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Public Procurement

Detecting and Correcting Common Errors in Public Procurement

CONTENTS

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How are "errors" in public procurement defined?

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 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 outside of (before) the formal procurement procedure undoubtedly have an impact on the course of action taken by the contracting authority; or
- **in the course of** a procurement procedure (for instance, during the incorrect evaluation of qualifications of the economic operator, misapplication of rules on the selection of economic operators, or erroneous evaluation of offers); or
- **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 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 (appeals that initiate a review by the court or 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 or the ministry of finance) or by another competent oversight body on request (complaints of relevant parties) or *ex officio* on their own initiative;
- **Controls** performed by other administrative or financial inspections and law enforcement agencies.

How may procurement errors be classified?

Various types of errors 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:

- **Significant** (material) errors; or
- **Insignificant** (trivial) errors.

The auditors of the European Court of Auditors (ECA) make the same distinction. In its brochure entitled "*Definition & Treatment of DAS*[1] *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 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 purpose 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 tender that happens to be the best one 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 who was wrongly rejected would not in any case have been the winner of the procedure). In other words, the failure to publish a **contract notice** (call for tender), if such a notice was 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, although 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) infringes formal rules stipulating that such an attempt has to be made. However, if the offer submitted by that bidder, due to a higher price proposed in his tender, did not stand a chance of winning the contract, such an infringement is inconsequential, since 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 (at another time, in different circumstances, such an error may affect the result of the procurement procedure).

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.

[1] 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.

What are the most common errors in public procurement?

1. Errors concerning planning, preparation and launching of the procedure

a) Non-application of procurement rules

Public procurement rules define categories (types) of institutions, bodies or persons that are obliged to follow specific rules when awarding pecuniary contracts (i.e. contracts that may be expressed in monetary terms) related to the delivery of goods, provision of services or execution of works. If the institution (body) that is defined by those rules as the contracting authority 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 (to a specific contractor) a contract that normally should be concluded following a transparent and competitive procedure.
- 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, the subject matter of the contract or the circumstances under which it takes place do not occur, or the value of procurement exceeds the financial threshold, triggering the application of those rules).
- Sometimes but seldom, there are also cases where the contracting authority concludes the contract by following a procedure that may in itself be transparent and competitive, but it is not the procedure that is required by procurement law (for example, the call for tender was published, but not in a place required by the law, such as publication at national or local level rather than in the *Official Journal of the EU*).

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 chance 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 in the case where the contracting authority pays more for goods or services than it would have paid if competitive and transparent procedures had been applied.

Such an error, if the contract has already been concluded, may be remedied exclusively by declaring the contract ineffective (in accordance with the provisions of Remedies Directive 2007/66/EC) and by launching a new, competitive procurement procedure.

b) Incorrect choice of procurement procedure

Under the EU procurement rules defined by Public Sector Directive 2004/18, there are two basic award procedures: the open 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. Under the Utilities Directive (2004/17), contracting entities may choose freely between open, restricted and negotiated procedures, provided that a call for competition has been made (i.e. publication of a contract notice or another form of call for competition). All other procedures are exceptional and may be applied only under specific

circumstances, which are strictly defined by the respective EU directives, such as an urgent, unforeseen need to award a contract and for objective reasons only one specific provider is able to perform the contract and other similar conditions that are strictly defined and interpreted. 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, this infringement may be remedied only by declaring the contract concerned ineffective 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 apply only 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 allowed (it is even recommended as a means of increasing the chances of small and medium-sized enterprises – SMEs) 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 IT system (which it referred to as the “trial” or “test” version), with an estimated value under the national threshold of EUR 14,000 (hence no contract notice was published). The contracting authority omitted to stipulate in the contract that the copyrights related to the system were to be transferred to the contracting authority. Subsequently, claiming that the contractor had exclusive rights concerning the further development of the IT system, the contracting authority awarded to the same company a series of contracts related to the modernisation and development of software. 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 18,000,000.

