAS “*if they, individually or aggregated with other errors, would reasonably affect the*

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<sup>1</sup> DAS is a French acronym used for a statement of assurance (in French: *Déclaration d'Assurance*). It refers to the annual opinion issued by the European Court of Auditors, in accordance with Article 287 (1) of the Treaty on the Functioning of the European Union (EU), concerning all revenue and expenditure of the EU. [http://www.eca.europa.eu/Lists/ECADocuments/DAS\\_ERRORS/DAS\\_ERRORS\\_EN.PDF](http://www.eca.europa.eu/Lists/ECADocuments/DAS_ERRORS/DAS_ERRORS_EN.PDF)

*decisions of the addressees of the audit opinion*". According to ECA policy, it is unrealistic to assume that no errors occur in practice, and "consequently, a degree of tolerance regarding the appropriate level of accuracy is to be considered acceptable".

For the purposes of this Brief:

- **Significant (material) errors** are those that **have an impact on the results of the specific procurement procedure**. In other words, the results of the procedure would have been different if an error had not been committed. For example, the ungrounded rejection, for formal reasons, of the best tender submitted in the procedure clearly has an impact on the results of the procedure, as a less advantageous or simply more expensive tender is chosen.
- **Insignificant (trivial) errors** are all other errors occurring in the application of procurement rules, which **do not affect the results of the procedure**. For example, the same offer would still have been selected as the best one even if no error had been made, or the economic operator that was wrongly rejected would not have been the winner of the procedure.

In the context of public procurement, the failure to publish a **Contract Notice** (call for tender), if such a notice is required by law, and the failure to publish or the late publication of a **Contract Award Notice** are both infringements of specific public procurement provisions. However, they have different consequences for the procurement in question. Similarly, a contracting authority that did not ask a bidder to submit missing or incomplete documents, while it did request such documents from other participants, has infringed formal rules stipulating that such a request has to be made. However, if the offer submitted by that bidder did not stand a chance of winning the contract as the price was too high, such an infringement was inconsequential. The reason for the classification of this error as insignificant is that the results of the procedure would have remained the same even if the contracting authority had fully complied with its obligations.

The **distinction between significant and insignificant errors is not clear-cut**, however, and requires a case-by-case approach and a careful assessment of the particular circumstances. Insignificant errors, even if they do not have an impact on the result of the procedure, should be detected and brought to the attention of the contracting authority concerned, for educational as well as preventive reasons.

This Brief presents a list of the most common errors in public procurement, with a short explanation of the relevant rules breached, methods of detection, consequences of infringement, and ways of removal (correction). The list presented below is not meant to be an exhaustive list of potential errors, which may vary between national legislations as the rules may be different. On the contrary, the list is limited to the most universal errors. It should also be remembered that the more complicated and the more prescriptive the rules in place are, the more likely that sooner or later violations of those rules will occur.

The errors indicated below have been grouped according to the stage of the procurement process.

## What are the most common errors in public procurement and how they should be corrected?

### 1. Errors concerning planning, preparing and launching the procedure

#### a) *Non-application of procurement rules*

Public procurement rules define categories of institutions, bodies or persons (contracting authorities) obliged to follow specific rules when awarding public contracts. If the contracting authority/entity concludes a contract without applying the rules that should be followed, it breaches procurement rules. This kind of infringement may occur, for example, in the following situations:

- The contracting authority directly awards a contract that should be concluded following a transparent and competitive procedure to a specific contractor.
- The contracting authority unlawfully refrains from the application of procurement rules, relying on a specific exemption from the procurement rules, when in fact the conditions for non-application of those rules are not fully satisfied. For example, a contracting authority claims that an urgent situation that is out of its control applies, when in fact it does not.
- Occasionally, there are also cases where the contracting authority concludes the contract by following a procedure that may in itself be transparent and competitive, but is not the procedure that is required by procurement law. For example, the call for tender was published, but not as required by law, such as publication at national or local level rather than in the *Official Journal of the EU (OJEU)*.

