



**EUROPEAN COMMISSION**  
EUROPEAN ANTI-FRAUD OFFICE (OLAF)

Directorate D : Policy  
Unit D.2 : Fraud Prevention, Reporting and Analysis

# **Fraud in Public Procurement**

## ***A collection of Red Flags and Best Practices***

Developed by a working group of Member States' experts, directed and coordinated by the Fraud Prevention, Reporting and Analysis unit in the European Anti-Fraud Office (OLAF)

### **DISCLAIMER:**

*This is a working document drafted by a group of Member States' experts with support from the European Anti-Fraud Office (OLAF). It is intended to explore the issue of fraud in public procurement and to help Member States with its early detection by the set of red flags and best practices which were collected. **This document has no legally binding force on Member States.** This handbook is without prejudice to national legislation, should be read in the context of national legislation and may be adapted to take into account the national legal framework. This handbook is without prejudice to the interpretation of the Court of Justice and the General Court and decisions of the Commission.*

**NOTA**

**This document is not binding on the Member States, nor does it create any new rules or obligations for national authorities. It reflects good practices and must not be used as a legal or normative basis for audit or investigative purposes.**

## Introduction

Public procurement, the largest channel of public spending constitutes an area that is particularly vulnerable to fraud and irregularities. The European Anti-Fraud Office (OLAF) investigative experience<sup>1</sup> shows that public procurement is still attractive area for fraudsters. When looking at statistics on irregularities and fraud over the last five years<sup>2</sup>, 20 % of all reported irregularities have been related to breaches of public procurement rules, accounting for 30 % of all reported irregular financial amounts.

OLAF cases have revealed several underlying issues that make this particular area more prone to fraudulent activities: unclear or complicated applicable national public procurement laws that are difficult to apply, lack of administrative capacity and expertise of authorities who are to implement the rules in a coherent and consistent way, insufficiently qualified members of the evaluation committees (especially in complex infrastructure tenders), inadequate level of audits, controls and checks conducted by the regulatory authorities etc. Furthermore, corruption remains an almost universal aspect of fraudulent procurement cases; at the same time, there is an increasing trend to use off-shore accounts in order to hide the proceeds of such crimes.

Given the rising concerns of the European Parliament<sup>3</sup> and those of the European Court of Auditors<sup>4</sup> with regard to irregularities in the expenditure channelled through public procurement, more effective monitoring, and complete transparency is needed. Consequently, the Commission and the Member States have been called to address these shortcomings instantly.

Over the last five years, however, the framework for the protection of the EU financial interests has significantly been reinforced. Several legal and non-legal measures have been adopted at Commission level. The most important legal measures are as follows:

- The legal framework for the programming period 2014-2020 referring explicitly to the obligation for the Member States to put in place proportionate and effective anti-fraud measures<sup>5</sup>;
- The revised OLAF Regulation<sup>6</sup> to strengthen the European Anti-Fraud Office, following which also Anti-Fraud Coordination Services (AFCOS) were set up in all Member States;
- The package on the Public procurement Directives<sup>7</sup>;
- The Commission adopted a package of four delegated and four implementing acts on irregularity reporting<sup>8</sup> in the area of shared management;

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<sup>1</sup> Annual OLAF Report 2016

<sup>2</sup> Report from the Commission to the European Parliament and the Council, Protection of the European Union's financial interests — Fight against fraud, 2016 Annual Report, Brussels, 20.7.2017. COM(2017) 383 final

<sup>3</sup> Report on the Annual Report 2015 on the protection of the EU's financial interests – Fight against fraud, Committee on Budgetary Control, European Parliament, rapporteur: Julia Pitera

<sup>4</sup> Special Report No 10/2015 of the European Court of Auditors

<sup>5</sup> For instance Article 125.4 c) of Common Provisions Regulation (EU) 1303/2013

<sup>6</sup> Regulation No. 883/2013

<sup>7</sup> Directives 2014/23/EU (OJ L 94, 28.3.2014, p. 1.), 2014/24/EU (OJ L 94, 28.3.2014, p. 65.) and 2014/25/EU (OJ L 94, 28.3.2014, p. 243)

- The revised Regulation on mutual administrative assistance in the customs area<sup>9</sup>, creating two new databases to fight better customs fraud;
- The adoption of the Directive on the protection of the EU financial interests<sup>10</sup>, which will improve the prosecution and sanctioning of crimes against EU finances and facilitate the recovery of misused EU funds.

Moreover, on 12 October 2017 the Justice and Home Affairs Council adopted the Regulation on the establishment of the European Public Prosecutor's Office (EPPO), which will be implemented through enhanced co-operation. The EPPO has significant potential to improve the current situation as regards the low level of prosecutions for crimes affecting the Union's financial interests.

On the other hand, Member States have an equal share in fulfilling the treaty obligation (Article 325 TFEU) to protect the EU's financial interests from irregularities and fraud. In this respect, Member States have also taken numerous anti-fraud measures in recent years. Only in 2016<sup>11</sup>, Member States reported adopting measures covering the entire anti-fraud cycle<sup>12</sup>, mostly in the area of shared management and control of EU funds, followed by measures on public procurement, conflict of interest, corruption, AFCOS, financial crime, definition of fraud, anti-fraud strategy, organised crime and whistle-blowers.

With regard to the Public procurement Directives, the deadline for their implementation expired on 18 April 2016. However, a series of Member States did not meet the deadline and some Member States still need to notify national measures implementing them in full. The transposition is very relevant also in the context anti-fraud as the new rules promote accountability and help to combat corruption through increased transparency requirements. The Commission continues to assist Member States in this process by preparing implementation plans, dedicated websites and guidance documents, and by exchanging best practice in expert groups' meetings.

Furthermore, the Commission supports and assists Member States in protecting the EU's financial interests and fighting against fraud in many ways. For instance, already in 2012, OLAF set up a collaborative working procedure with Member States aimed at facilitating the discussion, the exchange of experience and sharing the know-how and best practices in the field of fraud prevention. This procedure is organised under the umbrella of the COCOLAF Fraud Prevention Group<sup>13</sup>.

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<sup>8</sup> Commission Delegated Regulations (EU) 2015/1970, (EU) 2015/1971, (EU) 2015/1972 and (EU) 2015/1973; Commission Implementing Regulations (EU) 2015/1974, (EU) 2015/1975, (EU) 2015/1976, and (EU) 2015/1977 (OJ L 293, 10.11.2015)

<sup>9</sup> Regulation (EU) 2015/1525 of the European Parliament and of the Council of 9 September 2015 amending Council Regulation (EC) No 515/97 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters.

<sup>10</sup> Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law

<sup>11</sup> Commission Staff Working Document, Implementation of Article 325 TFEU by the Member States in 2016, Accompanying the document to Report from the Commission to the European Parliament and the Council, Protection of the European Union's financial interests — Fight against fraud, 2016 Annual Report

<sup>12</sup> The stages of the anti-fraud cycle are: fraud prevention; fraud detection; investigation and prosecution; recovery and sanctions.

<sup>13</sup> Advisory Committee for the Coordination of Fraud Prevention

The aim is to select each year a topic to discuss, to exchange good practices and to draw up a practical documentation that Member States and the Commission may use as administrative tools, guidance or support to strengthen their anti-fraud measures/strategies. The procedure is implemented by the organisation of working groups involving experts from the Member States, OLAF and Commission departments concerned. After issuing guidance notes on various subjects<sup>14</sup>, such as for instance 'Conflict of Interest' and 'National Anti-Fraud Strategies', in 2017 the topic 'Fraud in Public Procurement' was in the focus.

The current document represents the latest result of this collaboration. The aim of this year's working group was to approach the issue of fraud in public procurement from a rather pragmatic viewpoint and hence, to collect case examples, red flags, solutions and best practices. Red flags are warning signals, which can indicate the existence of irregularity or fraud. Yet, a red flag does not mean that fraud has been committed; it rather points out that a certain area of activity needs extra attention to exclude or confirm potential fraud. They have a particular nature from the perspective of the anti-fraud cycle: red flags are linked both to the prevention and to the detection of irregularities and fraud. Red flags can serve the identification of fraud and therefore it is part of the detection, on the other hand, they could be seen as alert signals to prevent fraud. In this document, red flags were collected with the view to prevent future irregularities or fraud to happen. Besides, the reader will find ample number of case examples, solutions, including best practices. Best practices have a special added value, as they serve as concrete examples of measures that have already proven to be fruitful. Member States can learn from each other's experience and develop their own anti-fraud methods based on existing know-how. Any best practice example quoted in the document is illustrative; therefore it does not exclude the possibility that other Member States have similar practice in place (e.g. implementation of EU law or procedures).

The document is structured according to the phases of the tender procedure: Chapter I Pre-tendering phase, Chapter II Tendering phase and Chapter III Post-tendering phase. Additionally, horizontal fraud prevention tools are presented under Chapter IV. Finally a set of reference documents on public procurement together with the glossary were included in the Annex.

The list of red flags and solutions gathered in this document is abundant, yet not exhaustive; nonetheless they reflect the effort made by experts who committed themselves to take part in the 2017 working group.

*OLAF would like to thank all experts involved in the drafting of this handbook for sharing their knowledge and experience with a view to produce this practical guide thereby helping Member States when dealing with public procurement.*

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<sup>14</sup> 'Detection of forged documents - in the field of structural actions' (2013), 'Handbook on the role of auditors - A practical guide for managing authorities' (2014), 'Identifying conflicts of interests in public procurement procedures for structural actions - A practical guide for managers' (2013), 'Identifying conflicts of interests in the Agricultural Sector - A practical guide for funds managers' (2015), 'Guidelines for national anti-fraud strategies for European Structural and Investment Funds (ESIF)' (2014), 'Practical Steps towards drafting National Anti-Fraud Strategies' (2015), 'General Guidelines on National Anti-Fraud Strategies' (2016)

## Table of contents

<b>Introduction</b> .....	<b>3</b>
<b>I. Pre-tendering phase</b> .....	<b>8</b>
1.1 Assessing the needs.....	8
1.1.1 Information gathering .....	9
1.1.2 External expert .....	11
1.2 Planning the procurement procedure.....	13
1.2.1 Division of responsibilities.....	13
1.2.2 Budgeting .....	13
1.3 Content of the call and specifications .....	15
1.3.1 Insufficient information in the publication .....	15
1.3.2 Selection and award criteria.....	16
1.3.3 Definition of requirements.....	16
1.3.4 Deadlines and time frame .....	17
1.3.5 Rigged specifications .....	17
1.3.6 Consultancy services .....	18
1.4 Choice of procedure type .....	18
1.4.1 Manipulation of the procedure .....	20
1.4.2 Negotiated procedure .....	20
1.4.3 Single source awards.....	20
1.4.4 Split purchases.....	21
1.4.5 Incompatible grouping of supplies or services.....	21
<b>II. Tendering phase</b> .....	<b>23</b>
2.1 Invitation to tender .....	23
2.1.1 Leaking of tender information .....	23
2.1.2 Manipulation of tender specifications .....	24
2.1.3 Lack of competition .....	25
2.1.4 Collusion .....	25
2.2 Evaluation.....	39
2.2.1 Directed selection process .....	39
2.2.2 Fictitious offers.....	40
2.2.3 Discrepant offers .....	42
2.2.4 Manipulation of the offers .....	42
2.2.5 Illicit influence .....	43
2.3 Award .....	50
2.3.1 Conflict of Interests .....	50
2.3.2 False documents.....	52

<b>III.</b>	<b>Post-tendering phase.....</b>	<b>55</b>
3.1	Quality of contract implementation.....	55
3.2	Offering bribe .....	55
3.3	Embezzlement .....	56
3.4	Subcontracting works without obtaining the approval.....	57
<b>IV.</b>	<b>Horizontal fraud prevention tools .....</b>	<b>59</b>
4.1	Transparency .....	59
4.1.1	E-procurement .....	59
4.1.2	Publication of procurement .....	68
4.1.3	Risk assessment tools and ICTs .....	69
4.2	Ethics and integrity.....	70
4.2.1	Awareness-raising and training.....	70
4.2.2	Information to the public .....	71
4.2.3	Whistle-blower tool.....	72
4.3	National strategy for public procurement.....	74
	<b>Annexes.....</b>	<b>75</b>
	Annex 1 – List of reference documents.....	76
	Annex 2 - Glossary .....	77

## I. Pre-tendering phase

The pre-tendering phase entails the identification of needs, the planning and the budgeting, the project preparation including the definition of the requirements and the choice of procedure type. Therefore, the pre-tendering phase is considered to be crucial for successful managing of procurement, as right planning minimises necessity of contract modifications.

### *Main challenges*

The main risks during the pre-tendering stage of the public procurement cycle are as follows:

- Inadequate assessment of needs;
- Inadequate planning and budgeting;
- Undue outside influence (external actors, including political interference);
- Requirements and specifications are not adequately or objectively defined;
- Inappropriate or irregular choice of procedure type;
- Timeframe for the preparation of the tender that is insufficient or not consistently applied;
- Lack of transparency and publicity
- Lack of objectivity and impartiality (the contract documents in a way that does not favour certain bidders)

### 1.1 Assessing the needs

#### *Common types of fraud/violation*

- Demand for non-essential supplies, goods or services:

#### *Red flags*

- ◆ Inadequate or misleading justification of the necessity of the supply / service
- ◆ The contract does not agree with the initial requirements of the notice, since it includes supplies and services not foreseen etc.

#### *Solutions*

In order to assess adequately the needs and to avoid risks to integrity in the pre-tendering phase, OECD suggests the following precautionary measures<sup>15</sup>:

- ✓ Reducing information asymmetry between the private and public sector to develop a needs-based strategic management approach to public procurement: a) obtaining as much information as possible on the market and the goods and services; b) organising wider consultations with the private sector, where appropriate, in cases that are likely to be of interest to a large number of operators, ensuring that this information is

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<sup>15</sup> OECD Principles for integrity in public procurement, OECD, 2009



exchanged in an open, structured and ethical manner, in order to prevent any collusion.

- ✓ Promoting a needs assessment that takes the following into consideration: a) the need to replace or strengthen existing resources or to address a new need; b) lack of alternatives to internal resources or the strengthening of existing resources through efficiency gains; c) acknowledgement of external procurement's key role in terms of developing business and improving performance; d) real need for the desired capacity and scale.
- ✓ Using an approval system that is independent from the decision-maker by: a) ensuring that decisions to initiate the procedure involve more than one person, if possible, to reduce the risk of collusion or undue influence; b) in projects that pose a greater risk due to their cost, complexity or sensitive nature, giving greater weight to independent assessment mechanisms; c) consulting stakeholders and the general public, in cases where this is justified.

### 1.1.1 Information gathering

Contracting authorities might lack the expert knowledge for planning, preparing and managing the procurement procedure by themselves. While seeking for information, they may be unlawfully influenced by the companies. Contracting authority should assess all relevant data and ensure the award criteria do not give certain economic operators undue competitive advantage or create unjust obstacles to competition.

Article 18 of Directive 2014/24/EU<sup>16</sup> entitled 'Principles of procurement' lays down that "Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner"<sup>17</sup>. Furthermore, it stipulates that "The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators".

There are two ways for obtaining information on the industry or on the goods and services in question: 1) the standard way, or 2) Conduct market consultations.

1) The standard way means to gather information from previous own experience, from publicly available sources, such as statistical data or market research. This type of preparation should take place before starting any procurement procedure. Economic operators do not take active part in the planning.

2) Contracting authorities may seek or accept advice from independent experts or authorities or from market participants. Contacting market participants directly may be necessary in some cases when the standard way of planning is not sufficient. However, in

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<sup>16</sup> The same applies to special sectors, as laid down in Article 36 of Directive 2014/25/EU.

<sup>17</sup> The reference to the principle of proportionality was expanded in this Directive, compared to Directive 2004/18/EC and Article 5(1) and (4) TEU, as regards the Union's action, while Article 7 of Portugal's Code of Administrative Procedure governs the actions of national authorities.

such a situation it can be challenging to comply with the principles of procurement (e.g. treating economic operators equally and without discrimination, acting in a transparent and proportionate manner etc.) .Consulting experts or economic operators directly can be a starting point for conflicts of interests, bid rigging or collusion between potential suppliers.

### **Red flags**

- ◆ Studies of varying quality and usefulness that may prove to be entirely useless or redundant if other studies have already been carried on the same topic;
- ◆ Consultancy work carried out by friends or bodies with links to the decision-maker;
- ◆ Studies that are paid for in full or in part, but that are never delivered.

### **Solutions**

- ✓ The contracting authority shall act circumspectly to prevent conflicts of interest and bid rigging<sup>18</sup>. Consultation with experts can be determined by commitment of exclusivity (an expert cannot advise suppliers).
- ✓ The contracting authority should record all communication with stakeholders which should constitute the basis for decision- making during the pre-tendering phase.
- ✓ Proper information provided about the pre-tendering phase can prevent the distortion of competition. As it is stipulated in Article 40 of Directive 2014/24/EU, communication to the other candidates and tenderers of relevant information exchanged in the context of or resulting from the involvement of the candidate or tenderer in the preparation of the procurement procedure constitutes an adequate preventive measure.
- ✓ Setting longer time limits for submission of tender can eliminate potential advantage gained by a candidate consulted during preliminary market consultations.

### **Best practice**

#### **BEST PRACTICE EXAMPLE**

*In some Member States, for example in the Czech Republic, the text of the contract must be published. The Register of Contracts is one of the convenient sources of information especially when authorities have difficulties for instance with calculating the estimated value of the procurement. The Register of Contracts allows for consulting the details of another contract, which can be of great help to the contracting authority. Furthermore, there are many factors influencing the value, for example whether the helpline runs during working day or also on weekends, the scope of licence agreement or conditions of delivery etc. Such source material should be critically assessed as well. Simple copying of clauses of contract may result in making the same mistakes that were not spotted in former contract.*

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<sup>18</sup> See: OECD Guidelines for Fighting Bid Rigging in Public Procurement

### 1.1.2 External expert

Contracting authority and public procurement committee do not always have sufficient knowledge in the specific areas where they need to prepare good quality tender regulations/technical specifications and/or to evaluate received offers from the tenderers/candidates. This is the reason why external experts are very often involved in procurement committee work. However, external expert work in public procurement committee certainly carries different risks: violation of the competition law (for example – prohibited agreement between market participants) ; violations of the public procurement law (mostly discriminatory requirements); conflict of interest or other types of fraud.