- **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 signify that a number of similar contracts, each of which may be below a specific financial threshold, are all to be taken into account, and the provisions that are applicable above the threshold should also be applied to contracts that, if taken separately, do not reach that threshold. The contracting authority, if it

decides to award a contract in parts, 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 and the ban on artificial splitting constitute a substantial infringement, especially if it results in the application of non-transparent and non-competitive procedures (such as a direct award).**

Again, if, instead of a transparent and competitive procedure, the contracting authority, due to the artificial splitting of contracts, applied a non transparent and non competitive procedure, such as for instance direct award, this infringement may be remedied only by cancelling the procurement procedure if the contract has not been yet signed or, if it had been already concluded, by declaring the contract ineffective.

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 1,525,649; 2) EUR 951,368; 3) EUR 1,260,502; and 4) EUR 1,490,807. The total value of all lots amounted to EUR 5,228,326. In accordance with EU rules, all lots should be advertised in the Official Journal of the EU (OJEU), even if they were awarded in separate procedures (as was the case here), since the accumulated value of the procurement exceeded EUR 5,000,000. 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.

d) Incorrect description of the object of the procurement

The transparent and competitive procurement rules would be useless if it were possible to define the object of the public procurement in a biased manner, thereby restricting access to the procurement in such a way that only a particular supplier would be able to provide the goods or services required. Therefore, 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 in an unequivocal and exhaustive manner by 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 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 usually bring these errors to the attention of relevant institutions by complaining about measures that deprive them of chances to offer their goods 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 qualification (selection) conditions is to identify those economic operators who 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 minimum **levels of capacity** that economic operators must satisfy (alone or, where appropriate, dependent on the capacities of third parties). Those conditions should be **related** and **proportionate** to the **object of the procurement.** EU law as it now stands requires that qualification criteria be limited to an assessment as to 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 illegitimate by the European Court of Justice (ECJ) 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 is 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 the 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 have **at the time the bid is submitted** 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 qualification 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 experience in similar services obtained 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 products, services or works constituting the object of the procurement and/or requirements that are disproportionate and attainable by only a limited number of economic operators.

Case studies

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. The contracting authority required, among other conditions, that economic operators interested in providing those services had to have an insurance policy for an amount of EUR 2.5m. The conclusion of inspectors who audited that procedure was that the contracting authority had set a disproportionately high requirement.

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 may be demonstrated to be contrary to procurement law.

- **Requirement from economic operators of documents that are irrelevant for the procedure**: 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 not related to the requirements or conditions imposed by the contracting authority.

- Infringements related to the description of the public procurement matter can be remedied if they were detected and challenged by economic operators early enough in the procurement procedure. To correct this infringement it would be enough to delete or to amend in the tender documents all discriminatory criteria or the requirements which are not related to the object of the procurement. In addition, the contracting authority would probably need to amend the contract notice if this modification concerns 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 restarted, 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 different 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 ECJ 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 preference 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 lowest-price criterion when, in accordance with the relevant rule, in such a case it should apply the most economically advantageous criterion;
- 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 which are not compliant with the relevant provisions. If they were published in the contract notice, the publication of corrigendum of the notice would be necessary, followed by the appropriate extension of the time period for receipt of tenders.

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 periods 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 periods set are 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 that were received after the elapse of the time period; such tenders should be returned unopened to the

bidders concerned, unless the late submission is a result of a fault of the contracting authority (for example, it wrongly indicated the place of receipt of tenders, or some malfunction of the IT systems made it impossible to submit electronic offers on time); in general, admittance to the procedure of offers that were received after the deadline is tantamount to a breach of the equal treatment principle.