**The non-application of the procurement rules required by procurement law is one of the most serious infringements of procurement rules.** This is particularly the case when, as a result of the non-application of these procurement rules, the contract in question is directly awarded to a specific contractor, without giving other economic operators the opportunity to express their interest. Not only does this non-application of the rules go against the fundamental principles of public procurement, but it may also be harmful for public finances. It may result in the contracting authority paying more for works, supplies or services than it would have paid if competitive and transparent procedures had been applied.

**This kind of error can only be remedied by declaring the contract ineffective if the contract has already been concluded (in accordance with the provisions of the Remedies Directive<sup>2</sup>), and by launching a new, competitive procurement procedure.**

#### b) *Incorrect choice of procurement procedure*

Under the EU procurement rules defined by the Directive<sup>3</sup>, there are two basic award procedures: open procedures and restricted procedures. These procedures are treated as “default” procedures, meaning that they may always be applied, and the choice as to which procedure to apply is left with the contracting authority.

All other procedures may only be applied under specific circumstances, which are strictly defined by the respective procurement directives.

Under the Utilities Directive<sup>4</sup>, contracting entities may choose freely between open, restricted and negotiated procedures, provided that a call for competition has been made.

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<sup>2</sup> Directive 2007/66/EC 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, 11 December 2007, as amended.

<sup>3</sup> Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EU, 26 February 2014.

<sup>4</sup> Directive 2014/25/EU on procurement by entities in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, 26 February 2014.

See SIGMA Public Procurement Brief 10, *Public Procurement Procedures*, for further information on the circumstances in which the different procedures may be applied. The contracting authority that does not respect the relevant rules concerning the proper choice of award procedure infringes public procurement rules, in particular if it awards a contract directly without any call for competition.

**As in the case discussed in point 1 a) above concerning the non-application of procurement rules, an infringement concerning the incorrect choice of procurement procedure may only be remedied by declaring the contract concerned ineffective (where the contract has already been awarded) and by launching a new, competitive procurement procedure.**

### **c) *Misapplication of rules related to the estimation of procurement value***

The application of both EU and national rules on public procurement normally depends on the value of the contract in question. For example, the EU directives only apply to contract values that exceed specific financial limits. A number of general principles, as well as more detailed rules, apply to the calculation of the estimated value of public contracts. The infringement of procurement rules occurs if the contracting authority:

- **underestimates the value of the contract** in order to avoid the application of specific rules; consequently, in the context of EU procurement, the contract is advertised at national level only (or not advertised at all), thereby significantly limiting the access of foreign companies to information about the bidding opportunity;
- **artificially splits the contract** into smaller parts and applies in consequence less transparent and less competitive procedures; the division of a contract into smaller parts is encouraged as a means of increasing the chances of small and medium-sized enterprises. The division of a contract is acceptable if it is not done deliberately to avoid the requirement to apply relevant rules;

### **Case study**

The contracting authority directly awarded a contract for the development of a new information and communication technology (ICT) system (which it referred to as the “trial” or “test” version). The estimated value of the contract was under the national threshold of EUR 14 000, and so no Contract Notice was published. The contracting authority did not stipulate in the tender specification or in the contract terms that the copyrights related to the software were to be transferred by the successful tenderer to the contracting authority. The successful tenderer, Company X, therefore retained the copyrights in the software. The contracting authority then awarded to Company X a series of additional contracts related to the modernisation and development of the software. It awarded the additional contracts directly to Company X without any competition. The contracting authority claimed that it was permitted to award the additional contracts in this manner because Company X had exclusive rights (the copyrights) concerning the further development of the IT system. In this way the contracting authority started with a very modest-value contract and then entrusted to the same enterprise, without any competition, the provision of services of a combined value of EUR 18 million.

- **does not aggregate identical or similar deliveries, services and works** to be awarded in a given period and applies less transparent and less competitive procedures, whereas it should apply the rules that are applicable to the total value of all parts combined.