#### **CASE EXAMPLE**

##### ***Suspected conflict of interest/discriminatory requirements***

*A public authority signed a contract with experts for the public procurement to gain expertise in car purchase tender. Based on the contract the technical specifications were drawn up by the experts whose services were agreed by the Car Association, an independent organisation. The same experts evaluated the submitted tenders as well. Almost all members of the Car Association are also working at car dealer companies. The Member of the Board, who was contracted to be the chief expert in public procurement, has gained income from various car dealers at different time periods.*

*After consultations with the Procurement Monitoring Bureau and lawyers it was concluded that there was no legal basis or documents to prove conflict of interest. Nonetheless, it was possible to prove that requirements in one of the seven parts of the technical specifications were discriminatory and subsequently, financial correction has been applied.*

**CASE EXAMPLE**

**Conflict of interest**

*A public authority signed a contract with a company about consultation services to prepare the technical specification for an IT public procurement. These consultation services concerned for questions during public procurement and evaluation of tenders submitted. Seventeen potential tenderers consulted the tender documentation; however, only one of them participated, most probably due to the discriminatory requirements in the tender documentation. The winner was a company where the chairman of the consultation company gained income in previous years.*

*After consultations with the Procurement Monitoring Bureau and lawyers, it was concluded that there was enough legal basis and documents to prove the conflict of interest. As a consequence, financial correction has been applied.*

**CASE EXAMPLE**

**Conflict of interest**

*An IT public procurement was divided into parts. The audit authority found that the tenders were not evaluated against the tender documentation. The winner did not even have the necessary certificates what the competitor had.*

*Probably both competitors had decided beforehand who will win and in which part of the procurement. It was highly suspicious that for one part they prepared a detailed offer for IT solutions and for the other part they submitted just a formal offer. This case illustrates a suspected fraud case, notably prohibited agreement, which is one of the severest violations of competition law. Agreements concluded between market participants which have as their object or effect the hindrance, restriction or distortion of competition are prohibited.*

*Financial correction was applied for the incorrect evaluation of tenders was applied, and the suspicion of artificial competition was reported to Competition Council.*

**Red flags**

- ◆ Too specific requirements;
- ◆ Complaints/questions from interested suppliers about procurement documentation and especially technical specifications;
- ◆ Low competition;
- ◆ Formal offers from tenderers;

- ◆ The winner of the public procurement is geographically located in a specific region, where public procurement takes place;
- ◆ Expert has no conflict of interest in accordance with legal acts; however the expert is somehow related or was related to the tenderer or to more tenderers.

### ***Solutions***

- ✓ To identify possible violation, the regulatory authorities need very experienced experts to check the public procurement documentation. The above-mentioned cases (where external expert was involved in the tender preparation) reveal violations that are difficult to detect and especially to prove. Consequently, cooperation with other institutions (such as law enforcement body, competition council and procurement monitoring bureau) is necessary
- ✓ To inform contracting authorities (for instance via seminars or official letters) about possible financial corrections and their responsibility in case of detected violations;
- ✓ To not only rely on independence declarations, but also to use data bases to identify possible conflict of interest (for example ARACHNE or any similar national data base);
- ✓ It is necessary that all bodies involved in administration of EU funds at Member State level has common understanding of how national criminal law covers Article 1 and 2 of Convention on the protection of the European Communities' financial interests (Council Act of 26 July 1995).

## **1.2 Planning the procurement procedure**

### **1.2.1 Division of responsibilities**

#### ***Red flags***

- ◆ Directed selection process: fake draw for the selection of the Competition Committee members;
- ◆ The Committee is manipulated by a member;
- ◆ The evaluation criteria differ from those described in the notice;
- ◆ The contractor is not included in the pre-selection list of prerequisite qualifications;
- ◆ The lowest bid is rejected almost inexplicably.

### **1.2.2 Budgeting**

#### ***Red flags***

- ◆ Over- or under-estimation of the value of the contract: this creates a positive impression if the contract is carried out below the budget or favourable prices can be charged for goods and services on the market, paving the way for further contracts and making it easy to accommodate kickbacks;
- ◆ Inclusion of kickbacks in the price which is to be paid to the decision-maker;

### *Solutions*

OECD recommends paying attention to the following points when planning the procurement procedure<sup>19</sup>:

- ✓ Guaranteeing that public procurement is in line with: a) the contracting body's strategic priorities; b) the general investment policy, which should be set out before the procurement process begins.
- ✓ Ensuring that the timescales involved at each stage of the process are clearly defined and appropriate by making sure that: a) they can be applied consistently; b) they take into account the cost, complexity and sensitivity of the contract.
- ✓ Ensuring that estimated budgets are realistic and approved in a timely manner by: a) using realistic estimates based on sound methodologies; b) guaranteeing that the funds will be available; c) granting the necessary approval of budgets or expenditure in a timely manner; d) considering possible variations in timescales that could have an impact on the contract.
- ✓ Preparing a business case for large-scale projects that present a greater risk in terms of their cost, complexity or sensitivity: a) calling upon outside technical or project experts, with a view to carrying out an objective cost-benefit analysis; b) promoting sound project management; c) preparing project-specific plans for the procurement, assessing the level of risk and drawing up contingency plans; d) ensuring that the decision-making criteria are defined in a clear and objective way in the tender documents, and that decisions taken are in line with these criteria.
- ✓ Clear definition and division of responsibilities by: a) giving one body or person the responsibility for project development and implementation; b) defining levels of delegation for the various stages of the procedure; c) assessing which persons involved are in a vulnerable position and which activities present the greatest risk during the procedure; d) planning supervisory activities by high-level managers during the critical stages and considering additional checks, based on the cost, complexity and sensitivity of the procurement.
- ✓ Ensuring that everyone involved is aware of the system's transparency criteria and prepared to apply them by: a) appointing one person in charge of compliance with publicity requirements; b) ensuring sufficient publicity of legal rules, court or administrative decisions, standard contractual or procedural clauses and any amendments to them; c) using electronic means of communication or other widespread and easily accessible means of communication; d) ensuring that decisions taken during the procedure are filed properly; e) harnessing the benefits of new technologies, which can automatically process and register information without the risk of human intervention.
- ✓ Ensuring separation of tasks by: a) making sure that, when it comes to approval, the technical, financial, contractual and project-related tasks are kept separate whenever possible, such as the issuing of purchase orders or a recommendation to award the

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<sup>19</sup> OECD Principles for integrity in public procurement, OECD, 2009

tender, or the acknowledgement of receipt of goods and services; b) identifying different people with a clear responsibility during the critical stages of the procedure, including the identification of requirements, assessment, checks and payments, ensuring that additional checks are made if one person has to be in charge of several tasks.

## 1.3 Content of the call and specifications

### *Common types of fraud/violations*

- Insufficient definition of the subject matter of the contract<sup>20</sup>;
- Selection and award criteria that are not clearly and objectively defined, or not established in advance, including failure to indicate the selection and award criteria and their weighting in the call<sup>21</sup>;
- Illegal or discriminatory selection or award criteria in the tender documents<sup>22</sup>;
- Selection and award criteria that are not related to the subject matter of the contract or are disproportionate<sup>23</sup>;
- Discriminatory technical specifications (e.g. technical specifications that are tailored for one company)<sup>24</sup>;
- Technical specifications that are too vague or not based on performance requirements;
- Failure to comply with deadlines for submitting tenders or requests to participate<sup>25</sup>;
- Insufficient time for the potential participants to obtain the tender documents<sup>26</sup>.
- Terms and conditions are non-essential or incompatible with the procedure type.

### 1.3.1 Insufficient information in the publication

#### *Red flags*

- ◆ Tenders are not opened in public;
- ◆ Incomplete and irregular publicity of the procedures;
- ◆ Limited publicity, e.g. publicity in a local rather than a nation-wide newspaper that would lead to greater participation of bidders;
- ◆ Insufficient information on contact points for clarifications, questions on the terms of the competition, etc.;
- ◆ Insufficient information or clarifications and non-notification of replies to other candidates;
- ◆ Inadequate clarifications or response given to requests;

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<sup>20</sup> Directive 2014/24/EU - Article 18(1). Directive 2014/25/EU - Article 36(1).

<sup>21</sup> Directive 2014/24/EU – Articles 35, 51(1), 56, 57, 58, 62, 63, 65, 66, 67 and 69 and Annex V. Directive 2014/25/EU – Articles 69, 71, 78, 79, 81, 82 and 84 and Annexes IX and XI.

<sup>22</sup> Commission Decision C(2013)9527 and the OLAF/ESADE study.

<sup>23</sup> Directive 2014/24/EU - Article 58(5). Directive 2014/25/EU - Article 78(1).

<sup>24</sup> Directive 2014/24/EU - Article 42(2). Directive 2014/25/EU - Article 60(2).

<sup>25</sup> Directive 2014/24/EU - Articles 27, 31, 47 and 53. Directive 2014/25/EU - Articles 45, 49, 66 and 73.

<sup>26</sup> Directive 2014/24/EU - Article 53. Directive 2014/25/EU - Article 73.

- ◆ Intimidation or discouragement towards possible tenders at the stage of expression of interest by public officials;
- ◆ Changes of terms and evaluation criteria, which are not published publicly and on time: as a consequence, potential candidates are not properly informed;
- ◆ Complaints for vague, unclear or incomplete specifications;
- ◆ Cancelling the procurement for no obvious reason;

### 1.3.2 Selection and award criteria

#### *Red flags*

- ◆ Unfair assessment criteria for the bids making it impossible for most of the bidders to be successful;
- ◆ One of the bidders is involved in writing the technical specifications for the tender;
- ◆ The volume of the procurement is unusually large so that only a few bidders would qualify;
- ◆ Unusual or unexplained benchmarks;
- ◆ Well established companies in the field are rejected without any reason, although they expressed interest (e.g. field of electromechanical equipment);
- ◆ Rejection for minor reasons.

### 1.3.3 Definition of requirements

#### *Red flags*

- ◆ Vague descriptions of the required works, goods or services, making it difficult for the bidders to prepare the bid; In this way, candidates cannot determine whether it is in their interest to undertake the specific tendering process;
- ◆ Very narrow description of supplies, services in order to favour the participation of bidders who otherwise could not participate and to exclude potential candidates. The same applies to descriptions that are too broad;
- ◆ The qualifying requirements for the bidders are unreasonable for the tender (e.g. requirement for a minimum annual sales revenue of 10 million € for a 50 000 € tender);
- ◆ Not necessary items in the terms and conditions: for instance specific benefits not required for the successful implementation of the project and subsequently could be used as a bribe to officials, (e.g. vehicles offered to supervisors);
- ◆ Removal of certain low budgeted value products, e.g. some items offered at particularly low prices which are not listed in the contract requirements;
- ◆ Inconsistent terms. This may lead to a conflict of interest situation, for example, when the contractor offers to undertake the education abroad of contracting authority staff or to pay remuneration to the consultant/supervisor for the contracting authority.
- ◆ Unnecessary use of in-house resources or of outsourcing, (or outsourcing using pre-existing standards) when defining the project specifications and preparing the tender documents;



- ◆ Unnecessary purchase of services to decode complex specifications for the market;
- ◆ Enabling misappropriation at a later date, creating conditions that will benefit entities linked to the same economic group by including specifications for services to be provided in the future that give those entities a singular advantage, or leaking confidential information;
- ◆ Use of one-off, non-standard specifications;
- ◆ ‘Deliberate mistakes’ in terms of quantities or quality;
- ◆ Omissions, such as omissions of penalties for sub-standard performance;
- ◆ Inclusion of mandatory maintenance by the supplier (very common in IT contracts);
- ◆ Incompatibility of the material to be supplied with the current stock, making adjustments/additional purchases necessary.

### 1.3.4 Deadlines and time frame

#### *Red flags*

- ◆ Deadline for submitting bids is very short;
- ◆ The delivery times are unreasonably short that allows only geographically close bidders to be on time (e.g. the term of delivery on extremely tight timetable which automatically excludes all international competitors), except if some bidders had received advance information about the tender beforehand;;
- ◆ The person in charge of drafting the documents organises the procedure in such a way that there is no time to revise the documents carefully before the tender procedure is launched;

### 1.3.5 Rigged specifications

#### *Red flags*

- ◆ The technical specifications for procurement are unusual or unreasonable: e.g. they are unusually detailed and seem to describe the winning bidder’s products. It is not clear, why some of the required features are necessary for the contracting authority to carry out its functions;
- ◆ The general requirements to the contractor seem to describe the characteristics of one particular contractor (e.g. what they have, or when/where they must have it) and it is not obvious, why this is essential for carrying out the contract;
- ◆ Choice of less competitive procedure;
- ◆ Direct assignments on the ground of force majeure, whereas there were events that could be prevented, and/or the delay was due to the responsibility of the contracting authority;
- ◆ Only one or a few invited operators respond to the call;
- ◆ Complaints received from other bidders;
- ◆ Specifications that are significantly narrower or broader than in previous calls;
- ◆ Unusual or unreasonable specifications;

- ◆ High number of competitive awards to one tenderer;
- ◆ Close relationship between managers and staff in relevant posts at the contracting body and the economic operator;
- ◆ Reference to a brand as opposed to a definition using a generic description.

### 1.3.6 Consultancy services

#### *Red flags*

- ◆ Lack of signed contracts or agreements, with payments of invoices that are not clearly differentiated;
- ◆ Contracts or agreements that are unclear in terms of the services to be provided and lack of other supporting documents to justify expenses, such as detailed invoices, mission reports or studies;
- ◆ Services paid for are used to improperly influence the content of applications, the assessment of tenders, the selection of bidders, the negotiation of or amendment to a contract or complaint, paid for by the tenderer or a subcontractor;
- ◆ Services procured or provided in breach of legal or statutory rules that prohibit improper practices or involving a conflict of interest.

## 1.4 Choice of procedure type

### *Common types of fraud/violations*

- Unjustified use of the negotiated procedure without prior publication<sup>27</sup>;
- A negotiated procedure is chosen, even though an open procedure is possible;
- Instead of open procedure, another type of procurement has been selected;
- Unjustified use of the special regime for social and other specific services<sup>28</sup>.
- Unjustified direct award or supply by single-source provider:

One critical aspect with regard to direct awards is the lack of transparency and traceability as no formal procedure is necessary throughout the pre-tendering phase. Especially in case of an existing conflict of interest, it can be difficult to justify previously made awarding decisions, if there has been no public call, invitation for bids or solicitation of competitive offers. In other words, with lacking documentation and reporting, the application of objective selection criteria during a previously made awarding is difficult to be traced back.

- Incompatibility of procedure with the subject of the procurement
- Incompatible grouping of supplies, services (the opposite of fragmentation also leads to lack of competition)

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<sup>27</sup> Directive 2014/24/EU - Article 32. The regime in place under Article 30 of Directive 2004/18/EC was changed and the exceptional cases and legitimate grounds are not included in the current Directive. The regime equivalent to the negotiated procedure without publication of a contract notice under the old Article 31 was retained. The descriptions of irregularities were brought into line with those used in Commission Decision C(2013)9527 as set out in the previous Directive.

<sup>28</sup> Directive 2014/24/EU - Article 74 and Annex XIV.

- Violation of the provisions on direct agreement due to force majeure
- Below-threshold bids mean that there are multiple calls for contracts of budget just below the prescribed threshold for open procedures. This implies the awarding of contracts repeatedly at prices lower than those for open procedures, while the aggregated budget for these bids would imply an open procedure with significant impact on competition.

Dividing the project into several pieces or underestimating the total project cost to avoid more difficult mandatory procurement process. Organising a public procurement tender can be a complicated task that requires a lot of manpower and time even in the case everything goes smoothly. If some bidders decide to go to the court against the decision of the procurement committee, it will further delay the outcome. Therefore, there is a temptation for the contracting authority to avoid more complicated processes as often as possible and split the works or deliberately underestimating the cost of the projects in such a manner that their contract value would fall under the public procurement threshold. Indeed, increased flexibility, leading to faster procedures, and adaptability of specifications of the bids during the process of direct awards can be seen as major advantages for both authorities awarding tenders as well as for bidders.

However, besides being a violation of the rules, such practice may eliminate some (especially international) bidders thus resulting in discrimination and possibly too high prices paid for the contract. Moreover, below-threshold bids are particularly prone to lead to contradictions with regard to requirements set by EU law and fraudulent behaviour. Given the reduced regulation of awarding procedures for below threshold bids, an increased potential of conflict between national and EU-law - for instance in terms of requirements of publicity and transparency or equal treatment of bidders - is likely to be identified. .

### **CASE EXAMPLE**

*A public authority made a contract with an IT company for building a computer system. As the contract amount was just under the threshold for public procurement, the competitive bidding procedures were not followed. Later, the same company offered to install additional features (system archive) for additional costs that exceeded the initial contract amount several times. Moreover, no public procurement tender was organised in this case, since the technical specifications of the installed computer systems were such that no other company could provide that capability.*

- Incompatible grouping of supplies or services: combining a variety of goods that have no relation to one another. The goal is to reduce competition as only complete lots are accepted. Typically the contract will be awarded to a favoured bidder at a high price.

**CASE EXAMPLE**

*A hospital carried out a tender to purchase additional highly specialised equipment together with installation. One of the requirements was that the equipment had to be of the same brand as the existing equipment in the hospital. Because of the restriction, only one bidder could submit a bid. In addition to that, the same bidder carried out also the construction works needed for the installation.*

### **1.4.1 Manipulation of the procedure**

#### ***Red flags***

- ◆ Manipulation of the procedure by using subjective criteria to select the most financially beneficial proposal, such as the individual abilities of the coordinators of the study, the reputation of the service provider or its previous work in this area;
- ◆ Manipulation of the procedure at two points in time; firstly, no tenders are received following the call because the amounts indicated are significantly undervalued, which then leads to the opening of a negotiated procedure;
- ◆ If there is a high level of competition between tenderers, subsequent extension of the scope of the study to allow room for misappropriation;
- ◆ Kickbacks to the decision-maker through subcontracting arrangements or false invoices.

### **1.4.2 Negotiated procedure**

#### ***Red flags***

- ◆ Negotiated procedure following a failed call for tenders, leading to clear risks of collusion;
- ◆ Failure to observe the requirements that apply in an extremely urgent situation caused by unforeseen events;
- ◆ Failure to observe the specific requirements for security and defence contracts.

### **1.4.3 Single source awards**

#### ***Red flags***

- ◆ The use of sole source procedure for a common type of good or service;
- ◆ Purchasing processes that were previously competitive are replaced by non-competitive processes;
- ◆ Contract awards that are repeatedly just above or below the competition thresholds;
- ◆ Call sent to only one operator;
- ◆ Handwritten corrections on the prices offered.

#### 1.4.4 Split purchases

##### *Red flags*

- ◆ A contracting authority has several contracts just under threshold for public procurement over short period of time where the works performed and/or goods delivered seem to be almost identical regarding content and location: e.g. unjustified splitting up of purchases for labour and materials, both of which are below the competition threshold;
- ◆ Splitting items that are usually purchased together to keep the contract value below threshold;
- ◆ Repeated purchases or more purchases from the same operators at just below the competition threshold: e.g. the same or similar types of contract in a very short period of time with the same contractor;
- ◆ Unjustified contracts' partitions: e.g. two or more contracts for similar items, over a short period of time (e.g. in the same year for no apparent reason), for which less competitive procedures were followed.
- ◆ Work split between related economic operators to stay below the individual annual turnover thresholds.