- Infringements related to the application of provisions concerning the time periods may be remedied in the procurement process. The appropriate (legally compliant) extension of the relevant time periods 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 not be excluded and then proceed to check whether they fulfil 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 who 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). In case of 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. Allowing the bidders concerned to correct those tenders would be contrary to the principle of equal treatment. On the other hand, tenders that are non-compliant with 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) in general should be the criteria applied. During the tender process, however, a contracting authority may 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, the 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 to participate in the procurement procedure or not. Moreover, the change concerns an

element that should have been disclosed in the contract notice. **A non-material change, on the other hand, in principle is allowed**. 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 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 this 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 it amounts to the material change as defined above, this change usually requires readvertising of a contract notice and appropriate extension of the time period for submission of offers. On the other hand, if the contracting authority changed the award criteria once the time period for submission of offers had elapsed, such an infringement may be remedied only by a 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 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.

In any case, the decision of the contracting authority to cancel the tender procedure must be fully justified, especially when the cancellation was 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 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 those elements published in the

contract notice – for example, the contracting authority extends the time period for receipt of applications or tenders but 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.

In order to decide whether to cancel the whole procurement procedure or to remedy the infringements mentioned above, one should first analyse the specific case and the impact of the error on the results of the procedure.

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 a wrong decision. The contracting authority that does not respect the standstill period (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. **Only if this infringement 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 (bidder that did not have its offer selected, contrary to the legal provisions) does not have a chance to challenge the decision of the contracting authority and consequently loses the chance of winning the contract.**

If the contract has been concluded before the expiry of the standstill time period, this error by the contracting authority cannot be remedied otherwise as by declaring the contract ineffective. Whether it is necessary to annul the contract depends, however, on whether this infringement fulfils the condition discussed 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 to participants in the procedure an opportunity to challenge the decision of the contracting authority if they consider that it is wrong. According to the EU 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 with regard to 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 its results since the time period for submission of requests for review (appeals) is counted from the moment the information is (depending on the law applicable) sent to or received by concerned economic operators.

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 *Official Journal of the European Union (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 since 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 it. It is nevertheless an element ensuring greater 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 fact in the interest of the contracting authority to publish such a notice since a (shorter) time period for review starts to run from the moment of this publication.

d) Publication of incomplete information in the contract award notice or publication after the required time period

The contracting authority may nevertheless also commit an error when it does publish a contract award notice, but in such a way that the communication of this information is delayed (the notice is published but later than required by law) or it does not contain all of the required information. In both cases this error amounts to an infringement of transparency rules, since it does prevent economic operators, public institutions – including audit or monitoring bodies – as well as the public from performing monitoring functions. It may happen that the contracting authority fails 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 and the price of the winning tender. Although this failure is an infringement of procurement rules, normally it does not have an impact on the results of the concluded procurement procedure, in particular a transparent and competitive procedure, and as such the infringement is more formal than substantial. Most likely the results of the procedure would have been the same if the contracting authority had fully complied with its

publication requirements. It is another situation when the publication of the contract award notice follows a procedure that was not transparent or competitive, such as the negotiated procedure without previous publication of a call for competition. Such a notice should contain in particular information on the reasons for the application of this procedure (legal grounds justifying the lack of competition). The lack of this information does not necessarily mean that the law was breached in that regard, but it should draw the attention of the relevant bodies with regard to 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 receive more money or to perform a contract on terms that are more advantageous terms for the bidder. On the other hand, the modification of a contract as compared with the tender is allowed exceptionally, in highly justified cases, if such a need results from circumstances that could not be foreseen when the best tender was selected and in other precisely circumscribed circumstances. However, these changes should not concern the commitments of the economic operator included in the tender, which were evaluated in the course 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 a change results from unforeseeable events. In general, the **substantial modification of a contract is prohibited**. It is understood that this general applies to a change that renders 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; or
- if 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.

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. One such case is the award of additional works or services to the economic operator that was party to the original contract as well as the award of a contract consisting in new works or services that constitute the 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 time period 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 contrary to the relevant provisions amounts to illegal award of contract. Such a contract (or contracts) should be declared ineffective, as is discussed in points 1 a) and 1 b) above.