The aggregation provisions require that when there are a number of similar contracts, each of which may be below a specific financial threshold, they are all to be taken into account in calculating the contract value. The aggregation provisions also mean that where the aggregate value of similar contracts exceeds the threshold, then the procurement rules should also be applied to the contracts that, if taken separately, do not reach that threshold. If the contracting authority decides to award a

contract in parts, it should take into account the value of the respective parts and apply the provisions (procedures) that are relevant to the value of the contract taken as a whole. **The infringement of rules concerning the estimation of contract value or the artificial splitting of contracts constitute substantial infringements, especially if they result in the application of non-transparent and non-competitive procedures (as for a direct award).**

#### Case study

The contracting authority awarded four contracts for similar works for the construction of a sewage system. The values of the respective contracts were: (1) EUR 1 625 649, (2) EUR 951 368, (3) EUR 1 360 502, and (4) EUR 1 49 807. The total value of all lots amounted to EUR 5 428 326. In accordance with EU rules, all lots should be advertised in the *OJEU*, even if awarded in separate procedures (as was the case here), since the accumulated value of the procurement exceeded the EU threshold of EUR 5 225 000. However, the contracting authority applied public procurement rules as if each lot were the object of an entirely different procurement and omitted to publish a Contract Notice in the *OJEU*, thereby breaching the above-mentioned rules on aggregation.

**As in the case of direct award of contracts, the infringement of splitting contracts artificially instead of applying a transparent and competitive procedure may only be remedied by cancelling the procurement procedure if the contract has not yet been signed or, if it has already been concluded, by declaring the contract ineffective.**

See SIGMA Public Procurement Brief 5, *Understanding the EU Financial Thresholds*, for further information on the rules concerning the calculation of contract value.

#### d) *Incorrect description of the object of the procurement*

Transparent and competitive procurement rules would be useless if it were possible to define the object of the public procurement in such a way that only a particular supplier would be able to provide the supplies or services required. The object of the procurement should be described in terms of technical specifications, affording equal access to bidders and preventing the creation of unjustified obstacles to the opening of the public procurement to competition. The object of the procurement contract should be described clearly using sufficiently precise and comprehensive wording, taking into consideration all of the requirements and circumstances that could have an impact on the preparation of a tender.

The contracting authority breaches the law if it describes the object of procurement in a manner that could unfairly restrict competition; in particular, it breaches the law when it describes the object of procurement by referring to trademarks, patents or origin, unless the reference is justified by the nature of the contract's object or unless the contracting authority cannot otherwise describe the object with sufficient precision, and provided that such a reference is accompanied by the words "or equivalent".

Errors concerning biased, tailor-made specifications are among the most difficult to detect. However, **economic operators often bring these errors to the attention of relevant institutions by complaining about measures that deprive them of opportunities to offer their works, supplies or services. To prove to the contracting authority that procurement rules have been breached, it may be necessary to call on independent, external experts in the specific field to express their opinions.**

#### e) *Conditions for participation that do not comply with the principles of equal treatment, proportionality and genuine competition*

The purpose of the selection (qualification) conditions is to identify those economic operators that are capable of performing and completing the contract to be awarded. The contracting authority should establish requirements that are equal for all economic operators. When setting the conditions for participation, the contracting authority may fix the minimum levels of capacity that economic operators must satisfy, where appropriate, including the capacities of third parties. These

conditions should be related and proportionate to the object of the procurement. The selection process should be limited to an assessment of whether the grounds for exclusion (mandatory or optional) have been satisfied as well as an assessment of the economic operator's suitability to perform services, its financial and economic standing, and its technical and/or professional capacity.

The following qualification criteria were found to be unlawful by the Court of Justice of the European Union (CJEU) in its case law:

- preference given to economic operators carrying out their main activity in the region where the works constituting the object of procurement are to be carried out;
- participation in the procurement procedure restricted to bidders with a majority of capital that is publicly owned;
- requirement of proof that the designer is a member of the association of architects of the country of the contracting authority;
- exclusion of bidders from the procedure for the sole reason that they receive a public subsidy;
- condition that the bidder must, at the time the bid is submitted, have an office open to the public in the capital of the province where the service is to be provided.