#### 1.4.5 Incompatible grouping of supplies or services

- ◆ Complaints by one or more candidates for incompatible groupings of supplies, services, etc. in the same tender;
- ◆ The supplies are incompatible in common tendering while there is a term that if a bidder does not offer one type of supplies, the offer will be considered as unacceptable and will be rejected;
- ◆ There is a significant reduction of bidders in an aggregated tender;
- ◆ The contracting authority cannot justify grouping in terms of cost saving and risk reduction.

##### *Solutions*

- ✓ Helping the contracting authority develop an optimal procurement strategy, with an appropriate balance between administrative efficiency and equal access for operators:
  - a) ensuring that the type of procedure chosen allows for a sufficient level of competition and that the procedure is sufficiently open given the subject matter of the procurement contract;
  - b) setting out clear rules to guide the choice of procedure, ensuring that the process is competitive and providing additional guidance to help those applying these rules in practice;
  - c) reviewing and approving overarching procurement strategies, to ensure they are in line with the contract value and associated risk.
- ✓ Preventive measures designed to strengthen integrity in cases where a competitive procedure is not mandatory, such as:
  - a) drawing up clear and documented requirements;
  - b) providing justification when a competitive procedure is not used and logging the decision as appropriate;
  - c) listing the staff with decision-making powers

and specifying the level; d) planning spot checks of the outcome of non-competitive procedures; e) considering the possibility of involving stakeholders to assess the integrity of the process, particularly in exceptional cases with high-value contracts; f) publishing the selection criteria and the expected terms of the contract; g) publishing the agreed contract following the contract award.

- ✓ In restricted or selective procedures, specific measures could be used to enhance integrity, such as: a) estimating the maximum number of potential suppliers to be invited in each procedure, recording the reason if it proves impossible to consider the minimum number; b) carrying out checks to confirm submitted tenders and asking for reasons why subsequent calls were not answered, with a view to stopping any possible manipulation that might occur.
- ✓ In negotiated procedures, specific measures could be used to enhance integrity, such as: a) keeping a detailed record of the supplier selected; b) including the agreed terms of the contract, specifying the choice of supplier.
- ✓ In qualification procedures covering multiple purchases and which are not permanently open to applicants (such as framework agreements), the following measures could be used to improve integrity: a) publishing an annual list of qualified suppliers; b) regularly publishing the call for applications, indicating the qualification criteria; c) ensuring that the specifications are drawn up in advance and are published; d) publishing contracts awarded under framework agreements.
- ✓ Verification of the manner in which the procurement procedure was established;
- ✓ Verification of the connections between the staff of the Contracting Authority and the one who obtained the contract.

### **Best practice**

#### **BEST PRACTICE EXAMPLE**

*In the direct award procedure, additional compulsory requirements are imposed by several public institutions in Austria in order to increase transparency and comparability, as well as to enhance equal treatment of potential bidders. Based on the Austrian Federal Procurement Law, requirements of direct awards have been specified by the Ministry for Social Affairs in an internal circular ('Rundschreiben Nr. 8'). In addition to regulations set by the federal law, this circular calls for the solicitation of at least three binding proposals for direct awards above €3.000 and below €100.000 (net of VAT), thereby strengthening the legal obligations within public procurement procedures of departments in the ministry.*

## II. Tendering phase

The tendering phase is composed of the following steps: preparation of tender documents; specification of selection/award criteria, publication of tender/invitation to tender; opening, assessment and evaluation of tenders and finally signature of contract and notification of contract award.

### ***Main challenges***

In this complex phase the main challenges include:

- Inconsistent access to information for tendering in the invitation to tender (e.g. absence of public notice for the invitation to bid, award an evaluation criteria not announced in advance);
- Lack of competition;
- Collusive bidding (resulting in inadequate prices);
- Fictitious offers;
- Conflict-of-interest situations or corruption in the evaluation and in the approval process;
- Lack of access to records on the procedure (difficulty for unsuccessful tenderers to challenge a procurement decision).

### 2.1 Invitation to tender

#### 2.1.1 Leaking of tender information

##### **CASE EXAMPLE**

*The staff, responsible for the contracting, drawing up the project or evaluating the offers, revealed confidential information to the tenderer on the preferred solutions. This allowed to the latter to formulate a technical proposal for which he received a higher score.*

### ***Red flags***

- ◆ Tenders received are disparate due to selective leaks of information;
- ◆ Unreasonably low prices are proposed for certain line items;
- ◆ Changes made shortly after the tender award in order to remove or change certain line items;
- ◆ Line items in the tenders are different in the final contract;
- ◆ Tenderer is close to the procurement staff or was involved in drafting the specifications.

- ◆ There are known relations between the organisers of the procurement and some of the bidders: e.g. contracting authority officials often socialise with some of the bidders that could raise the question on their impartiality.
- ◆ A contracting authority official is involved in the tender procedure, no matter at which stage. At the same time, the official has a relative or a business partner who is a stakeholder in one or more bidding companies. This official does not necessarily need to be concerned by that particular tender; a simple access to information is enough to be a red flag
- ◆ Advantage to a bidder: e.g. contracting authority officials provide inside information only to specific bidder(s);
- ◆ Insufficient checks during the procedure, for example, failure to meet deadlines;
- ◆ Winning tender just below the next lowest bid;
- ◆ Some tenders opened early;
- ◆ Late submissions accepted;
- ◆ The last tender received is selected;
- ◆ All tenders are rejected and the procedure reopened;
- ◆ Winning tenderer communicated privately with the relevant staff at the contracting body by email or other channels during the submission period for tenders.

### ***Solutions***

- ✓ Verification of the award procedure.
- ✓ Verification of the price differences between the offers.
- ✓ Verification of the dates when the offers were opened and the presence of all the tenderers who submitted an offer to the opening event;
- ✓ Verification if there were offers accepted after the deadline.
- ✓ Verification of the connections between the shareholder structure of the tenderer declared successful and the staff charged with contracting.

### **2.1.2 Manipulation of tender specifications**

The request for offers or proposals may contain specifications adapted in order to correspond to the qualifications or competences of a certain tenderer. Often this is the situation in case of contracts concluded in the IT domain and in other technical fields. Restrictive specifications may be used in order to exclude other qualified tenderers or to justify procurements from a single source and to avoid any other competition.

### ***Red flags***

- ◆ Complaints from tenderers;
- ◆ Lack of checks and unsuitable tender procedures;
- ◆ Indications that changes were made to tenders after they were submitted;
- ◆ Tenders declared null and void due to errors;
- ◆ Suitably qualified tenderer disqualified on questionable grounds.



### *Solutions*

- ✓ Verification of the tenderers which answered to the offer requests;
- ✓ Verification of the similarities between the specifications and products or services of the successful contractor;
- ✓ Verification of the aspects claimed by the other tenderers;
- ✓ Verification of the connections between the staff responsible with the contracting and the tenderers.

### 2.1.3 Lack of competition

#### *Red flags*

- ◆ Insufficient publicity;
- ◆ Creation of barriers to SME participation;
- ◆ Including subjective criteria: e.g. architectural design or environmental standards;
- ◆ Setting unrealistic deadlines based on unjustified urgency;
- ◆ Problems in obtaining documents: this can create an advantage for some operators when preparing tenders;
- ◆ Selective leaks of information;
- ◆ In restricted procedures, limited choice from a list of economic operators;
- ◆ Collusion in a number of situations, such as group agreements between operators that are regularly invited to submit tenders, sharing of contracts, external selection of the winning tender and compensation for operators not selected, which inflate cost for the contracting authority;
- ◆ A candidate economic operator withdraws its tender without any reason: it may indicate that it has deliberately lost the competition;
- ◆ One or more economic operators submit repeatedly incomplete bids which are rejected.

### 2.1.4 Collusion

One of the main challenges of the overall procurement process – especially in the pre-tendering and tendering phases – is to prevent, detect and eliminate collusion in public procurement.

Collusive tendering (also referred to as bid rigging) occurs when different companies secretly agree to manipulate the bidding process in order to limit or eliminate competition among them, generally with the purpose of artificially raising prices or lowering the quality of goods or services for contracting authorities who wish to acquire products or services through a competitive process.

This leads to extraordinary profits for the conspirators which will be distributed among them according to different compensation schemes. On the other hand, contracting authorities are deprived from the benefits of competitive bidding: paying higher prices unnecessarily for

a goods or services imply losing public funds which would have otherwise been used elsewhere.

Collusion agreements among bidders (or potential bidders<sup>29</sup>) have two main objectives which usually appear together:

- 1) To agree on the price of the contract to be awarded (price fixing) in order to pre-determine a price or a price range that is higher than the price that would derive from a competitive bidding process.

In this way, competitors agree on the discounts to be offered, or on a minimum price that all the bidders will observe (i.e. all the bids will be higher than this fixed minimum), furthermore they could also agree on the same formula to be applied by all bidders in order to calculate the price to be included in the different bids, etc.

Bidders could also agree on other elements different from the price, such as the technical features of the product, the quality of goods and services, the periods of implementation of the contract, etc.

- 2) To agree in advance on the competitor who will win the corresponding tender on a contract to be awarded through a competitive bidding process.

The other competitors involved in the collusive agreement, which have agreed to intentionally lose the contract, will receive some compensation by the designated winning bidder. In this way, the additional profit obtained as a result of the collusive agreement will be shared by all colluding bidders..

Such compensation may take several forms, for instance the following:

- ✓ The designated winner gives a subcontract or a supply contract to the other colluding bidders; or
- ✓ The designated winner gives a direct payoff to the other colluding bidders in the form of goods or cash, normally disguised as legal payments through false invoices for non-existing services.

However, long-standing bid-rigging arrangements may employ much more sophisticated methods for distributing bid-rigging profits over a period of months or years.

Collusion or bid rigging can take up different forms or schemes; however the following ones are the most common types, which may even appear together:

### ***a) Cover bidding***

A cover bid (also referred to as complementary, shadow, symbolic, courtesy or token bid) is a bid which is submitted with the only purpose of giving the formal appearance of competitive bidding but with no intention to win the contract, in other words, with

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<sup>29</sup> It should be taken into account that the collusive agreement may be between a bidder and a potential bidder that does not actually submit a bid, and also that it is not necessary that all bidders participate in the conspiracy, although it will be more effective if they do.

the deliberate purpose of losing the contract. Such bids are intended not to secure the contracting authority's acceptance.

After competitors have agreed which of them will win the contract, they submit bids at deliberately higher prices than that of the designated winner or which contain terms and conditions that are known to be unacceptable to the contracting authority, for example the bid is higher than the acceptable maximum price laid down in the tender documents or it is clearly incomplete. Such practice ensures that the bid of the designated winner is selected by the purchaser while giving the impression of real competition.

Cover bids may also be submitted by shell companies or affiliated firms.

Cover bidding is the most frequent form of bid-rigging and allows the designated winner to determine a price which is higher than the price that would have resulted from a real competitive bidding.

### ***b) Bid suppression***

In this type of collusive scheme, one or more companies - who would otherwise be expected to bid, or who have previously bid - agree not to bid or to withdraw a previously submitted bid in order to allow the designated winning bidder to win the contract.

In return, the non-bidders may receive a subcontract, supply contract or direct payoff from the designated winning bidder in order to share the benefits from the collusive agreement.

This scheme occurs typically when a new or uncooperative bidder wants to enter a competition in which a previous collusive agreement has been arranged by the conspirators.

If the new or uncooperative bidder succeeds to submit a competitive bid, the price inflation which results from the collusion will become apparent, hence, in order to prevent this to happen, conspirators decide to pay-off the new company not to bid or to withdraw a previously submitted bid.

Conspirators, in order to protect the collusive agreement, can also use other means to discourage non-cooperating companies from submitting a bid, for instance by persuading suppliers and subcontractors not to enter into contract with such companies.

### ***c) Bid rotation***

Unlike bid suppression, bid rotation occurs when colluding companies continue to submit bids but they agree to take turns in being the winners (i.e. offering the lowest bid) with the aim of ultimately allocating the same monetary value of contracts to each participant, or monetary values that correspond to the size or market share of each colluding company.

Bid-rotation schemes are usually used in conjunction with complementary bids submitted by the designated losing bidders in each tender.

Rotation usually has a pre-set time schedule: each colluding bidder is designated to win a contract following a certain chronological order which have been previously agreed among the conspirators (e.g. A, B, C, A, B, C, etc.). This occurs especially when the contracts affected by the bid-rotation agreement are similar to each other.

However, rotation may also be based on other elements, such as the value of the contracts, the type of good or service, the deadline of the tender, the period of implementation of the contract, etc.

As in bid-rotation schemes every bidder wins a certain number of contracts, it may not be necessary to establish a further compensation scheme among them.

### ***d) Market allocation***

Market allocation or market division is an agreement among bidders not to compete in designated geographic regions or for specific contracting authorities, dividing markets among themselves.

With this purpose, colluding companies allocate each contracting authority or geographic region to a different bidder, so that companies will not bid (or will submit only a cover bid) on contracts tendered by a contracting authority or in a geographic region which is not assigned to them.

In order to reduce costs and maximize the profits of the cartel members, market division is usually made on the basis of proximity, so that each geographic region or contracting authority is allocated to the colluding company whose factories are closer to the corresponding region or contracting authority. To that end, tenders in their respective "home markets" should be awarded to the "home producers".

For the allocation of geographic regions and contracting authorities, colluding companies usually consider the historical market shares in order to preserve the status quo and to avoid a "price war", or they pay attention to each other's individual preferences.

**CASE EXAMPLE**

***Collusion in the public procurement***

*In 2012, a cartel among the most important producers of paper envelopes in Spain was uncovered. Those companies secretly agreed to divide up the market of paper envelopes used in the elections for the Spanish National and Regional Parliaments and also for the European Parliament.*

*The colluding companies held regular meetings to decide on the winner of each contract or lot and the price of the winning bid. The other colluding companies committed themselves to submit cover bids.*

*Subsequently, the designated winner secretly subcontracted a part of the contract to the rest of the members of the cartel with a pre-determined price, so that each of the involved companies benefit of the profit, which was more or less constant along time and corresponded to the relative size of the company. In addition, the colluding companies agreed on the "fines" (25% of the contract amount) to be imposed on those members of the cartel who would not comply with the agreement.*

*This cartel was in place since the first democratic elections in Spain (1977) until the investigation started (2010). It could be uncovered due to the information submitted by one of the members of the cartel under the new leniency program laid down in the Spanish Competition Law.*

*In the elections for the European Parliament in 1994, a company which was not a member of the cartel won one of the lots by submitting a bid which was 20% lower than the designated winning bid, however this did not lead to the opening of an investigation.*

*Here is an example of the first five lots of the contract tendered for the elections for the National Parliament in 1982:*

LOT	Bidders	Bid price (pesetas)	
		Congress	Senate
1	A	929	849
	F	960	870
	G	965	973
2	B	929	849
	F	960	870
	G	965	873
3	C	929	849
	G	960	870
	A	929	849
4	D	929	849
	F	960	870
	G	965	873
5	E	929	849
	F	960	870
	G	965	873

LOT	Winning Bidder	Winning bid price (pesetas)	
		Congress	Senate
1	A	929	849
2	B	929	849
3	C	929	849
4	D	929	849
5	E	929	849

*Some red flags:*

- *Each bidder (from A to E) wins one lot.*
- *Winning bidders only bid for one lot and win.*
- *The price of the winning bid is always the same.*
- *F and G always submit bids but never win.*

This type of fraud relates to situations, where there are relatively few bidders for a given projects and all know each other. It can be beneficial for them to work together, for example the winning bidder may subcontract the loser to do a part of the works. It can also happen that a company makes one bid directly and the other through a subsidiary registered in another country. There could also be cases, where there is just one true bidder (that is the preferred company), as the other bidders are unlikely to be able to carry out the works at a competitive price (especially in case of construction works) and have submitted their bids merely to comply with the three-bid requirement. A variant of this situation arises when there

are special clauses in the bids of the other bidders that the contracting authority cannot accept and thus prevents them from being selected for the contract.

### **CASE EXAMPLE**

*A local government administration organised a tender to build a new road in a relatively remote region and awarded the contract to one of the construction companies. Later, it turned out that the winner had subcontracted about half of the works to another local company who has also participated in the tender and made the second-best bid. As a consequence, there was a reason to suspect that the two bidders had agreed not to compete against each other but were working together in the bidding process.*

### **Red flags**

Bid-rigging or collusion in public procurement can be very difficult to detect as collusive agreements are usually concluded and kept in secret, with only the participants knowing about the collusive scheme. However, collusive strategies usually result in unusual bidding or pricing patterns that constitute indicators or red flags that procurement officials can detect by reviewing the procurement documents and by analysing the past contract awards.

It is recommended, however to carry out the analysis of these indicators systematically comparing different tenders of the same or different contracting authorities by over a longer period of time. In this way the chance is higher to reveal the existence of collusion. Therefore, it is beneficial to maintain a central database containing previous tenders and tenders of every contracting authority, as it helps detecting such indicators and red flags more easily.

These unusual patterns do not constitute evidence of collusion; rather they suggest that further investigation is needed (by the competent authorities, e.g. the corresponding competition authority) in order to determine whether collusion exists.