**The following errors may take place with regard to the application of selection criteria:**

- discriminatory criteria related to qualification or criteria that distort competition;

#### Case study

In a public procurement procedure concerning supervision services related to the construction of a sewerage system, the contracting authority required proof from economic operators that they had obtained experience in similar services following a procurement procedure and financed by external aid funds (such as EU funds, the Norwegian Financial Mechanism, or the World Bank). This requirement was found to be discriminatory and to distort competition.

- requirements that are not related to the works, supplies or services constituting the object of the procurement and/or requirements that are disproportionate and attainable by only a limited number of economic operators;

#### Case studies

1) The contracting authority awarded a contract for supervision services related to the construction of a sewerage system. The value of services was estimated at a modest EUR 60 000 and the risks of the contract performance were low. The contracting authority required, among other conditions, that economic operators interested in providing these services had to have an insurance policy for an amount of EUR 2.5 million. The conclusion of the inspectors who audited the procedure was that the contracting authority had set a disproportionately high requirement.

2) In another procedure, concerning the renovation of a railway station, economic operators were required to demonstrate experience in various types of works (construction of car parks, electricity grids, railways, etc.) that had been **obtained during the implementation of a single project**. Economic operators were barred from proving their technical capacity by demonstrating experience concerning various types of works gained in separate projects. Here also, inspectors found the requirement related to the way in which technical capacity could be demonstrated to be contrary to procurement law.

- **requirement from economic operators of documents that are irrelevant for the procedure or failure to accept the European Single Procurement Document (ESPD):** in accordance with the above-mentioned rules, the contracting authority commits an error if

it demands documents that are not necessary in order to prove that the economic operator is reliable and able to perform the contract in question, such as documents that are unrelated to the requirements or conditions imposed by the contracting authority. It may also commit an error if it fails to accept an ESPD as proof of evidence. See SIGMA Public Procurement Brief 7, *Selecting Economic Operators*, for further information on the ESPD.

- infringements related to the description of the public procurement matter: such infringements can be remedied if they are detected and challenged by economic operators early enough in the procurement procedure. To correct this infringement, it would suffice to delete or amend all discriminatory criteria or requirements that are not related to the object of the procurement in the tender documents. In addition, the contracting authority would probably need to amend the Contract Notice if this modification concerned the information included in the Contract Notice.

#### **f) Incorrect application of tender evaluation (award) criteria**

The award criteria constitute the basis on which a contracting authority chooses the best offer and consequently awards a contract. The award criteria must be established in advance by the contracting authority and may not be prejudicial to fair competition. The proper application of contract award criteria is crucial for the process of awarding public contracts – if they are not applied properly, the tender process, the evaluation of tenders and the contract award decision may be flawed. This could mean that the tender process would have to be cancelled and re-started, as otherwise the best tender has not been selected.

While determining the award criteria, the contracting authority should first of all respect the underlying principle of non-discrimination (especially on the grounds of nationality). Second, the award criteria cannot be prejudicial to fair competition. Third, in accordance with the principle of transparency, all award criteria (and sub-criteria if the contracting authority decides to break the evaluation criteria into various constituent elements) should be disclosed in advance to potential bidders by means of the contract documents or the Contract Notice. Fourth, the award criteria should be formulated in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way. Finally, the contracting authority must interpret the award criteria in the same way throughout the entire procedure.

As in the case of the selection criteria described above, the CJEU identified in its case law some award criteria that it found to be illegitimate:

- account taken of a list of principal deliveries effected by the bidder in the past (this criterion can be applied only as a qualification criterion, since it refers to capacity, i.e. the experience of the economic operator);
- requirement that the product that is the object of the tender be available for inspection by the contracting authority within a radius of a specific number of kilometres;
- criterion that is not accompanied by requirements enabling the effective verification of the accuracy of the information provided in the tender;
- criterion that rewards, by extra points, the existence, *at the time the tender was submitted*, of a plant situated within 1 000 km of the capital of a province or of offices open to the public in other specified cities.