### **Red flags with regard to the bid submission and process**

- ◆ The number of bidders is significantly lower than the average in other similar tenders;
- ◆ Regular suppliers do not bid on a tender they would normally be expected to bid for, but have continued to bid for other similar tenders;
- ◆ The winning bidder is often the same company, although it seems to be a competitive market;
- ◆ Some companies unexpectedly withdraw from bidding in a certain tender;
- ◆ Some companies persistently reject to submit a bid in tenders of certain contracting authorities or in certain geographic areas;
- ◆ The winning bidder does not accept the contract without existing reasonable grounds;
- ◆ There are companies that never win a contract although they usually submit bids for the tenders of a certain contracting authority;
- ◆ A certain company rarely bids but always wins when it does so;

- ◆ Certain bidders repeatedly win contracts of one contracting authority, but not elsewhere for similar goods or services;
- ◆ Certain companies submit bids which are incomplete or which include data which make those bids unlikely or impossible to be the winning bid (for instance, they do not include any information with regard to one or more awarding criteria);
- ◆ The winning bidder repeatedly subcontracts work to unsuccessful bidders or to companies which would normally bid for the tender but did not in the given case;
- ◆ There seems to be a pattern to determine the winning bidder so that each of the companies that usually submit bids wins part of the contracts: for instance, there is a turn among them or each company always wins contracts of the same type of product or of the same value range);
- ◆ A company submits a bid including information that is significantly different from the one usually included by that company in its bids for other tenders: for instance, prices for the same or similar products, duration of the contracts, quality offered for similar products, etc.);
- ◆ A number of companies submit bids in every geographic area but each of them only wins tenders in certain different geographic areas. There seems to be a geographic distribution of tenders among the bidders;
- ◆ Companies that could submit separate bids decide to join and submit together only one bid;
- ◆ Whenever a certain company submits a bid, other certain companies do not submit a bid without existing reasonable grounds that may explain such behaviour;
- ◆ Certain bidders always bid against each other or never bid against each other;
- ◆ There are significant links between two or more bidders, such as common or related administrators, cross-ownership, same legal addresses, same employees, same phone numbers, family ties, etc.;
- ◆ Losing bidders are totally unknown or seem not to be real companies: e.g. they do not appear on the Internet, cannot be located in databases or business directories, do not have a track commercial record, cannot be contacted on the phone or the address included in the bid documents, etc.;
- ◆ Relations between the participants: in some cases, they have common names in their management or shareholder composition.
- ◆ It may also happen that after the contract award, the contractor is cooperating with those who withdrew their tenders or who had been rejected;
- ◆ Lack of involvement of well-known companies in the area:

### ***Red flags with regard to bid documents***

- ◆ Different companies submit bid documents which contain the same mistakes, such as miscalculations or orthographic errors (e.g. the same words are misspelled in the same way in different bids);
- ◆ Different companies submit bid documents which contain similar or identical handwriting, wording or typeface, particularly if these are unusual;



- ◆ Bids from different companies have been submitted from the same email or postal address;
- ◆ Different companies submit their bids at the same time or with the same post mark;
- ◆ Bid documents contain round numbers in complex tenders;
- ◆ Bids from different companies contain a significant number of identical estimates of the cost of certain items;
- ◆ Bid documents of certain companies seem to have been modified prior to its submission to the contracting authority, e.g. some parts of a document have been rubbed out or physically altered. There is an indication of last minute amendments of such bids;
- ◆ There are significant inconsistencies in the data included in the documents submitted by a certain bidder: for instance, information contained in one part of a bid document is not consistent with that included in other parts of the same document);
- ◆ Bid documents submitted by different companies contain less detail than it would be necessary or expected, or give other indications of not being genuine;
- ◆ A company submits incomplete bids too frequently, or two or more companies submitted incomplete bids in one tender;
- ◆ The document properties of two or more electronic proposals show that the proposals were created or edited by one of the bidders or by the same person;
- ◆ The bids show unusual similarities: tenders have small differences in prices between them, indicating that probably the participants knew each other's bid;
- ◆ Tenders have similar misprints or similarities in font and / or postal address information, phone etc.;
- ◆ The offered prices differ by fixed rounded percentages, e.g. by 2%, 3%, 7% etc.;
- ◆ Switching same economic operators among themselves in the position of the tender contractor;
- ◆ Multiple candidate companies pretend to act competitively, but have the same address or the same mobile phones of their representatives. The headquarters of the economic operator is a private residence, uninhabited or abandoned building, or newly built building;
- ◆ A bidder is not found on the internet, neither in telephone registers etc.;

### ***Red flags with regard to pricing***

- ◆ The price offered by the winning bidder is significantly lower than the price offered by the rest of the bidders;
- ◆ The winning bid is significantly high compared to cost estimates;
- ◆ Prices offered by non-winning bidders are identical to the maximum price laid down in tender documents, or slightly below that maximum;
- ◆ Prices offered by all of the bidders are above the maximum price laid down in tender documents: this could mean that companies are trying to force the contracting authority to increase such maximum price;

- ◆ Prices offered by all bidders are constantly high or above the average prices in the corresponding market/industry or those included in published price lists;
- ◆ All bids are very close in price for items where some variation is expected: this indicates that competitors may be communicating and sharing bidding information;
- ◆ Sudden and identical increases in price or price ranges by bidders that cannot be explained by cost increases;
- ◆ When a new company submits a bid in a certain tender, usual bidders offer significantly lower prices than those offered in past tenders;
- ◆ There is a fixed difference in the prices offered by different bidders, which might even appear for item costs: for example prices offered by one bidder are always an exact 5% or 10% higher than those offered by the other bidders;
- ◆ Different companies include identical unit prices in their bid documents, especially if these prices have been the same for a long time or they were different for a long period of time and suddenly started to be the same;
- ◆ Only one of the bidders contacts wholesalers for pricing information prior to a bid submission;
- ◆ Certain companies submit a bid which is much higher than other bids submitted by the same companies in other similar tenders of the same contracting authority or a different one (public or private) with no objective justification (e.g. a change in input costs);
- ◆ Anticipated discounts disappear unexpectedly;
- ◆ Companies significantly reduce or give up offering certain discounts which were traditionally offered;
- ◆ Prices submitted by bidders increase in regular and similar increments without existing an objective justification;
- ◆ Companies which are located in a certain geographic area offer higher prices for contracting authorities located in such area than for contracting authorities located far away;
- ◆ Similar transportation costs are specified by local and non-local companies;
- ◆ The offered prices are unusually high: the auction prices are higher compared to the average market prices;
- ◆ Bid prices are significantly higher than those on the market price list of the same company;
- ◆ Persistently high or increasing offer prices for the same economic operators;
- ◆ Bidders have submitted prices for line items under past procurements that were significantly above or below current price quotes with no apparent reason;
- ◆ The winning bid is much higher than cost estimates or industry averages;
- ◆ Bid prices drop when a new or infrequent bidder enters the bidding process;
- ◆ A company submits unusually high bid prices;
- ◆ Bid prices of all companies are very close;

- ◆ Almost identical unit prices in all bids;
- ◆ Bid prices differ by an equal amount or factor.

### *Red flags with regard to bidders' statements or behaviour*

- ◆ There have been spoken or written references to an agreement among bidders;
- ◆ A bidder has knowledge of matters that the contracting authority has only communicated to another bidder;
- ◆ Bidders formally justify their prices by looking at "industry suggested prices", "standard market prices" or "industry price schedules";
- ◆ There have been statements indicating that certain firms do not sell in a certain geographic area or to certain contracting authorities;
- ◆ Bidders have advanced knowledge of competitors' pricing or bid details before such information is made publicly available;
- ◆ A bidder does not take much interest in one of its bids or even indicates that it was a symbolic bid;
- ◆ Different bidders use the same explanation and terminology to justify certain issues, such as price increases;
- ◆ One of the bidders asks for the tender documents on behalf of other bidder(s);
- ◆ One of the bidders submits its bid and other company's bid for the same tender;
- ◆ Bidders have held private meetings before submitting their respective bids;
- ◆ Winning tender is too high compared to estimated costs, published price lists, similar work or services, average industry prices or fair market prices;
- ◆ Consistently high prices across all tenders;
- ◆ Drop in prices when a new operator enters the competition;
- ◆ Rotation of winning tenderers;
- ◆ Subcontracting to economic operators not selected during the tender procedure;
- ◆ Unusual patterns in tenders: precise percentage difference between tenders, winning tender very close to the acceptable price threshold, tender submitted at the exact price budgeted, very high or very low price, highly divergent prices, round numbers, incomplete tender, etc.;
- ◆ Obvious connections between competitors, for example, addresses, staff and telephone numbers, or shared contacts;
- ◆ Tender includes subcontracting to operators that are competing for the main contract at the same time;
- ◆ Suitably qualified operators do not submit tenders and become subcontractors;
- ◆ Some operators always compete with each other, and others never do;
- ◆ Unsuccessful tenderers cannot be found on the internet or in business directories or do not have a physical address;
- ◆ Evidence that economic operators exchange price information, divide up areas or enter into informal agreements;

- ◆ Key sectors that have been identified are, for example, road surfacing, building construction, dredging, electrical equipment, roofing and waste disposal;
- ◆ In case of two or more bidders might be related if there is some kind of geographical distribution of winning bids: e.g. some companies tend to win in one region, the other in another;
- ◆ Some companies that would be logically expected to participate in a tender will not submit a bid, although they continue to participate in other similar cases;
- ◆ Two or more companies submit a joint bid, although they should be able to participate individually;
- ◆ Some bidders regularly participate in the tenders, but will (almost) never win;
- ◆ There seems to be an alternating sequence of winners among the same bidders;
- ◆ The winner of the competition will not sign a contract, but will be subcontracted later;

### *Solutions*

- ✓ Learn about the market before designing the tender process. Gather information about the products, suppliers and conditions in the corresponding market, especially potential suppliers' prices and costs: find out how many suppliers could compete for the award, which suppliers are best positioned for the award etc.
- ✓ Include information about prices in other geographic areas or for similar products.
- ✓ Collect information about past tenders and seek information from other public procurers and if possible private ones too, who have recently purchased similar goods or services to improve the understanding of the market.
- ✓ Consider whether the market has the characteristics that make collusion more likely. Collusion can occur in almost any industry or market; however some are more prone to carry the risk of collusion due to particular features present in certain markets, industries or products.
- ✓ An indicator / red flag of collusion can be more alerting when the market or industry conditions are already favourable to collusion. Consequently, employees involved in the procurement procedure should be more vigilant to red flags when they are detected in riskier markets or industries. More precisely:
  - Collusion is more likely to occur if there are few sellers in the corresponding market compared to the number of contracts to be awarded. The fewer the number of sellers, the easier it is for them to get together and agree on prices, bids, customers or territories. Collusion may also occur when the number of companies is enough large, but there is a small group of major sellers dominating the market.
  - The probability of collusion increases if the product to which the tender refers cannot easily be substituted for other similar products or if there are restrictive specifications for the product being procured. The more simple and standardized a product is, the easier it is for bidders to reach an agreement on a common price structure and to make that agreement longstanding. It is much

harder to agree on other factors subject to competition, such as design, features, quality or service.

- Collusion is more likely to occur if there are significant entry barriers, e.g. high entry costs, restrictive legislation etc.
- Collusion is also more likely to occur if the market is relatively stable, i.e. it is unlikely that significant technological innovations in the product or important changes in the demand / consumer patterns would happen.
- Collusion is more likely to occur if competitors know each other well through social connections, business or trade associations, legitimate business contacts, if they shift human resources from one company to another, or if there are other contractual or structural relationships between them.

The existence of trade associations or other forums - be it professional or social – provides opportunity for competitors to get together and discuss matters in person.

- ✓ Define tender specifications in terms what performance is expected from the product rather than describing the product itself. This can make bid-rigging agreements more difficult to implement as it leaves room for alternative or innovative sources of supply / substitute products to enter the tender.
- ✓ Try to avoid predictable procurement patterns which facilitate bid-rigging schemes: repetitive purchases and unchanging quantities may increase chances for collusion, as competitors may become familiar with other bidders and with tender features over time. Consequently, it is important to hinder the predictability of procurement by varying both the scope and size of the contracts, (for example, aggregating or disaggregating them, or by purchasing jointly with other government procuring entities), as well as the tender calendars.

On the other hand, in general, there is more incentive to compete when the contract is large and tenders are not very frequent.

- ✓ As the probability of bid rigging increases if there are only a few potential bidders, it is advised to ensure the participation of large number of potential bidders. In order to do so:
  - Keep tender requirements clear and easy to follow, thereby encouraging more companies to participate.
  - Consider existing yet unnecessary restrictions on bidders that may eliminate companies otherwise qualified for the implementation of the contract, and try to avoid them.
  - Keep bidding costs as low as possible by allowing adequate time for bid preparation, use electronic bidding system if possible, avoid requiring unnecessary information, restrict the possibility to amend the application forms / processes to the minimum, aggregate tenders in order to spread the fixed costs of the bidding.

- Avoid discriminatory or preferential treatment of certain type of suppliers / companies that have contracts up for renewal, as it can discourage other suppliers from bidding.
- With regard to large contracts, consider allowing bids on certain lots or parts of the contract and not only bids for the whole contract, thereby encouraging small and medium-sized companies to participate.
- ✓ Adopt any measures that hinder speculation among the bidders regarding the number and identity of their possible competitors. Keep the identity of bidders undisclosed as far as possible to make it more difficult for cartel members to contact all bidders.
- ✓ Consider the possibility of adding contracts from different contracting authorities into one single tender in order to avoid market segmentation by the companies, especially if the contracts have the same object, similar characteristics, relatively small estimated value and are frequently tendered.

However, combining contracts might discourage the participation of small and medium-sized companies in the procurement. By increasing the size of the tender, this combination must be considered without prejudice to the possibility of allowing bids for certain lots within the contract.

If the contracting authority decides to divide up a contract into several lots:

- The number of lots should not be the same as the estimated number of bidders.
- The size of lots should not reflect the suppliers' market structure: symmetric companies find it more difficult to reach a collusive agreement when lots do not have the same size (i.e. lots are asymmetric). Though if there is one large company and one small company in the corresponding market, one big lot and one small lot may favour collusion.
- The size of lots should not be too big, as this can make it difficult for small businesses to compete, and hence it reduces the number of potential bidders.
- The size and design of the lots should change from time to time in order to make it more difficult for the bidders to allocate the lots among themselves.
- ✓ Make it harder for bidders to communicate with each other. In particular:
  - Avoid unnecessarily presenting the bidders with opportunities to communicate with each other (e.g. at pre-bid face-to-face meetings or at site inspections).
  - Use electronic bidding procedures, as they prevent competitors from meeting each other.
  - Require bidders to disclose all communications with competitors.
  - Require bidders, where possible, to sign a certificate or warranty that their bids have been independently elaborated and that there has been no communication with competitors about, and no contract, arrangement or understanding has been entered into with competitors about price, bid submission or terms of the bid, including quality and quantity of goods or services.

- In those cases where law stipulates the possibility of holding meetings with companies before the tender procedure, such meetings should be held individually with each company and never with all of them collectively.
- If meetings are necessary before the tender procedure, mitigate the risk of collusion by reminding attendees the prohibition of bid-rigging schemes and the existing sanctions for such conducts. This reminder should also be included in the tender documents.
- Manage the risks that may be associated with the use of industry consultants to conduct the tender process, as they may have established working relationships with bidders. Ensure any external consultants have signed confidentiality agreements and are subject to a reporting requirement with regard to any inappropriate competitor behaviour.
- In order to safeguard the secrecy of the bids, they should not be submitted in person and the contracting authority should manage them internally by using codes.
- If bids or prices do not make sense, this should be discussed individually with each bidder, not with all bidders collectively.
- ✓ When publishing the results of a tender, carefully consider which information is published: avoid disclosing competitively sensitive information as this can facilitate the formation of bid-rigging schemes.
- ✓ Improve employees' knowledge and understanding of bid rigging schemes through specific training programmes.
- ✓ Make it easy for companies and their employees to inform the contracting authority about any collusive practice they encounter. If there is a whistle-blower mechanism to report bid-rigging, include it in the tender documents.
- ✓ Lay down clear internal procedures requiring contracting authority's employees to report any suspicion of collusive practice.
- ✓ Verification of the connections between the tenderers;
- ✓ Verification of the value of the offers submitted, compared to the estimates of costs;
- ✓ Review previous procedures where the same bidders took part, for instance to know whether the successful tenderer in the past subcontracted in favour of another tenderer that withdrew its bid or if it was a supplier;
- ✓ Finding the real reasons for withdrawing of the offers.

## 2.2 Evaluation

### 2.2.1 Directed selection process

#### *Red flags*

- ◆ Fake draw for the selection of the competition committee members;
- ◆ The committee is manipulated by a member;

- ◆ The evaluation criteria differ in from those described in the notice;
- ◆ The contractor is not included in the pre-selection list of prerequisite qualifications;
- ◆ The lowest bid is rejected almost inexplicably.

### 2.2.2 Fictitious offers

Although this type of fraud is not very common in the field of public procurement, it has already occurred. On the other hand, it is quite common in case of ESIF projects, where the recipient of EU funding is a private company. In the EU funded projects, the recipient must usually self-finance a part of the project costs. This gives the recipient an incentive to overstate the reported project costs so that the EU funding would cover 100% of the actual costs, if not more. Although following public procurement regulations is often not mandatory for these companies in such cases, they still have to take at least three bids from different suppliers in order to be eligible for EU funding for the goods/services they receive. However, the submitted offers are not "real". The prices indicated in the bidding documents are inflated and/or the quantity of goods delivered or works performed are overstated. In some cases, it is even possible to prove that the three bidders are somehow related to each other and/or to the contracting authority.

A similar type of fraud occurs, when there is just one "real" bidder and the other bids have been falsified: they are either submitted on behalf of existing companies without their knowledge or the other bidders do not exist at all.

#### **CASE EXAMPLE**

*A beneficiary applied for EU funding to purchase certain production equipment and submitted three bids received from the suppliers of the equipment as a part of its application. However, by analysing the bidding documents the experts discovered hidden signs indicating that the bid No. 2 and bid No. 3 had been composed by the same person. Moreover, by looking at the homepages of the bidders No. 1 and No.2, it turned out that the same person (with the same phone number) represented both of them. The third bidder was registered in another EU country and little information was available about it, however it was possible to reveal that bidders No. 3 and No. 1 shared the same board member. As a result, it was suspected that at least one person had links with all three bidders and consequently the bids were not independent.*



### **CASE EXAMPLE**

*During the procurement, it was discovered that some of the submitted bids were falsified: they were submitted on behalf of existing companies without their knowledge. The fraud was discovered because of striking grammatical errors in the documents. A variation of this type of fraud occurred when the bids were real, but outdated. The beneficiary of the EU funding altered the dates of the bids to make them eligible.*

### **CASE EXAMPLE**

*In yet another case the bids were real, but the beneficiary of EU funding altered the amounts in some of them in order to award the contract to a favoured bidder. It was discovered because of unusually high prices in the offers.*

### **CASE EXAMPLE**

*Finally there were cases where the same three bidders had been asked to submit their offers in a majority of projects in the same application round, although the service they offered was not unique. Although it could not be proven that there was fraud in that case, the doubts still remained.*

### **Red flags**

- ◆ Most of the bid prices of a relative common (standardised) good or service are unusually high when compared to some similar contracts with some other partners;
- ◆ The same person, e-mail address or phone number has been given as a contact point for several bidders;
- ◆ The related documents composed by the contracting authority and some of the bids were printed with the same printer;
- ◆ The same person appears to have composed the bidding documents for several, if not all seemingly unrelated bidders. If this has not been explicitly stated, it can sometimes be read from the metadata of the bidding files;
- ◆ Several bidders have sent their bidding documents from the same e-mail address;
- ◆ Some or all bidders have the same person in key roles, e.g. current or past board member, owner, or are related in some other way;
- ◆ The same three bidders that are not big companies submit bids to many projects;

- ◆ A person with a key role in one of the bidders has also key roles in one or more beneficiaries;
- ◆ The same person submits project implementation reports about several projects with having seemingly no official role in them;
- ◆ Some or all bidders have never been active before in the field they are now bidding for;
- ◆ No logo of the bidding company on the accompanying letter;
- ◆ Some bidders withdraw their bids during the procurement process with no logical reason or as soon as they have to answer more detailed questions;
- ◆ The lowest bidder is the same in many cases;
- ◆ Some of the bidders have very few or no employees other than the board member;
- ◆ All or several bidders share the same office, especially if the same person represents all of them;

### 2.2.3 Discrepant offers

In this fraud pattern, the employees responsible for the contracting procedure provide confidential information to a favoured tenderer, which is not available to the other tenderers; for instance, one or several activities foreseen in a request for offers will not be accomplished in the contract. Such information allows the favoured company to submit an offer with a price much more reduced than the one of the other participants, offering a very low price for the activity which would not be included in the final contract. In case of the framework agreements, this aspect must be analysed in connection with the subsequent contracts.