#### **The contracting authority may commit an error in the application of the award criteria if it:**

- applies criteria that are inconsistent with procurement law, in particular with the principles of transparency and equal treatment, such as allowing price preferences for companies located in the same area as the contracting authority;

- applies criteria that are not allowed in a specific procurement procedure – for example, in the competitive dialogue the contracting authority applies the price criterion when in such a case, in accordance with the relevant rule, it should apply the best price-quality ratio;
- applies criteria that raise uncertainty as to how bidders will be evaluated.

### Case study

In a procurement procedure concerning the award of a turnkey contract for the design, delivery and construction of a wind farm, the contracting authority set as one of the criteria the evaluation of “conditions offered under warranty” on the basis of “expert opinion”.

**Infringements related to the application of award criteria may be remedied by removal or amendment of the criteria that are not compliant with the relevant provisions. If the criteria were published in the Contract Notice, the publication of a corrigendum of the notice would be necessary, followed by the appropriate extension of the time limit for the receipt of tenders.**

See SIGMA Public Procurement Brief 8, *Setting the Award Criteria*, for further information on this issue.

## 2. Errors committed in the conduct of the procedure

### a) *Non-observance of the time limits stipulated in the procurement rules*

The purpose of the provisions regulating the minimum time limits for the receipt of offers is to enable economic operators, in particular foreign operators, to prepare and submit tenders that satisfy the requirements of the contracting authority.

The following irregularities may occur in the course of the procurement procedure:

- Time limits being too short for the receipt of offers or requests for participation, in particular if they are shorter than the minimum time limits required by procurement law;
- Admittance to the procedure and evaluation of tenders received after the time limit: such tenders should be returned unopened to the bidders concerned, unless late submission is the result of a fault by the contracting authority (for example, wrongly indicating the place for receipt of tenders, or a malfunction of the ICT system, made it impossible to submit electronic offers on time). In general, admittance to the procedure of offers received after the deadline is tantamount to a breach of the equal treatment principle;
- Infringements related to the application of provisions concerning the time limits: such infringements may be remedied in the procurement process; the appropriate (legally compliant) extension of the relevant time limits and notification of that fact to all economic operators concerned would normally suffice.

### b) *Incorrect evaluation of the qualifications of economic operators, resulting in their disqualification*

When the contracting authority assesses the submitted tenders or requests for participation, it should check whether tenderers or candidates should be excluded and then proceed to check whether they fulfil the criteria related to their qualification (selection). An irregularity thus occurs when the contracting authority wrongly disqualifies an economic operator that in fact meets all of the requirements or, on the contrary, when the contracting authority admits to the procedure an economic operator that should be excluded or not be invited to submit a tender. This issue is closely related to the proper interpretation of documents submitted by participants (those documents or declarations may be missing, incomplete or unclear). If in doubt, the contracting authority should seek clarifications from the bidder (candidate) concerned, but with due respect for the principle of equal treatment (all participants in the same situation should be treated in the same way).

***c) Incorrect evaluation of tenders, resulting in the rejection of a compliant tender or the failure to reject a non-compliant tender***

Tenders should be evaluated in accordance with the requirements set out in the technical specifications that are provided in the Contract Notice or tender documents. Tenders that are substantially non-compliant should be rejected. If the contracting authority allowed the bidders concerned to correct those tenders, it would be contrary to the principle of equal treatment. On the other hand, tenders that are non-compliant with the requirements of the contracting authority that are not fundamental requirements should not be rejected immediately.

**Infringements related to the evaluation of tenders may be remedied by the repetition of the evaluation process followed by a selection of the best tender.**

***d) Modification of award criteria in the course of the procurement process***

The criteria published in the Contract Notice (tender dossier) should generally be the criteria applied. During the tender process, a contracting authority may nevertheless need to take into account new circumstances that have an impact on the announced award criteria, or it may need to correct an omission or a mistake. Changes in the award criteria may be divided into material and non-material changes. A change is material when it is likely to have repercussions on the identity of the economic operators that would participate in the tender process. Broadly speaking, when a change occurs that is material, it is necessary to go back to the stage at which the change was made. For example, a change related to application of the most economically advantageous tender rather than the lowest-price criterion is material, since it concerns one of the elements that provide the basis on which economic operators decide whether or not to participate in the procurement procedure. Moreover, the change concerns an element that should have been disclosed in the Contract Notice. A non-material change, on the other hand, is allowed in principle. In this case, a corrigendum to the Contract Notice and/or contract documents, which should be accompanied by an adequate and duly announced extension of the deadline for the submission of tenders, would generally suffice. The determination as to whether a change is material or non-material must take into account the specific circumstances of each case. Under no circumstances may the announced award criteria (including the relative weighting of the various criteria, the application of any sub-criteria and their relative weighting, and a more detailed evaluation methodology) be changed or waived during the process of evaluation of tenders. At that stage, all criteria (and any sub-criteria) must be applied as they stand.

**If the contracting authority wants to change the award criteria in such a way that the change would amount to a material change as defined above, this change usually requires the advertisement of a second Contract Notice and an appropriate extension of the time limit for the submission of offers. On the other hand, if the contracting authority changes the award criteria once the time limit for the submission of offers has elapsed, such an infringement could be remedied only by cancellation of the whole procedure and its re-publication.**

***e) Cancellation of the procedure without a valid reason***

Public procurement procedures, in particular those that are launched with a public call for competition, should not be cancelled without a valid reason. The reason for this rule is that interested economic operators replying to a bidding opportunity and taking part in the procurement process invest time and resources in the preparation of their tenders, which cannot be considered as negligible. Public procurement rules usually allow the cancellation of the procedure for important, unforeseen reasons, in particular if the award of the contract, due to an unexpected change of circumstances, is no longer in the public interest. The need for the cancellation of a contract may also be the result of illicit actions of the bidders, for example if it transpires that they acted in collusion. It may also be the case that the cancellation of the procedure is necessary in order to correct a procedure that is flawed in such a way that the irregularities committed by the contracting

authority cannot otherwise be removed. For example, if no call for competition was published, contrary to the procurement rules, and the contracting authority became aware of that infringement, it would be preferable to terminate the procedure rather than proceed further with the conclusion of a contract, which might subsequently be declared ineffective by a court or another independent review body.

The decision of the contracting authority to cancel the tender procedure must be fully justified, especially when the cancellation is due to a change in the circumstances in which the tender procedure was announced or for other unforeseeable reasons.

**Ungrounded cancellation (termination) of the contract procedure may be remedied by a cancellation of the decision to terminate the procedure and the award of the relevant contract.**

**f) Other errors occurring in the course of the procedure**

- **Incorrect application of communication rules** – for example, the contracting authority does not inform all participants of the specific decisions taken in the course of the procedure.
- **Failure to publish** an addendum to the Contract Notice in a situation where there was a change in the procedure related to the elements published in the Contract Notice – for example, the contracting authority extends the time limit for the receipt of applications or tenders, but it does not publish a notice concerning the change.
- Participation, on the part of the contracting authority, of a person who is in a position of **conflict of interest** – for example, the person is related to or has been employed by the economic operator participating in the procurement procedure. In accordance with the principle of impartiality, once the requests for participation or the tenders have been opened, all members of the tender committee should declare any potential conflict of interest; they should be exempted from the further work of the tender committee and should have no say in the selection of the best tender. This infringement is substantial, as it may have an impact on the results of the procurement process. Article 24 of the Directive contains specific provisions requiring contracting authorities to take measures to effectively prevent, identify and remedy conflicts of interest in the conduct of procurement procedures.

**In order to decide whether to cancel the whole procurement procedure or to remedy the infringements mentioned above, the specific case should be analysed and the impact of the error on the results of the procedure should be assessed.**

**3. Errors committed after selection of the best offer or conclusion of a procurement contract**

Public procurement rules, including EU directives, impose some requirements that should be met by the contracting authority even after the award procedure is over. Some of the irregularities listed below may in general be qualified as substantial irregularities, while others, depending on the specific circumstances, may or may not be qualified as substantial.