#### *Solutions*

- ✓ Identification of the offers for certain activities which seem unjustifiably low;
- ✓ Verification of the modifications or eliminations of requirements after the award of the contract;
- ✓ Verification of the connections between the tenderer and the staff responsible with the procurements or who participated to drawing up the specifications.

### 2.2.4 Manipulation of the offers

#### **CASE EXAMPLE**

*In a procedure of request for offers, the staff in charge manipulates the offers after submitting them with a view to select the favoured contractor, e.g. the offer is modified.*

#### *Red flags*

- ◆ 'Tweaked deals': Missing data / pages by certain tenders;
- ◆ Some offer contains pages with different font;
- ◆ Not all foreseen pages are signed by the members of the Competition Commission;

- ◆ The minutes are not originally signed by the attending members.

### ***Solutions***

- ✓ Verification of the aspects claimed by the other tenderers;
- ✓ Identification of the modifications from the offer;
- ✓ Verification of the reasons which lay on the basis of disqualifying other tenderers or cancelling the tender.

### **2.2.5 Illicit influence**

Undue outside influence constitutes a ground for exclusion from participation in the procedure under Article 57(d), (e), (f) and (i) of Directive 2014/24/EU, and are applicable to special sectors, with specific features, by virtue of the reference made in Article 80 of Directive 2014/25/EU. Illicit influence can take several forms:

- Prior involvement of the economic operator in the preparation of the procurement procedure;
- Efforts by the economic operator to illicitly influence the decision-making process: e.g. to obtain confidential information that may give it illicit advantage, or to provide incorrect information that may have a significant influence on the decisions concerning exclusion, selection or award;
- Conflict of interest that cannot be effectively avoided by other less intrusive measures;
- Agreements with other economic operators in order to distort competition;
- Failure to publish the call for competition;
- Insufficient justification for the failure to publish the call for contracts covered by Directive 2009/81/EC;
- Failure to publish the extension of deadlines for submitting tenders or requests to participate;
- Artificial division into lots of contracts for works/services/supplies;
- Influence peddling;
- Bribery.

#### **1) *Influence peddling***

Influence peddling in the field of public procurement contracts happens often when a bidder is favoured without having a chance for winning, or when the contracting authority concludes unjustified contracts with a single source, usually at excessively inflated prices.

**CASE EXAMPLE**

*A senior public official requests the head of the contracting authority to conclude a contract of public works, or a supply/service contract. It appears from the contracting authority's internal documents that the reason for concluding a supply contract was to ensure the effective performance management of the institution. However, the contracting authority had no real need to conclude such contracts. The only purpose of the procurement was to serve the benefit of companies in close connection with the senior official.*

**Solutions**

- ✓ Identification of the shareholding structure of the winning bidder;
- ✓ Request for documents in order to verify the real needs of the beneficiary;
- ✓ Verification of the contractor's accounts in order to establish the real beneficiary of the amounts received for the works/supply of goods/performance of services.

**2) Bribe and illegal fees**

The bribe and illegal commissions mean the give or receipt of valuable objects with a view to influencing an official document or a decision of commercial nature. The valuable objects in the case of offering the bribe should not be necessarily money, but may also include gifts, loans, reimbursed or not, the use of credit cards, the payment in excess of procurements, preferential rents, holding secret participations within the contracting company etc.

**CASE EXAMPLE**

*A tenderer offered bribe to the servants involved in the process of evaluation of bids in order to ensure a bigger score and, implicitly, to declare a certain tender as successful winner.*

**CASE EXAMPLE**

*A public employee accepts a bribe in order to finance certain organisations by planning and carrying out direct award procedures. For example, an association acquired exclusive rights to organise an event though such publicity services do not belong to the association's activity. Since the planning of the procurement, the contracting authority has chosen to use the negotiated procedure without the prior publication of the tender, and has granted the given association exclusive right to provide publicity services at the event. Then, the respective association subcontracted a commercial company to provide publicity services at events organised by the association. After the company received payment for the services provided, a part of that money was transferred to the association's accounts for the performance of fictitious services. The public employee was rewarded by trips to exotic countries for the successful financial engineering through the association.*

**Red flags**

**Attempts to illicit influence**

- ◆ Close relationship between managers and staff in relevant posts at the contracting body and the economic operator;
- ◆ Unexplained or sudden income for managers and staff in relevant posts at the contracting body and the economic operator;
- ◆ Economic operator with a reputation in the market for paying kickbacks;
- ◆ Frequent changes to the contracts to increase the value of the contract;
- ◆ Managers or staff at the contracting body turn down promotions to posts outside the area of procurement;
- ◆ No declaration of conflict of interest.

**Solutions**

- ✓ Verification of the shareholding structure of the organisation;
- ✓ Verification of the object of activity of the organisation;
- ✓ Verification of the connections between the contracting authority and the respective organisation;
- ✓ Verification of the documents which certify the existence of an exclusivity;
- ✓ Following the transfer of the money received by the respective organisation.
- ✓ Verification of the manner in which the evaluation took place;
- ✓ Identification of the criteria where there was awarded an unjustified score;
- ✓ Verification of the statements of assets of the members of the evaluation commission;
- ✓ Verification of the accounts of members of the evaluation commission.

**3) Failure to declare conflict of interests**

**CASE EXAMPLE**

*Member of the evaluation commission is employed by one of the tenderers, which he omitted to declare during the carrying out of the contract awarding procedure.*

**Solutions**

- ✓ Verification of the kinship relations of the members of the evaluation commission;
- ✓ Verification of the work places where the members of the evaluation committee were employed;
- ✓ Verification of the connections between the shareholding of the tenderers and the members of the evaluation committee;
- ✓ Identification of the interest manifested by the member of the evaluation committee, such as friendship or other relations to a certain tenderer, material advantages received etc.

**4) Conflict of Interests**

Despite the establishment of preventive measures, there are certain critical aspects, which have to be borne in mind. One important aspect is the issue of conflict of interests, which is almost an inevitable feature of the awarding processes in the public sector.

Before the award, a typical case of conflict of interests occurs when, an official working for the contracting authority receives some sort of a "present" from a bidder or is connected with a particular bidder in some other way. For example, the official may have an open or hidden economic interest in one of the bidding companies, or has simply good relationship with some key personnel of the bidding company. In any case, this official is interested in creating favourable conditions for one of the bidders. This could take several forms, for example:

- The established technical criteria for the procured items could be adjusted to favour certain bidders: in some cases one bidder may actually be involved in writing them;
- The required delivery times could be too short for bidders located in another country of region;
- The required qualifications from the bidders could unnecessarily exclude certain bidders on basis of some formal criteria e.g. required years of experience, size of previously carried out contracts, number of employees, size of the balance sheet or sales revenue from the previous year etc.;
- There could also be information leaks from the contracting authority to certain bidders so that they have more time to prepare their bid;

- After selecting the winner, the initial requirements could be reduced as compared to initial tender specifications;

- There is intentional lack of supervision, i.e. the actual quality could be lower and/or quantity of goods or services can be reduced compared to the contract specifications.

There are also cases where the beneficiaries of EU funding are private companies who must submit three bids for the goods or services they are supposed to get. Although the winner is not formally related to the beneficiary, he later subcontracts the provision of goods or services to it, which in fact means that the beneficiary is also the factual provider of goods of services.

### **CASE EXAMPLE**

*An official working for the Environmental Inspectorate was the owner of a company that imported certain types of boats. At the same time, he was involved in preparing the tender for procuring some boats. Clearly, he had an incentive to create the conditions in the procurement process that favour his own company. As he had to hide his interest in the outcome of the bidding process, he did not submit the bid himself but in the name of his friend's company. Later the money was transferred from his friend's company to his company by using false invoices.*

*As this official was involved in writing the technical specifications for the tender, he could write them in a way that his company could win. He was so sure about winning that he had actually already ordered the boats before the tender was announced. Therefore, he put very short delivery times to the technical specifications that no one else could meet. He even added some brand-specific characteristics to the technical specifications. In fact, his company was the only one in that country having import licences for that particular brand of boats.*

**CASE EXAMPLE**

*Officials working for the contracting authority were interested in awarding the construction contract to a particular bidder. In order to achieve this, they dedicated a relatively high importance to the quick completion of the works in the bid evaluation criteria, although there was no real urgency to complete the works so quickly. The reason behind was that there were natural reserves nearby and all contractors would need a special environmental certificate to do construction works in that area. It took time to get that certificate. However, one local bidder already had that certificate and could therefore complete the works more quickly. As a result, the contract was awarded to the bidder who made the highest bid.*

**CASE EXAMPLE**

*There was a competition to purchase some equipment in a local government administration. The auditors discovered that documents in the call for bids and those which were submitted by the winner shared some peculiar marks e.g. both used the same font etc. Experts concluded that both sets of documents were printed by the same device.*

**CASE EXAMPLE**

*A company conducted a procurement to purchase certain types of equipment with the technical specifications that favoured a certain bidder. The matter also caught the attention of the police that conducted an on-the-spot check at the beneficiary's premises. In the car of the board member of the beneficiary they found several versions of the bid sheets of one bidder for the same tender. All the sheets were exactly the same except for the price that barely differed. Obviously, the goal of the board member was to award the contract to that bidder at the price just slightly below the next best bid. He just waited for the opening of the other bids so that he could learn about the next best bid and insert the 'right' bidding sheet to the bidding documents.*



### **CASE EXAMPLE**

*A board member of a private company founded a non-profit organisation to maintain a natural reserve in a relatively remote region and submitted an application for EU funding to purchase a number of cows. The tender documents required that all those cows must come (as a whole herd) from the same supplier. As a result, there were only two offers, since no other suppliers nearby could offer 200 cows simultaneously. The winning bidder was the same private company. It could offer the cows at a very competitive price as they were already there and the additional costs for them were zero. In fact, the cows did not even change place but remained on the same pasture.*

### **Red flags**

- ◆ Choice of a closed procedure, although an open procedure would have been possible;
- ◆ Eligibility or awarding criteria are determined in a way that favours or even exclusively qualifies a specific bidder;
- ◆ Family ties between employees in the public authority launching the tender and a bidding company or organisation
- ◆ Managers and staff in relevant posts at the contracting body and the economic operator engaged in an undisclosed outside business activity;
- ◆ One or more operators who are already in the list do not meet the requirements e.g. information from other candidates' comments, rumours, etc.;
- ◆ Candidates qualified fail to pass the stage of the evaluation of the technical requirements.
- ◆ Unexplained or unusual favouritism towards a specific economic operator;
- ◆ Unusual behaviour of employees: inquiring others about a tender although the employee is not in charge of / not concerned by that tender procedure;
- ◆ The person in charge of drafting the tender documents (or just a senior official) insists on hiring an outside firm to help drafting of the tender documents for no obvious reason;
- ◆ Two or more preparatory studies are requested on the same subject from external firms and someone puts pressure on staff to use one of these studies in drafting the tender documents;
- ◆ Specifications are customised to a product or service of the award-winning bidder and might even be too specific to allow other bidders to submit their offer;
- ◆ Amount of deliverables is reduced without a reduction in the amount payable;
- ◆ Number of working hours is increased, but material costs remain the same;
- ◆ Alteration of specifications with regard to quality or quantity in the contract, leading to non-compliance with the previous set specifications in the call;

- ◆ Continued acceptance of high-cost but low-quality work;
- ◆ No declaration of conflict of interest;

## 2.3 Award

### 2.3.1 Conflict of Interests

Conflict of interest situation could occur after the winner has been selected. This could involve intentionally poor supervision so that incomplete works - if they have been carried out at all - or substandard goods are accepted. For this type of fraud to happen, there must be an illicit link between the winner and an official of the contracting authority responsible for supervision of the contract implementation. This official will then receive a reward for his/her intervention in the procurement procedure. It is also possible that the requirements of the contract will be reduced after selecting the winner. As one bidder knows this, he can make the lowest bid knowing that he will not be required to carry out all the work at that price. Favours certain suppliers constitutes another violation.

#### CASE EXAMPLE

*In a construction project, the contracting authority asked bidders to submit a list of previously completed projects in a specified time period as part of the required qualifications. Later, it turned out that although the winning bidder had submitted the list, none of the projects were successfully completed during the specified time period and therefore, the bidder should have been disqualified from the tender. Moreover, the signed contract differed significantly from the contract advertised during the tender in terms of volume, deadlines and objects. Finally, the investigation revealed that the contracting authority had accepted the use of some inferior materials that significantly shortened the life-cycle of the project. The price of the materials used was ten times lower than the material specified in the contract, although the contracting authority still paid the full price to the contractor.*

#### Solutions

- ✓ Awarding of contract must be based on objective criteria. There are tendencies to prefer e.g. local products or current supplier. It is necessary to stay clear from such tendencies while drawing award criteria or choosing the type of procedure.
- ✓ During the procedure it is important to stick to the award criteria and demand declarations of absence of conflicts of interests from decision makers. Identification of tenderer's beneficial owners can be used for revealing a conflict of interests.
- ✓ To prevent such misconduct a contracting authority should focus on high level of integrity of its employees. Special training should be required.
- ✓ In order to prevent attempts to overcome poor planning, additional information can be requested by the economic operators. Such an attempt can indicate that procurement

document is not sufficiently clear. Contracting authorities tend to ignore such signs and continue in the procedure given the tight schedules.

- ✓ After the expiry of the time limit for the submission of tenders, the procurement documents cannot be changed. Dealing with discrepancies is pushed to the phase after awarding a contract (modification of contract).
- ✓ Contracts shall be awarded on the basis of criteria laid down.
- ✓ The contracting authority should verify that:
  - tenderer does not meet grounds for exclusion;
  - tenderer meets the selection criteria;
  - tender complies with the requirements, conditions and criteria set out in the contract notice and in the procurement documents;
  - tender complies with applicable obligations in the fields of environmental, social and labour law;
  - evaluation was performed correctly;
  - price is not abnormally low.

Carrying out such verifications can become a demanding task. If the presented information or documentation appears to be incomplete, erroneous or if missing, contracting authorities should request clarification or completion. Nonetheless, all these steps are substantial for complying with procurement law, as well as successful performance of contract. Corruption, fraud, conflict of interest, bid rigging or illicit influence issues constitute grounds for exclusion. Despite the existence of a ground for exclusion, an economic operator may still provide evidence that it has taken sufficient measures to demonstrate its reliability. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure. Yet, national laws may determine that some grounds for exclusion are facultative (Article 57 directive 2014/24/EU).<sup>30</sup>

### **BEST PRACTICE EXAMPLE**

*The Register of Contracts can be used to check lists of references carried out in the past, such as selection criteria related to technical and professional requirements. Buyer, scope, price and period are typical facts presented in the lists of references and can be found in the texts of contracts as well. The Register of Contracts enhances transparency with regard to references among suppliers.*

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<sup>30</sup> An example from Czech law: The contracting authority may exclude a participant from the procurement procedure on grounds of unsuitability provided that it demonstrates that the participant has made an unjustified attempt to influence the decision made by the contracting authority within the procurement procedure or has made an unjustified attempt to obtain non-public information that could provide it with undue advantages during the procurement procedure (Section 48 of Act no. 134/2016 Coll., on Public Procurement).

### 2.3.2 False documents

#### **CASE EXAMPLE**

*A certain company enclosed a fiscal certificate to its bid within a procurement procedure, in which it falsely stated that it did not have debts to the state budget. The certificate was entirely false; it was drawn up by the company's accountant.*

#### **CASE EXAMPLE**

*An economic operator presented false statements according to which it fell in the category of small and medium-sized enterprises with the purpose of establishing a smaller financial guarantee for the participation to the tender. However, in reality, the economic operator belonged to a company with large turnovers, which it failed to declare. If this were known by the contracting authority, the economic operator would have been considered a large taxpayer and subsequently its offer would have been rejected. This type of fraud can occur especially in open and restricted tenders.*

#### **Solutions**

- ✓ Verifications of the documents directly at the issuer;
- ✓ Verification of the shareholding structure of the tenderer;
- ✓ Verification of the number of employees and of the turnover;
- ✓ Verification of the connections of the shareholders with other companies;
- ✓ Verification of the existence of groups of shareholders which could be related/partners with tenderer;
- ✓ Establishing the turnover and of the employees of all the enterprises related/partners with the tenderer, according to the methodology foreseen by the law.

#### **Red flags**

##### **General read flags regarding the tendering phase**

- ◆ The bids are composed not by the provider of goods or services, but by an outside consultant;
- ◆ The tender is not properly advertised (e.g. published in a local newspaper instead of national one; in the wrong category, in an unexpected section of the homepage etc.);
- ◆ Identical errors in two or more bids (e.g. typos, errors in name or address of the beneficiary, wrong brands, calculation errors);
- ◆ The bid prices among the bidders seem to vary by a fixed amount or factor;

- ◆ There is wide and inexplicable disparity in bid prices considering the type of works, goods or services being procured;
- ◆ One bid is detailed, all other bids are general;
- ◆ Some bidders are making bids outside their expected competence or business profile;
- ◆ More than one bid is composed by the same person;
- ◆ Bidder's phone numbers of contact persons are not in their country of establishment;
- ◆ No or almost no additional information about the bidder is available elsewhere (e.g. in the internet or phone book);
- ◆ Contact persons are not given in the bidding documents;
- ◆ Only mobile phone numbers and/or anonymous e-mail addresses (like Hotmail, google etc.) are given for the contact persons of the bidders;
- ◆ Some bidders have no physical address, only P.O. boxes; address is unusual for the type of company (e.g. non-business location);
- ◆ Two or more bidders have identical contact data (phone, address, person etc.);
- ◆ The procurement has not been published in the E-procurement environment;
- ◆ The procurement documents are incomplete;
- ◆ Inexplicable great differences in the bid prices of the bidders;
- ◆ Obviously wrong data in the bidding documents;
- ◆ The bid prices differ significantly for similar good or service offered to another tender;
- ◆ The bid price of a newcomer in a particular type of tender is significantly lower than the price of the experienced bidders;
- ◆ The local bidders ask higher prices for local than for faraway deliveries;
- ◆ The local bidders offer the same delivery prices as faraway bidders;
- ◆ The bidders meet before submitting their bids;
- ◆ Several bidders ask for similar additional information;
- ◆ One bidder also submits the bid of the competitor;
- ◆ Employee of the contracting authority worked for a company just before it submitted a bid;
- ◆ Pressure to the evaluation committee to select a given contractor;
- ◆ The official documents and/or certificates of receipt of the documents have obviously been changed (e.g. crossing-out);
- ◆ The evaluation committee members do not have the necessary technical expertise to evaluate the submitted bids, especially when they are dominated by one individual;
- ◆ Subjective elements are overrepresented in the criteria system;
- ◆ Some obligatory information from the winning bidder is missing;
- ◆ Some information provided by the winning bidder relates to contract authority staff (e.g. an employee's address);

- ◆ Few of the companies that bought the bidding documents submit bids, especially if more than half of them drop out;
- ◆ Large number of contracts just below public procurement thresholds;
- ◆ Unusually many complaints from bidders regarding the tender;
- ◆ Signs of bid manipulation in the premises of the contracting authority (e.g. bids are not in a sealed envelope; a bid is „forgotten” in the safe, bids are not kept in a secure location, some bid pages are either missing, not signed or formatted differently etc.)
- ◆ Bids are not opened in the public;
- ◆ Very vague bid description (essentially only a figure without supporting calculations and other explanations) that makes it impossible to compare it with other bids;
- ◆ The bids are not submitted electronically, especially if there are no copies of e-mails available demonstrating that the offer has been sought and received - refers to a fictitious offers. Usually bids are not in the company's headed notepaper;
- ◆ The importance of price is unusually low in the evaluation criteria: this may indicate that the relative weights are adjusted to favour a particular bidder;
- ◆ The opening of bids is not conducted at an advertised date: this may indicate that some bids were submitted later;
- ◆ Two or more bids have the identical format, although no special format for bids was specified by the contracting authority;
- ◆ Cancelling a tender after receiving the bids for no obvious reason and then organising a new tender for the same contract. This could indicate the wish to get information about the other bidders so that the favoured bidder could get information to adjust its own bid;
- ◆ Delayed submissions: one or more tenders are accepted although submitted later than the deadline;
- ◆ New deadline after the late submission of some tenders;
- ◆ The tenders are not contained in a sealed envelope. Bids are not kept in a secure location with limited access;
- ◆ Some rejected for minor errors.

### III. Post-tendering phase

In the post-tendering phase, it is to be verified if the contract is implemented in accordance with the outcome of the procurement procedure and if the primary needs are met. Subsequently, the following issues take place in this phase: payments to the contractor, amendments to contract, resolution of any problems, etc.

#### ***Common types of fraud/violation***

- Quality of contract implementation;
- Offering bribe;
- Embezzlement;
- Subcontracting works without receiving the approval;

#### **3.1 Quality of contract implementation**

The quality is not checked and/or warranty is not claimed. However, modification of a contract breaches the law. Sometimes parties neglect paper work and the actual performance deviates from the text of contract.

#### ***Solutions***

- ✓ Terms of contracts should set convenient quality checks, supervision, warranty and sanctions. Procurement directives from 2014 enable modifications of contracts. However, contracts should not be modified on a regular basis. For example, *de minimis* modifications (10% or 15% of original value) should not compensate for low prices.

#### ***Best practice***

Publishing the text of contracts, for instance in a Register of Contracts, constitutes a universal prevention tool. It has a deterrent effect as the contracting authorities do not dare deviating from the contract.

#### **3.2 Offering bribe**

When a contract awarding procedure is concluded, the bribery takes place usually under the form of awarding illegal commissions: after receiving a payment, the contractor pays or returns a percentage established in advance from each amount received. Regardless of how the bribe is paid, the prices are usually artificially increased or the quality of the merchandise and services is reduced in order to cover the bribe.

Offering bribe triggers further types of fraud, such as forgery of invoices, registration of fictitious expenses or the non-fulfilment of the contractual provisions.

**CASE EXAMPLE**

*The constructor presented works and documents regarding the execution of works which, in fact, were not carried out or were executed but by using materials of inferior quality. The works were approved by the site supervisor in exchange of a bribe, who falsely recorded that the quantities and/or the quality of materials used were the sufficient ones. In this way, the constructor was paid excessively by the contractor and the part the payment was offered to the site supervisor.*

**Solutions**

- ✓ Verification of the on-the-spot situation;
- ✓ Requesting expertise;
- ✓ Verification of the manner in which were used the amounts of money aimed for the carrying out of the contract.

**CASE EXAMPLE**

*According to the contract, it was necessary to establish guarantees on a given bank account, which would not be used for the fulfilment of the contract. However, the money was transferred as advance into other accounts than the one foreseen in the contract. The contracting authority was aware of the situation and turned a blind eye to it in exchange of a bribe. During the tender procedure, the contracting authority requested the evidence for the bank account and a letter of guarantee from the bank. The bank informed the contracting authority about the necessity of transferring the money into the respective account, following to the agreement between the representatives of the contracting authority and the supplier. Then, the contract was concluded and the advance was transferred into the correct account indicated in the agreement. However, after the money was transferred, the goods were no supplied and the money could not be recovered.*

**Solutions**

- ✓ Verification of the documents of financial identification presented by the tenderer;
- ✓ Verification of the establishment of bank guarantees presented by the tenderer;
- ✓ Verification of the motivation which laid at the basis of the change of the account in which were transferred the money from the Contracting Authority.

**3.3 Embezzlement**

This type of fraud may be encountered in any stage of the procurement process.



**CASE EXAMPLE**

*The contractor received an amount of money as advance for accomplishing several works. Yet, the money was used for other purposes, such as settling debts and carrying out other works than those defined by the contract. The actual works for which the contract was concluded with the contracting authority were not accomplished.*

**Red flags**

- ◆ Failure to fulfil the contract may hint to the embezzlement of the funds received by the contractor for fulfilling the contract

**Solutions**

- ✓ Periodical verification of the stages of execution of the contract;
- ✓ Verification of the accounts of the contractor.

**3.4 Subcontracting works without obtaining the approval**

Subcontracting works without obtaining the necessary approvals is another type of violation that appears in the post-tendering phase.

**CASE EXAMPLE**

*The contract concluded with the contracting authority foresaw that the works could not be subcontracted entirely. Only a certain percentage of subcontracting is allowed on condition that the consent of the engineer and/or the approval of the contracting authority are obtained. The contractor subcontracted entirely the works to a company that participated in the tender but was disqualified because it did not meet the necessary conditions regarding the technical capacity. The documents presented to the contracting authority in order to receive the payments certified that the works were executed by the contractor itself, although, in reality, they were executed by the subcontractor. The contractor omitted to inform the contracting authority or the engineer regarding the subcontracting. Such omission could have led to cancelling the contract for the reason of unduly obtaining funds.*

**Solutions**

- ✓ Identification of the actual executor of the contract;
- ✓ Identification of the actual possibilities of the successful tenderer for executing the contract;

- ✓ Verifications regarding the amounts of money paid by the contractor to the subcontractor;
- ✓ Verification of the reason why the subcontractor omitted to notify the contracting authority and those why the subcontractor did not obtain the necessary approvals;
- ✓ Verification of the works effectively executed by the subcontractor.

### ***Red flags***

#### ***General red flags regarding the post-tendering phase***

- ◆ Frequent changes in the contract;
- ◆ The winning bidder starts to ask for more money on the grounds that there were unforeseen complications that could not be foreseen during the signing of the contract and the contracting authority agrees easily;
- ◆ Necessary records for assessing the progress of the works or the delivery of goods are incomplete or missing;
- ◆ The contracting authority accepts works that are obviously incomplete, not related to the contract or not done at all;
- ◆ The contracting authority accepts the reduction of the quality or quantity of goods from that specified in the contract or tender documents;
- ◆ Winning bidder subcontracts its activities to somebody else, especially to somebody that is under influence of the contracting authority, the contracting authority itself or another bidder;
- ◆ Unknown companies with no track record win the contract;
- ◆ The contract is not signed at all, but the implementation begins;
- ◆ Anomalies in the submitted invoices (e.g. amounts exceeding the contract value, wrong contact and banking data, date etc.);
- ◆ The name and legal status of the firm is changed and the desk officer in charge does not question this;
- ◆ Numerous or questionable change orders for a specific contractor are made, and approved by the same project official;
- ◆ In international projects, there is a long, unexplained delay between the announcement of the winning bidder and the signing of a contract (this may indicate that the contractor is refusing to pay or is negotiating on a demand for a bribe);
- ◆ Unusual behaviour of the contractor's employee when dealing with the file: he/she is reluctant to answer management questions about unexplained delays and missing documents or resists government inspection of its books and records;
- ◆ Discrepancies between statements and supporting documentation or site visits;
- ◆ Invoiced items cannot be found in the inventory or elsewhere;
- ◆ Duplicate invoices for the same item; multiple payments of the same invoice;
- ◆ Total amount paid to the contractor exceeds the contract value.

## IV. Horizontal fraud prevention tools

### 4.1 Transparency

The case-law of the Court of Justice has set out a number of conditions that national action must fulfil in order for the conclusion of contracts to be in line with the principles of the Treaty<sup>31</sup>. Transparency is the first general obligation, which translates into a requirement for a sufficient amount of publicity. A certain number of guarantees must then be put in place during the procedure to ensure that the procedure is fair and impartial, that the subject matter of the contract is defined properly and in a non-discriminatory manner, that access is granted on equal terms to economic operators in other Member States, that certificates, grades, diplomas and documents giving evidence of a specific qualification are recognised, that the timescales give all participants enough time to properly assess and prepare their tenders, and, if negotiation is allowed, that all participants have access to the same information and are treated equally. As regards the selection of participants, the number of invited tenderers may be restricted, provided that this is done in a transparent and non-discriminatory manner. As regards the awarding of the contract, the procedural rules initially established must be respected, and the principles of non-discrimination and equal treatment must be observed.

There are inherent risks to public procurement, some of which are inevitable depending on the economic interests at stake, the amount of business involved and the close cooperation that is needed between the public and private sectors throughout public procurement procedures. One of the most effective remedies is to strengthen transparency throughout the entire procurement cycle. Therefore, promoting the use of ICTs during the public procurement process is very important especially in light of the new Directives. No doubt, these tools reduce the risks involved, however ICTs alone cannot eliminate the risks entirely, and hence these risks must be managed.

#### 4.1.1 E-procurement

The effective prevention tool of public control can include:

- Electronisation of the public procurement process;
- Creating an electronic business registry;
- Creating an electronic profile of contracting authorities;
- Establishing a registry of persons who are banned to participate in public procurement;
- Compulsory disclosure of information;
- Establishing a registry of partners of the public sector (before known as registry of beneficial owners).

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<sup>31</sup> Even if the contracts are not, or are not completely, subject to the Directives on public procurement, in an assessment that also applies to contracts above the thresholds.

1) **Electronisation of public procurement**

A) **Pre-tendering phase**

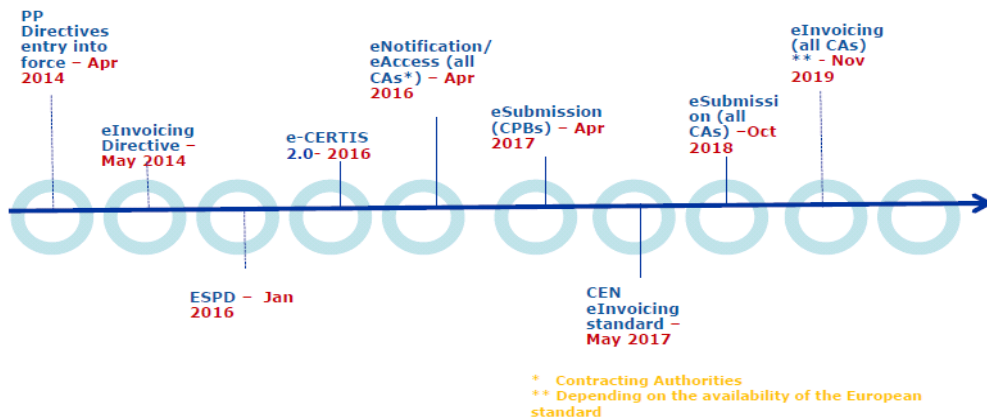
**BEST PRACTICE EXAMPLE**

The development of a national e-Procurement is a main component of the EU/OECD project to provide “Support for the Implementation of the Slovak Public Procurement Reform in the framework of the ESIF ex-ante conditionality action plan”. The project was designed between the Slovak Republic, the European Commission and the OECD to help Slovak Republic enact the country’s Action Plan to satisfy ex-ante conditionality (GEAC PP) for the use of European Structural and Investment Funds (ESIF).

The electronisation of public procurement follows the timetable established by the new EU Procurement Directives.



**Rollout of e-procurement in the EU**



The comprehensive e-Procurement strategy was given the highest priority in terms of content and timing, given its impact in the overall public procurement system for Slovak Republic. The strategy analyses the existing situation while addressing key topics for its successful implementation, including the political ownership, the governance model and the systems interoperability, amongst others, presenting at the end a roadmap towards a phased transition to an end-to-end e-procurement.

Within the pre-tendering phase the above mentioned strategy expects the electronisation of the following processes:

<i>Planning of public procurement</i>	<i>Preparation of public procurement</i>
<b><i>Entry of public procurement request</i></b>	<b><i>Grouping of public procurement requests</i></b>
<b><i>Evaluation of public procurement requests</i></b>	<b><i>Creation of contract notice / tender notice</i></b>
<b><i>Approval</i></b>	<b><i>Consultation process</i></b>
	<b><i>Publishing the contract notice / tender notice</i></b>

**Planning of the procurement**

The annual procurement plan is submitted in electronic form by each contracting authority. Aggregation of individual plans to higher levels and approval process are supported by the system. The estimated contract value is calculated based on predefined rules and with the support of the system, which offers that necessary data from past public procurements.

✓ <i>Estimated contract value calculation</i>	✓ <i>Procurement request approval functionality</i>	✓ <i>Users single registration</i>
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**Preparation of the procurement**

Preparation of the contract notice, tender documents and tender notice is supported by the system. It generates templates applicable to as many cases as possible, as well as it allows for consulting the history of all previous tender documents (including descriptions and technical specifications) which can be reused entirely or partially in new tenders.

The electronic system of public procurement facilitates public consultation; it supports the first voluntary ex-ante control. All information related to the preparation of public procurement is fully traceable in the system. Furthermore, all pieces of information are automatically saved and stored.

✓ <i>Grouping of requests</i>	✓ <i>Tender descriptions templates</i>	✓ <i>Public consultation functionality</i>
✓ <i>Ex – ante controls functionality</i>	✓ <i>English language support improvement</i>	✓ <i>Geography limitation in tenders</i>
✓ <i>Procedures separation – clarity</i>	✓ <i>E-Signature functionality</i>	✓ <i>Notice publishing – TED</i>

**B) Tendering phase**

The contract notice / tender notice shall be automatically sent to the National Journal of public procurement and Official Journal of the EU (TED). The basic information about the tender notice is available in Slovak and English languages.

Economic operators (hereinafter referred to as "EOs") are automatically notified, based on their subscription to specific goods, services or works categories. The EOs submit their offers fully electronically. EOs can use the European single procurement document (hereinafter referred to as "ESPD") for providing compliance to required certifications. EOs do not need to register for each tender they participate in, they use the credentials provided to them during their initial registration to the EO National Registry. If ESPD is not used, the required certificates are transferred automatically from the source national systems, as the system of public procurement is integrated with these. Blacklisted EOs are not allowed to participate.

Automatic certification check (either through ESPD or through the electronic submission of documents) is performed during the participation request phase and, if not complete, the EO is not allowed to submit a tender. EOs use e-Signature to confirm the validity of their submitted documents. No special (i.e. non-commonly available) software is required for EOs to submit their tenders.

Questions by the EOs are submitted electronically and answers by the contracting authorities are also shared in electronic form. All information exchange (Q&As) is recorded in the system. The offers are evaluated with the support of the system. All ratings, intermediate results, comments and total scores are recorded in the system.

If the procedure is e-Auction, then the proposed winning tenderer is automatically decided at the end of the auction. As soon as there is a proposed winner, the implementation of the second ex-ante control (control before the signing of the contract) takes place, supported by the system.

✓ <i>Tender evaluation functionality</i>	✓ <i>EO initial certification</i>	✓ <i>Control before the signing of contract</i>
✓ <i>Integration with national records</i>	✓ <i>e-Signature functionality</i>	✓ <i>EO unified certification</i>
✓ <i>ESPD integration &amp; adoption</i>	✓ <i>EO unified blacklist</i>	✓ <i>e Catalog tenders evaluation &amp; processing</i>
✓ <i>Financial statements register integration</i>	✓ <i>e- Catalog proposal support</i>	✓ <i>e-Certis integration</i>

**C) Post-tendering phase**

The entire procedure after the end of public procurement consists of the following sub-operations:

<i>Contracts creation</i>	<i>Contracts execution</i>
<i>Contract compilation and creation</i>	<i>Delivery of contract products / subject of contract</i>
<i>Contract finalization</i>	<i>Acceptance of contract products / subject of contract</i>
	<i>Receipt – Approval – Acceptance of invoices</i>
	<i>Payment orders &amp; payment execution</i>

**Contracts creation**

After all pre-contract checks are successfully completed; the contract is prepared in the system and signed electronically by the contracting authority and the EO. The contract is published automatically at the adequate repositories, National Journal of public procurement and Central Registry of Contracts. The list of tenderers and results are published. The contract is available both in electronic form and on paper as well (printed from electronic), both forms are officially valid.

✓ <i>Contract creation functionality</i>	✓ <i>Paper contract and e-Contract availability</i>	✓ <i>Minimum valid tenders</i>
✓ <i>Automatically publishing of tenders result</i>		

**Contracts execution**

Electronically generated orders are submitted (if applicable) to the EO according to the contract terms i.e. by the framework agreement. The EO delivers the goods / services / works to the contracting authority according to the orders. Delivery notes are registered in the system. Format acceptance of the contract deliverables by the contracting authority is registered in the system. The EO sends the related invoices through e-Invoicing. A three-way matching is performed in the system (order, delivery note, and invoice) to verify the consistency of all documents recorded. Approval of invoices is recorded in the system.

Payment orders are electronically generated. E-payment is the preferred payment execution method. Payment orders are transmitted to banks that transfer the appropriate amounts to the EOs' accounts. When all payments have been executed and after all contract items were checked, the contract and the related procurement procedure is closed. Then the evaluation of the EO will follow.