**a) Failure to respect the standstill period**

Contracting authorities are required to wait for a certain number of days between the contract award decision and the conclusion of the contract with the successful tenderer. This “standstill period” allows tenderers that have not had their offers selected to challenge the contracting authority’s decision and therefore to prevent the contract from being awarded on the basis of an erroneous decision. The contracting authority that does not respect the standstill period (i.e. enters into a contract before the expiry of the period) infringes the procurement rules. Under the EU rules, this infringement is treated as a significant one and should result in the contract being declared ineffective, provided that the infringement has deprived the tenderer that has applied for review of

the possibility to pursue pre-contractual remedies and provided that it is combined with an infringement of the public sector procedural rules. In other words, a breach of standstill rules alone is not sufficient to result in the requirement to declare the contract ineffective. **The contract is to be declared ineffective only if the infringement of the standstill rules is coupled with a breach of other procurement rules (for example, selection of a non-compliant offer or an offer that was not the best one), and the aggrieved bidder (the bidder that did not have its offer selected, contrary to the legal provisions) does not have the possibility of challenging the decision of the contracting authority and consequently does not have an opportunity to win the contract.**

**If the contract has been concluded before the expiry of the standstill period, this error by the contracting authority can only be remedied by declaring the contract ineffective. Whether it is necessary to annul the contract depends, however, on whether this infringement fulfils the condition indicated above.**

***b) Failure to inform participants in the procedure of its results***

Once a decision is taken concerning the selection of the winning tender, the contracting authority is obliged to notify all economic operators concerned of the results of the procedure. This obligation aims to provide participants in the procedure an opportunity to challenge the decision of the contracting authority if they consider that it is wrong. According to the Remedies Directive, the contracting authority is obliged to communicate the award decision to each tenderer and candidate concerned, providing them with a summary of the relevant reasons for selecting one tender over the others and with a precise statement concerning the applicable standstill period. Failure to communicate the results of the procedure is a serious infringement of the procurement rules, as it renders illusory the possibility of complaining about a decision of the contracting authority, in particular if this irregularity is coupled with the failure to respect the rules of the standstill period. However, whether this irregularity has an impact on the results of the procedure depends on the specific circumstances of the case.

**This kind of omission may be remedied by performing the required action (i.e. notification of the participants of the results of the procedure). It is in fact in the interest of the contracting authority to inform the participants in the procedure of the results, since the time limit for submission of requests for review (appeals) is counted from the moment the information is sent to or received by (depending on the applicable law) the economic operators concerned.**

***c) Failure to publish a Contract Award Notice***

EU rules require the contracting authority to communicate the decision on the award (conclusion) of a public contract by publishing a Contract Notice in the *OJEU*. This requirement is also stipulated in national law on public procurement. The notification should normally take place immediately and no later than a specified number of days following the conclusion of the contract. As this notice is not a part of the procurement procedure (which terminates with the decision to award a contract to a specific bidder), contracting authorities often ignore this requirement. It is nevertheless an element that enhances transparency, and its importance cannot be denied, although its impact on the functioning of the procurement system is not the same as, for example, the failure to publish a Contract Notice.

**This kind of error may be easily remedied by the publication of the required notice. It is in the interest of the contracting authority to publish such a notice, as a (shorter) period for review begins on publication of the notice.**

**d) *Publication of incomplete information in the Contract Award Notice or publication after the required time limit***

The contracting authority may also commit an error when it publishes a Contract Award Notice, in such a way that the communication of this information is delayed (the notice is published, but later than required by law) or does not contain all of the required information. In both cases, this error amounts to an infringement of transparency rules, since it prevents economic operators, public institutions – including audit or monitoring bodies – as well as the public from performing monitoring functions. The contracting authority may fail to provide information, for instance, on the identity of the selected economic operator, the reasons for selection of that offer, the number of offers submitted and rejected, the lowest price submitted, or the price of the winning tender. Although this is an infringement of procurement rules, normally it does not have an impact on the results of the concluded procurement procedure, in particular if the procedure was transparent and competitive, and as such the infringement is more formal than substantial. It is likely that the results of the procedure would have been the same if the contracting authority had fully complied with the publication requirements. This is not the case when the publication of the Contract Award Notice follows a procedure that is not transparent or competitive, such as a negotiated procedure without previous publication of a call for competition. This kind of notice should contain information on the reasons for the application of this procedure (the legal grounds justifying the lack of competition). Failure to provide this information does not necessarily mean that the law was breached, but it should draw the attention of the relevant bodies concerning the proper application of exemption from the general principles.