✓ <i>e-Orders functionality</i>	✓ <i>Invoice management functionality</i>	✓ <i>e-Invoicing functionality</i>
✓ <i>Payment management functionality</i>	✓ <i>Integration to contracting authority systems</i>	✓ <i>e-Payments functionality</i>

**Service to contractors**

EOs who have an active contract with a contracting authority can monitor the contract execution in the system, e.g. quantities they have delivered, quantities accepted by the contracting authority, quantities remaining to be delivered, invoices submitted and paid or unpaid, payment order, payments executed. This helps especially EOs that do not have their own systems for such monitoring, but also all EOs in checking the consistency between their own records and those of the contracting authority.

EOs can submit their invoices in electronic format (e-Invoicing).

✓ <i>e-Invoicing functionality</i>		
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**Analysis and data collection**

All documents are submitted electronically and managed electronically. All revisions procedures are managed electronically. Objections are submitted using electronic forms, decisions on the objections are sent to EO in electronic form and all further communication is electronic. All communication is registered and timestamped.

Database with detailed actual and historical e-Procurement data is available for all stakeholders who need to have access, e.g. contracting authorities, managing authorities, central purchasing body. Each stakeholder may have different access level. The procurement database stores information from all e-Procurement systems and all platforms if more than one platform is available. Flexible search facility is provided for all stakeholders to easily retrieve information in the Database. The “open data” standards are supported and access is provided to all entities with systems that can connect and retrieve data for performing their own analysis.

A flexible business intelligence (hereinafter referred to as "BI") tool for multidimensional analysis of the procurement data is available to those who have access to

the Procurement Database. The BI implements the calculation of a set of key performance indicators measuring the performance of Public Procurement in various areas.

A Knowledge database has been setup, for the use of contracting authorities and managing authorities who wish to share valuable information, good practices, exceptional cases (e.g. price fixing, fraud, and bid rigging) and experience.

✓ <i>BI component</i>	✓ <i>PP information – Open Data</i>	✓ <i>Public procurement information search tool</i>
✓ <i>PP information search for managing authorities - quick</i>	✓ <i>Knowledge database</i>	✓ <i>e-Forms: e-Proposals functionality</i>
✓ <i>e-Forms: e-Decisions functionality</i>		

**BEST PRACTICE EXAMPLE**

*The Estonian e-procurement environment was launched on 2 February 2011 in order to provide innovative workspace for contracting authorities for organising public procurements and for tenderers for participating in public procurements. The environment consists of an information portal where all relevant procurement information is gathered and of a Procurement Register through which contracting authorities can publish procurements and tenderers can participate therein. Already in 2015, 80% of all state procurement projects in Estonia were conducted through this environment. There is also a new State Procurement Act being developed that requires all state procurement to be conducted as e-procurement by 2018.*

*This e-environment is not only meant for state procurement. From May 2016 it can also be used for other projects, especially in case of the EU funded projects where the same private company is both the beneficiary and contracting authority of a project and has to comply with the so called three bids requirement. The transparency offered by the e-environment can result in significant cost savings by eliminating possibilities of fraud. The bidders or the beneficiaries cannot alter already submitted information without a trace, such as submitting documents retrospectively and manipulating them is much more difficult. In addition to that, the e-procurement also offers cost savings by simplifying information exchange and offering better value for money by increasing competition. A beneficiary can also use this environment voluntarily.*

*The Estonian Environmental Investment Centre started to require that the beneficiaries of most EU funded projects (that had to ask for three bids for a good or service) publish their procurement information in this e-environment. As a result, the final project cost was often just 50% of the initial indicative offers submitted by the beneficiaries outside of this environment. In several cases the application for EU funding was withdrawn altogether after the beneficiaries became aware of that requirement thus indicating that there was something wrong in their initial application.*



### **BEST PRACTICE EXAMPLE**

*E-Procurement has been adopted as a top priority for the Public Procurement in Greece, which constitutes a distinct set of Actions also in the national procurement strategy. This priority is based on the commonly accepted benefits of e-procurement in organisational terms of planning, logistics etc., as well as in terms of transparency and accountability in the context of fight against fraud and corruption.*

*Within this framework, different IT systems and platforms were designed to be complementary and interoperable with each other:*

- 1. The National Electronic Public Procurement System - E.S.I.D.I.S. is an integrated Information System developed by the General Secretariat of Commerce (GGE). It serves the bidding process throughout the different stages and the monitoring of contracts when the budget is more than EUR 60 thousand excl. VAT. The system has inter-alia functions related to the preparation and publication of the notice of tender, submission of tenders, evaluation and contract award and it supports all different types of tendering process including the electronic auction.*
- 2. The Central Electronic Registry for Public Procurement - K.I.M.D.I.S. is a data entry platform. The contracting authorities and public bodies involved to the Public Procurement enter all the necessary information on the purpose of collection, processing, reporting and publishing. The data entry is obligatory for all contracts of an estimated value equal or higher than EUR 1 000 excl. VAT.*
- 3. A Central online Lottery System has been in operation since March 2017 in order to ensure transparency and fairness in the process of direct awards. Direct awards is an option for the Contracting Authorities of the Public Sector, when the estimated value of the contract is equal to or less than the amount of EUR 20 thousand excl. VAT. Although direct award is a useful tool to respond rapidly and flexibly to exceptional and urgent needs of small projects, the process is vulnerable to repetitive and abusive application. The Lottery System Information ensures that the contract will be awarded to a random contractor chosen from a list of eligible suppliers.*

**2) Electronic business registry**

**BEST PRACTICE EXAMPLE**

*Since 1 February 2007, the Slovak Republic has implemented the electronic version of the business registry, which is publicly available and its use is free of charge. The business registry is managed by the registry court. The information in the business registry is updated in two days interval and they are also available in English version. Electronic business registry allows a general public control, as it can examine and identify the potential conflict of interests between contracting authorities and tenderers. It includes not only access to the current status of a company, but also to all changes regarding the company since the date of its first registration.*

**3) Electronic profile of contracting authorities**

**BEST PRACTICE EXAMPLE**

*The Public Procurement Office in Slovakia implemented the electronic profile of the contracting authority on 1 March 2014. Electronic profile of contracting authority is free of charge and publicly available on the web site of PPO. It constitutes another useful prevention instrument against fraud, as it is impossible to send notices to the National Journal of public procurement without a created electronic profile. This implies that the contracting authority can't validly start the public procurement procedure. Electronic profile of the contracting authority is an effective control tool, because it contains the whole documentation of the public procedure. The electronic profile is a very useful tool for the public control, because its functionality, which allows a backward control of all public procedures realized by the contracting authority.*

**4) Registry of persons banned on participation in public procurement**

Another useful prevention tool is the registry of persons ban on participation in public procurement. The registry contains primarily the economic operators for which the Public Procurement Office finally decided to impose a ban on participation in public procurement. In Slovakia, the PPO is obliged to put a legal person into this registry, if the final judgment of court condemned it and imposed a ban on it for participation in public procurement. This registry is also electronic and publicly available on the web site of PPO.

- The Law on Public Procurement of the Republic of Lithuania article No. 151 lays down the obligation for contracting authorities to perform at least 50 % of public procurement common value by the Central Portal of Public Procurement – it increases visibility of public procurement, transparency, it is more comfortable for suppliers to check new public procurements and it also helps both suppliers and contracting

authorities check history of their actions. It must be noticed, that The Law on Public Procurement implements Directive 2014/24/ES and its purpose is to stimulate the conducting of public procurement by electronic means (procurement execution not by electronic means is possible only in some cases);

- The Law on Public Procurement lay down an opportunity for contracting authority to reject suppliers proposal if supplier didn't fulfilled its contract or it was a substantial infringement of public procurement contract (called as „black list“) – although this measure is not so popular between contracting authorities, but it was heard response from some contracting authorities, that after this measure of „black lists“ appear – suppliers become more responsible in execution of public procurement contracts. It should be noticed that measure of „black lists“ is laid down in new Directive on Public Procurement that is why it cannot be called as unique.

### **5) *Compulsory disclosure of information***

Mandatory disclosure agreement is a written contract concluded between the obliged persons. The information relates to financial sources managed by the legal entities of public administration, including non-state special-purpose funds, or concerning the management of state property, municipal property, property of higher territorial unit or property of legal entities established by law or the management of European Union funds. The mandatory disclosure agreement is effective on the first day following the publication of the contract. The mandatory disclosure agreement, signed by the obliged person shall be published in the Central Registry of contracts, this obligation shall not apply to the National Bank of Slovak Republic and obliged persons, which are municipalities, higher territorial units, obliged persons who are their budgetary organisation or the contributory organisation, and obliged persons, in which they hold more than 50% of shares. Central registry of contracts is a public list of the mandatory disclosure agreements managed in electronic form by the Government Office of Slovak Republic. Mandatory disclosure agreement, which is not published in the Central Registry of contracts, shall be published on the website of the obliged person who is signing the contract, immediately after the conclusion of a contract or receive of approval, if it is required for the force of the contract.

Pursuant the Slovak law, state entities have a legal obligation to disclose information. The obliged persons are:

- state authorities;
- municipalities;
- higher territorial units;
- legal and natural persons, whom the act give the power to decide above the rights and obligations of natural and legal persons in public service;
- legal persons established by law and legal persons established by public authorities, higher territorial unit or municipality
- legal persons established by the state entities with the legal obligation.

### 6) *Registry of beneficial owners*

The aim of the registry of beneficial owners is to enhance the transparency of the public sources management in public procurement. The contracting authority shall not conclude a public procurement contract with the tenderer or tenderers that are not registered as end users in the registry of beneficial owners managed by the Public Procurement Office. The main reason for this is to ensure that the public procurement contract is concluded only with economic operators that have a known ownership structure up to the level of natural persons. Identification of beneficial owners is very important for increasing of transparency, avoiding the conflict of interest and the fighting against the corruption in public procurement. In the Slovak Republic, the registry of partners of the public sector is managed by the Ministry of Justice. Since 1 February 2017, a new act on registry of partners of the public sector entered into force that covers all contracts financed from public sources. The registry of partners of the public sector has stricter conditions than the previous legislation, since it does not allow the identification of the beneficial owner solely through the declaration. Pursuant the new act the identification and verification of the beneficial owner is carried out by an authorised person, such as by a lawyer, a notary, a bank, an auditor or a tax advisor.

#### 4.1.2 Publication of procurement

- Publicising the operating requirements amongst all interested parties by: a) publishing and recording these requirements in writing; b) ensuring that all potential suppliers are able to obtain clarifications, especially for higher value contracts, and, at the same time, ensuring the answers are made available to a wide audience and recording them in writing.

#### **BEST PRACTICE EXAMPLE**

*In order to make the application process for contracts of work as transparent as possible, every call or invitation for tenders of ESF co-funded projects is published on the ESF website. Moreover, all above threshold calls need to be published online in Austria at the "Lieferanzeiger" of the newspaper "Wiener Zeitung".*

- If a list of suppliers is used, ensuring that: a) the inherent risks to competition and transparency are mitigated, before the decision to use the supplier is made; b) the list is published on the basis of a set of clearly defined and established criteria; c) the list is regularly updated and a specific channel is set up and publicised for interested parties to send their applications, within an appropriate timeframe.
- Ensuring that the specifications are: a) based on identified needs; b) designed in such a way as to prevent prejudicial treatment (preconceived ideas), and written in a clear and understandable way that is non-discriminatory; c) designed with an emphasis on results and not on the methods used, with a view to encouraging innovation and value for money.

- Ensuring that the award criteria are defined in a clear and objective manner: a) using the criterion of the most economically advantageous tender<sup>32</sup>, except in those cases where the criterion of lowest price can be used; b) specifying the relative weighting and giving justification; c) specifying, if appropriate, the extent to which economic, social and environmental criteria are taken into consideration; d) including details of the contracting body's powers to act, such as its power to negotiate, for example, and recording them.
- In order to guarantee an objective and qualified selection of projects, an independent and impartial assessment committee shall be set up that documents all materials related to the awarding of a tender and timely informs the bidders about the decision in written form. In addition, internal procurement or audit departments of the Intermediate Bodies can be seen as further external bodies to audit the decision of the assessment committee, as it is the case in Austria.

### 4.1.3 Risk assessment tools and ICTs

It is advisable to apply national and/or supra-national databases and data-mining tools to prevent fraud in public procurement.

The Commission has developed ARACHNE<sup>33</sup>, an integrated IT tool for data mining and data enrichment aiming at supporting Managing Authorities and Intermediate Bodies in their administrative controls and management checks on European Regional Development Fund, Cohesion Fund and European Social Fund. This is a powerful risk-scoring tool that helps to prevent and detect errors and irregularities among projects, beneficiaries, contracts and contractors.

The tool can help in performing improved ex-ante checks before the signature of grant agreements and contracts based on the calculated risk indicators and affinity diagrams. ARACHNE systematically provides risk-based information on project beneficiaries, contractors and subcontractors during the phases of selection, approval and implementation of operations. In this way, during selection and approval, it is possible to identify risks related to conflict of interest, to non-compliance with State aid rules or to the operational, administrative and financial capacity of companies to undertake operations co-financed by the EU.

Furthermore, during the implementation of operations, several risk indicators provide valuable alerts on potential errors or irregularities for verification areas such as public procurement, eligibility of operations, concentration of projects and stakeholders or performance indicators.

ARACHNE is made available to all Member States. Once the managing authorities decide to use the tool, the European Commission can provide technical support for the implementation and training for the users. The use of the tool is optional, however, is recommended as it can constitute an effective and proportionate anti-fraud measure for instance in light of Article 125.(4)(c) of Regulation (EU) No 1303/2013.

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<sup>32</sup> As laid down in Articles 67 and 68 of Directive 2014/24/EU and in Articles 82 and 83 of Directive 2014/25/EU.

<sup>33</sup> For more information please consult: Arachne charter V1.0 - 2016-01-07:  
<http://ec.europa.eu/social/BlobServlet?docId=14836&langId=en>

### **BEST PRACTICE EXAMPLE**

*Austria and France use ARACHNE in order to identify risks at the level of beneficiaries and consequently develop measures to prevent fraud.*

In the ongoing project implementation process in relation to EU funds, well-trained and thoroughly operating First-Level-Control and Second Level Control can be seen as a major cornerstone to detect possible cases of fraud, document and communicate the critical instances and thereby initiate further actions taken by the national or European bodies. The EU fraud risk assessment tool<sup>34</sup> developed by the European Commission can help in this respect.

Furthermore, it is advisable to develop a risk management information system with the view to analyse and assess the risk of contracting authorities and thereby the risk of procurement. Such a system helps to execute operations of control, as well as to identify problematic areas, which need deeper analysis, organisation of dedicated training, development of guidelines etc. This is the practice e.g. in Lithuania.

## **4.2 Ethics and integrity**

To promote integrity in public procurement by the various institutions, effective fraud prevention relies on the observance of the ethics and integrity principles. In a less rigorous environment, fraud is more likely to occur.

### **4.2.1 Awareness-raising and training**

Awareness-raising and appropriate trainings are crucial to make employees aware of ethics and integrity principles. As conflict of interest constitute a major risk in public procurement, all agencies and bodies involved in the awarding process should sign a personal statement confirming that they are not involved in a conflict of interest situation. However, if there is any suspicion of such a critical situation, employees are obliged to immediately report the case to their superior. Contrary to the mere existence of a conflict of interests, the neglect of reporting can be seen as an illicit behaviour and can lead to legal action. If a case of conflict of interests is identified, the concerned employee has to be immediately excluded from the procedure and instead being replaced by his/her representative. Or, if no representation is available, full transparency throughout the process by documentation and communication of decisions via the electronic platform for legal acts needs to be guaranteed. In certain cases, the procedure might as well have to be reviewed or even dissolved and taken up again. Finally, if it is likely that the behaviour of an employee will lead to a criminal case of fraud or corruption, the corresponding prosecuting authority needs to be contacted.

Measures to prevent conflict of interest, collusion and corruption and to promote integrity could include the following: a) obtaining declarations of private interests from the stakeholders in the procedure and other individuals involved, if applicable; b) ensuring that

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<sup>34</sup> EGESIF 14-0021-00, 16/06/2014

these stakeholders are informed about and receive guidelines on how to deal with conflicts of interest, including restrictions and bans (for example, gifts and handling confidential information); c) ensuring that stakeholders know about the map of identified risks or that they receive the appropriate training and are encouraged to share any concerns and ask for advice from specialists in relation to collusion and corruption; d) promoting a culture of integrity by defining a set of values to be adopted and not merely minimal procedural standards to be followed.<sup>35</sup>

Taking integrity concerns into account during the selection phase: a) obtaining satisfactory evidence of the identity of potential suppliers and subcontractors, including key players with legal power of representation; b) giving weight to integrity pacts to be developed as part of an anti-fraud policy for staff at the contracting body and potential suppliers; c) exclusion of tenderers if they have a criminal conviction<sup>36</sup>.

### **BEST PRACTICE EXAMPLE**

*The Austrian Code of Conduct ("Die VerANTWORTung") was published by the Federal Chancellery in 2012 as a soft law tool in order to raise awareness and prevent corruption in public services. It consists of explanations of common legal regulations in respect of conflicts of interests and corruption and a guidance to avoid conflicts of interests. The document targets a broad audience and is communicated to both executive personnel as well employees across all levels of hierarchy in the public sector. Although it does not contain any new regulation or law it can be seen as input for discussions of standards and measures against corruption and communication for all stakeholders. It deals with issues such as acceptance of gifts, conflicts of interests, partiality or illicit sponsoring. Furthermore the general training of every public employee in Austria includes a module, which covers steps to be taken by employees in order to fight fraud in the public sector.*

#### **4.2.2 Information to the public**

Furthermore, the following activities can serve as prevention against violations of public procurement act as well as for awareness-raising for both contracting authorities and tenderers:

- publishing of the most common violations in public procurement;
- publishing of methodological guidelines;
- publishing methodology of procurement;
- publishing of good practice etc.

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<sup>35</sup> See further *Preventing Corruption in Public Procurement*, OECD, 2016

<sup>36</sup> See in particular, Part III A of the European Single Procurement Document. The form is taken from the Annex to Commission Implementing Regulation (EU) 2016/7, which applies from 18 April 2016 onwards.