**e) *Conclusion of a contract that is inconsistent with the terms provided in the winning offer***

The contracting authority should conclude a contract with the winning tenderer in accordance with the terms and conditions of that tenderer's offer. In other words, the terms of the concluded contract should reflect the commitments made in the offer that was selected as the best offer. The contracting authority would be breaching the principle of equal treatment if it allowed the winning bidder to be paid more or to perform a contract on terms that were more advantageous for the bidder. On the other hand, the modification of a contract as compared with the tender is allowed exceptionally, in rigorously justified cases, if it results from circumstances that could not be foreseen when the best tender was selected or in other precisely circumscribed circumstances. However, these changes should not concern the commitments of the economic operator included in the tender, which were evaluated by means of a procurement procedure.

**f) *Modification of a contract during its execution, contrary to the rules allowing such a modification***

Once the contract with the winning bidder has been concluded, it should be performed as it stands and cannot be amended other than in very exceptional cases, for example if the need for change results from unforeseeable events. In general, the **substantial modification of a contract is prohibited**. It is understood that this general rule applies to changes that render the contract substantially different from the one initially concluded. For example, such modifications would:

- alter the economic balance of the contract in favour of the contractor;
- include supplies, services or works that were not part of the original procurement process;
- result, if already implemented in the original procurement process, in the selection of another economic operator or the award of the contract to another tenderer.

Substantial modifications of contracts are prohibited unless they are implemented by means of a new (transparent and competitive) procurement process, with a new call for competition.

On the other hand, changes in the contract are not perceived as substantial if:

- they concern those elements of the contract that do not alter the overall nature of the contract;
- they have been provided for in the procurement documents concerning the original procurement procedure in clear, precise and unequivocal review clauses or options; such clauses or options should specify the scope and nature of possible modifications as well as the conditions in which those changes may be exercised.

Substantial modifications of contracts that are implemented regardless of the above-mentioned limitations constitute serious irregularities in the public procurement process.

**A substantial modification of the contract, contrary to the relevant rules, may be remedied exclusively by declaring the modification of the contract ineffective.**

***g) Award of additional services or works without the application of competitive and transparent procedures***

EU legislation and national laws implementing EU legislation allow, under certain conditions, the award of a contract without the previous publication of a call for tender. Such cases include the award of additional works or services to the economic operator that was party to the original contract or the award of a contract consisting of new works or services that constitute a repetition of the services or works that were included in the original procurement process. As an exception to the general principles of transparency and competition, this option may be used under strictly defined conditions (related, for example, to the value of the additional or new works or services or to the period of time during which that option may be exercised). A breach of procurement rules occurs if the contracting authority awards such services or works when these conditions are not fulfilled.

**The conclusion of contracts related to additional services or works in a way that is contrary to the relevant provisions amounts to an illegal award of contract. This kind of contract (or contracts) should be declared ineffective, as discussed in points 1 a) and 1 b) above.**

## Further information

### SIGMA Publications

#### Public Procurement Briefs

<http://www.sigmaweb.org/publications/key-public-procurement-publications.htm>

SIGMA (2016), *Understanding the EU Financial Thresholds*, Brief 5, OECD Publishing, Paris

SIGMA (2016), *Selecting Economic Operators*, Brief 7, OECD Publishing, Paris

SIGMA (2016), *Setting the Award Criteria*, Brief 8, OECD Publishing, Paris

SIGMA (2016), *Public Procurement Procedures*, Brief 10, OECD Publishing, Paris