### **BEST PRACTICE EXAMPLE**

*Public Procurement Office of Lithuania provides information to the public during office hours on public procurement procedures or via the Central Portal of Public Procurement. Consultations are provided by phone and by email. The Public Procurement Office web page is frequently updated and includes good practise guidelines, such as practical advice how to avoid mistakes of public procurement procedures and how correctly use legal acts in practise.*

*The PPO regularly organises trainings on public procurement procedures as well as opened door days in which both contracting authorities and suppliers may participate. Such occasion provide for new opportunities to have interesting discussion, ask questions, share information, and in general to improve public procurement skills.*

*Periodically there PPO publishes public procurement reviews and analysis by sectors, which helps identifying substantial common problems of sectors and find solutions. In this way one can analyse practises of public procurement contracts and monitor the budged implementation.*

### **4.2.3 Whistle-blower tool**

Another best-practice tool in order to detect cases of fraud and corruption is the Whistle-Blower tool.



**BEST PRACTICE EXAMPLE**

*The whistle-blower tool was launched in 2013 in Austria by the Public Prosecution Office. The aim of the website is to enable investigators of the PPO Office against Corruption and White Collar Crime to get in direct contact with whistle-blowers, meanwhile the anonymity of the latter is ensured. In case the investigators have additional questions based on the submitted information, they can contact the whistle-blower directly. In this case, whistle-blowers are entitled to decide whether they would like to remain anonymous or to identify themselves to the investigators. The tool is set up as an anonymous email system and invites citizens to report suspicious observations in their work or private environment via a link on the website of the Federal Ministry of Justice. The technical implementation of the system guarantees that the source of the submission cannot be traced.*

*There are several specific categories to which information can be submitted, in accordance with Austria's Criminal Code: Corruption, White Collar Crime, Welfare Fraud, Financial Crime, Fraudulent Accounting, Capital-Market Offences, and Money Laundering.*

*The website is a result of far-reaching developments in fighting against corruption. Moreover, after the tool was launched, the awareness of the Austrian judiciary's has changed significantly: the utility of accommodating and encouraging whistle-blowers has been recognised due to serious recent cases of corruption in Austria.*

## 4.3 National strategy for public procurement

### **BEST PRACTICE EXAMPLE**

*Greece set up and adopted a National Strategy for Public Procurement in January 2017. It reflects the political will and determination; the administration's commitment and availability. It is developed by the Hellenic Single Public Procurement Authority with the contribution of different national Authorities, including the General Secretariat Against Corruption/AFCOS and the General Secretariat for Investments and Development (competent for the cohesion policy and the structural funds). The General Secretariat for Commerce is the competent authority for the coordination of its implementation.*

*The strategy is scheduled on a five-year implementation period and it incorporates the following goals, sets of actions and measures:*

- *Reform of the legal framework;*
- *Establishment of a coherent and cohesive system of legal protection;*
- *Reform and rationalisation of the Contracting Authorities Registry and the setting up of new Central Contracting Authorities;*
- *E-procurement by introducing and incorporating innovative and "smart" IT solutions;*
- *Enhancement of provisions for transparency, good governance, innovation, sustainability, environmental protection, and social economy;*
- *Enhancement of access for SME's and the disabled persons;*
- *Upgrade of auditing standards and tools;*
- *Training and certification of personnel working in the field of Public Procurement;*
- *Distinct additional sets of actions related to the high risk sectors of health and public works.*

*The Public Procurement Strategy is complementary to two other intersecting national strategies: the National Anti-Corruption Strategy for the public sector and the National Anti-Fraud Strategy for Structural Actions. These incorporate reforms and measures related inter alia to:*

- *Proactive checks;*
- *Risk assessment and auditing;*
- *Codes of Conduct;*
- *Declaration of Assets;*
- *Reform of Auditing mechanism;*
- *Internal Audits;*
- *Filing Complaints;*
- *Whistle-blowers' protection;*
- *Money laundering.*

## **Annexes**

## Annex 1 – List of reference documents

*Principles for Integrity in Public Procurement, OECD, 2009*

*Preventing Corruption in Public Procurement, OECD, 2016*

*Guidelines for Fighting Bid Rigging in Public Procurement - Helping governments to obtain best value for money, OECD, 2009*

*Fraud and Corruption Awareness Handbook – A handbook for civil servants involved in public procurement, International Bank for Reconstruction and Development/The World Bank, 2013*

*Identifying and Reducing Corruption in Public Procurement in the EU, 2013, OLAF (Study)*

*Public Procurement: costs we pay for corruption, 2013, OLAF (Study): Highlights/focus area: Positive/negative practices; the most important recommendations to all EU and national authorities)*

*Stock-taking of administrative capacity, systems and practices across the EU to ensure the compliance and quality of public procurement involving European Structural and Investment (ESI) Funds, 2016, DG for Regional and Urban Policy (Report) Highlights/focus area: 2.9 Irregularities; 3.7 Audit Authorities; 6.2 Guidance documents; 7.5 Law enforcement; 7.7 Transparency*

*The EU institutions can do more to facilitate access to their public procurement, 2016, European Court of Auditors (Special Report)*

*PUBLIC PROCUREMENT GUIDANCE FOR PRACTITIONERS, 2015, DG for Regional and Urban Policy (Guide)*

*FIGHTING CORRUPTION IN THE EU Meeting business and civil society concerns, 2015, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE (Opinion)*

*Businesses' attitudes towards corruption in the EU, 2015, Eurobarometer, DG for Migration and Home Affairs (Report)*

*Corruption, 2012, Eurobarometer, DG for Migration and Home Affairs (Report)*

### USEFUL LINKS

<https://openknowledge.worldbank.org/handle/10986/18153>

<http://www.oecd.org/gov/public-procurement/>

<http://www.oecd.org/governance/procurement/toolbox/>

<http://www.oecd.org/gov/public-procurement/publications/>

## Annex 2 - Glossary

**Arachne:** a risk-scoring tool that helps to identify, prevent and detect high-risk operations, projects, beneficiaries and contracts or contractors. It aims to provide Member States' authorities involved in management of ESIF with a tool for identifying their highest risk projects.

**Audit:** the review of a body's activities and operations to ensure that it is carrying out the tasks assigned to it and that it is functioning in accordance with the objectives, budgets, rules and standards set in the Strategy. This type of review should be carried out at regular intervals, and will serve to identify deviations that might require corrective action.

**Audit authority:** a national, regional or local government authority or body that is functionally independent of the managing authority and the certifying authority, is designated by the Member State for each operational programme, and is responsible for checking that the management and control system is working as intended.

**Bid rigging:** a particular form of collusion between firms that can adversely affect the outcome of any sale or purchasing process in which bids are submitted.

**Bribery:** promising, offering or giving, by any person, directly or indirectly, of any undue advantage to any person in a position of power (e.g. a public official; a member of a public assembly exercising legislative or administrative powers, or a person who directs a public or private-sector entity or works for such an entity in any capacity), or requesting or receiving by such a person of such undue advantage, for himself or herself or for anyone else, in exchange for that person acting or refraining from acting in the exercise of his or her functions or in breach of his or her duties.<sup>37</sup>

**Conflict of interest:** a situation in which a public official has a private interest such as to influence, or appear to influence, the impartial and objective performance of his or her official duties.<sup>38</sup> Private interest is understood to mean any advantage to himself or herself, to his or her family, close relatives, friends and individuals or organisations with whom he or she has or has had business or political relations. It includes also any liability, whether financial or civil, relating thereto. Under Council Regulation (EC, Euratom) No 966/2012, a conflict of interest exists where the impartial and objective exercise of their role by a person involved in the implementation of the budget or by an internal auditor is compromised for reasons relating to family, emotional life, political or national affinity, economic interest or any other shared interest with the beneficiary.

**Contracting authorities:** the national, regional or local authorities, bodies governed by public law and associations formed by one or more such authorities or one or more such bodies governed by public law.

**Control:** as defined in the Financial Regulation, any measure taken to provide reasonable assurance regarding the effectiveness, efficiency and economy of operations, the reliability of reporting, the safeguarding of assets and information, the prevention, detection and correction of fraud and irregularities and their follow-up, and the adequate management of

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<sup>37</sup> Criminal Law Convention on Corruption, Strasbourg, 27.1.1999.

<sup>38</sup> Council of Europe. Recommendation No R (2000) 10 of the Committee of Ministers to Member States on codes of conduct for public officials, Article 13.

the risks relating to the legality and regularity of the underlying transactions, taking into account the multiannual character of programmes and the nature of the payments concerned. Controls may involve carrying out various checks or implementing any policies and procedures to achieve the objectives described in the first sentence.

**Economic operator:** any natural or legal person or other entity taking part in the implementation of assistance from the Fund, with the exception of a Member State exercising its prerogatives as a public authority. For the purposes of this document, the terms ‘economic entity’ and ‘economic operator’ are considered substantially identical.

**Embezzlement** (diversion of assets): the misappropriation of property or funds legally entrusted to someone in their formal position as an agent or guardian. The UN Convention against Corruption has identified ‘embezzlement, misappropriation or other diversion of property by a public official’ as a corruption offence. However, embezzlement is not necessarily corruption- it can also be fraud (by a single actor)<sup>39</sup>.

**ESIF:** European Structural and Investment Funds.

**European Anti-Fraud Office (OLAF):** the body within the European Commission responsible for combating fraud detrimental to the European Union budget.

**Fight against fraud and corruption:** part of the wider effort to tackle financial and organised crime, specifically, the issue of countering all illegal activities that may adversely affect the financial interests of the EU. The concept is based primarily on Article 325 of the Treaty on the Functioning of the European Union (TFEU), which relates to activities affecting the EU’s financial interests and requires the Council and the European Parliament to adopt measures under the ordinary legislative procedure after consulting the Court of Auditors. Since June 1999, the body tasked with combating fraud has been the European Anti-Fraud Office (OLAF). On the basis of Chapters 4 and 5 of the TFEU, which relate to police and judicial co-operation in criminal matters, Eurojust and Europol also have competence to support Member States in the fight against fraud and corruption.

**Financial interests of the EU:** in accordance with Regulation (EU, EURATOM) No 8383/2013, include revenues, expenditures and assets covered by the EU budget, and those covered by the budgets of the EU’s institutions, bodies, offices and agencies, and the budgets managed and monitored by them.

**Fraud:** is defined under Article 3 Fraud affecting the Union’s financial interests<sup>40</sup>:

- (a) in respect of non-procurement-related expenditure,** any act or omission relating to:
- (i) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the Union, or on its behalf;
  - (ii) non-disclosure of information in violation of a specific obligation, with the same effect; or
  - (iii) the misapplication of such funds or assets for purposes other than those for which they were originally granted;

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<sup>39</sup> Study on corruption in the healthcare sector, HOME/2011/ISEC/PR/047-A2, October 2012.

<sup>40</sup> Article 3 of Directive (EU) 2017/1371 on the fight against fraud to the Union’s financial interests by means of criminal law, 5 July 2017, OJ L 198, 28.7.2017, p. 29–41.

**(b) in respect of procurement-related expenditure**, at least when committed in order to make an unlawful gain for the perpetrator or another by causing a loss to the Union's financial interests, any act or omission relating to:

- (i) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the Union, or on its behalf;
- (ii) non-disclosure of information in violation of a specific obligation, with the same effect; or
- (iii) the misapplication of such funds or assets for purposes other than those for which they were originally granted, which damages the Union's financial interests;

**(c) in respect of revenue other than revenue arising from VAT** own resources referred to in point (d), any act or omission relating to:

- (i) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the Union budget or budgets managed by the Union, or on its behalf;
- (ii) non-disclosure of information in violation of a specific obligation, with the same effect; or
- (iii) misapplication of a legally obtained benefit, with the same effect;

**(d) in respect of revenue arising from VAT** own resources, any act or omission committed in cross-border fraudulent schemes in relation to:

- (i) the use or presentation of false, incorrect or incomplete VAT-related statements or documents, which has as an effect the diminution of the resources of the Union budget;
- (ii) non-disclosure of VAT-related information in violation of a specific obligation, with the same effect; or
- (iii) the presentation of correct VAT-related statements for the purposes of fraudulently disguising the non-payment or wrongful creation of rights to VAT refunds.

**Intentional conduct:**<sup>41</sup> an act committed by a person who in doing so intended to infringe or prejudice an interest protected by law, or was aware that his or her conduct was likely to cause such an infringement or prejudice, and was prepared to accept that consequence, should it occur.

**Irregularity:** According to Article 1 (2) of Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities financial interests, 'irregularity' shall mean any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure.

For the Common Agricultural Policy, Article 2 (1) (g) of Regulation (EU) No 1306/2013 refers to the definition of irregularity contained in Article 1 (2) of regulation (EC, Euratom) No 2988/95.

However, for ESIF, and in accordance with Article 2 (36) of Regulation (EU) No 1303/2013 (Common Provision Regulation), 'irregularity' means any breach of Union law or of national

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<sup>41</sup> By analogy, see Section 15 of Act No 300/2005 (Slovak Criminal Code).

law relating to the application of EU law, resulting from an act or omission by an economic operator involved in the implementation of the Fund, which has, or would have, the effect of prejudicing the EU budget by charging to it an unjustified item of expenditure. The same definition is introduced in Article 2 (16) of the Regulation (EU) No 223/2014 on the Fund for European Aid to the Most Deprived (FEAD).

**Kickback:** a form of negotiated bribery in which a commission is paid to the bribe-taker as an exchange for services rendered. Generally speaking, the remuneration (money, goods or services handed over) is negotiated ahead of time. The kickback varies from other kinds of bribes in that there is implied collusion between the two parties (rather than one party extorting the bribe from the other). The purpose of a kickback is usually to encourage the other party to co-operate in an illegal scheme.<sup>42</sup> The most common form of kickback involves a vendor submitting a fraudulent or inflated invoice (often for goods or services which were not needed, of inferior quality, or both), with an employee of the victim company assisting in securing payment. For his or her assistance in securing payment, the individual receives some sort of recompense (cash, goods or services) or favour (e.g. a job being offered to themselves or a relative). Kickbacks often occur in relation to corruption in the context of procurement.

**Protection of the financial interests of the EU:** ensuring efficiency and transparency in the creation of revenue (agricultural duties, sugar levies, customs duties, VAT revenue and revenue dependent on GDP) for the EU budget; efficiency, effectiveness, frugality and transparency in using this budget and budgets managed by the EU, and in the use of the property owned by the EU, its institutions and bodies.

**Public expenditure:** any public contribution to the financing of operations from the budget of national, regional or local public authorities, the EU budget allocated to ESIF, the budget of public law bodies or the budget of associations of public authorities or of public law bodies. For the purpose of determining the co-financing rate for programmes receiving funding from the European Social Fund, it may also include any financial resources collectively contributed by employers and workers.

**Public private partnership:** a form of co-operation between public bodies and the private sector designed to allow better quality results to be achieved from investment in infrastructure projects or in other areas of public service. Partnerships can deliver public services more effectively as they have the advantage of being able to make use of risk sharing and pooling of private sector expertise and have access to additional sources of capital.

### **Public procurement procedures:**

The six main types of public procurement procedure under the 2014 directives:

- Open procedure. The most often used, accounting for 51 % of all contracts awarded. Offers have to be submitted by a certain date and all admissible offers are evaluated<sup>13</sup>.
- Restricted procedure. Interested suppliers are first asked to provide their qualifications, then a shortlist is drawn up and only the shortlisted suppliers are invited to tender.

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<sup>42</sup> Study on corruption in the healthcare sector, HOME/2011/ISEC/PR/047-A2, October 2012.



- Competitive dialogue. Used for more complex procurements. The procedure involves a dialogue between the contracting authority and potential suppliers, with the aim of identifying and defining the best legal and/or financial set-up of a project to satisfy the contracting authority's needs or objectives.
- Competitive procedure with negotiation. After a call for tender and an initial evaluation, the contracting authority invites its chosen economic operators to submit an initial tender. It then negotiates the initial and all subsequent tenders submitted, except for the final tender, with a view to improving their content.
- Negotiated procedure without publication can be used only in a small number of pre-determined cases. The contracting authority enters into contract negotiations with one or more suppliers.
- Innovation partnership. The contracting authority selects suppliers following an advertisement, and uses a negotiated approach to invite them to submit ideas to develop innovative works, supplies or services aimed at meeting a need for which there is no suitable existing 'product' on the market. The contracting authority can award such partnerships to more than one supplier.

*(EU Financial Regulation)*

- *Open procedure: Standard procedure that may be used for any contract starting with publication of a contract notice in the Official Journal (OJ). Any economic operator who is interested may tender.*
- *Restricted procedure: Standard procedure in two steps starting with publication of a contract notice in the OJ that may be used for any contract. Any interested economic operator may ask to participate, but only those invited may submit a tender that will be evaluated in the second step. A variant of this procedure is the dynamic purchasing system with exclusive use of electronic means.*
- *Competitive procedure with negotiation: A procedure which is similar to the restricted procedure and that may be used only under specific cases regardless of the value of the purchase. The submitted tenders (technical and financial offers) can be negotiated.*
- *Procedures following a call for expressions of interest (CEI): The CEI preselects candidates or registers vendors who may later be invited to submit offers in different procurement procedures.*
- *Negotiated procedure without publication of a contract notice: Exceptional procedure that can only be used in certain cases or circumstances (for example extreme urgency).*  
*Negotiated procedure for middle and low value contracts: The contracting authority must invite economic operators to tender who have shown their interest during ex ante publicity, and can, in addition invite candidates of its choice. For very low value contracts negotiation with a single candidate chosen by the contracting authority is allowed.*
- *Competitive dialogue: Used for complex procurements where the contracting authority is unable to define the means of meeting its needs or of assessing what the market can offer in terms of technical or financial or legal solutions without a dialogue with potential tenderers.*
- *Innovation partnership: Two step procedure for the acquisition of an innovative product that still has to be developed and for which no equivalent product is available on the market.*

- *Design contest: This enables the contracting authority to acquire a plan or design proposed by a jury after a competitive procedure with or without the award of prizes. The winner or winners are then invited to negotiate before signature of the subsequent contract.*

- *Negotiated procedure for building contracts: Building contracts (purchase, long lease, usufruct, leasing, rental or hire purchase, with or without option to buy, of land, existing buildings or other real estate) can be concluded by negotiated procedure without publication of a contract notice, after the local market has been prospected.*

**Red flag:** warning signals, hints, indicators of possible fraud. The existence of a red flag does not mean that fraud exists but that a certain area of activity needs extra attention to exclude or confirm potential fraud. However, some patterns, practices and specific forms of activity are red flags that could signal irregularities or fraud.

**Risk** shall mean potential threat, event(s), activity(ies) or lost opportunities which can lead to irregularity i.e. unjustified item of expenditure, the need for financial corrections or reputational damage to the management and control system body. It can impact the performance of the management and control system body or even the performance of the management and control system as a whole.

**Risk assessment:** one of the steps in the risk management process. It involves measuring two quantities associated with the risk  $R$  — the magnitude of the potential loss  $L$  and the probability  $p$  that the loss will occur.

**Risk management** shall mean a continuous, proactive and systematic process of identifying, assessing, and managing risks in line with the accepted risk levels, carried out at each body of the managing and control system in order to provide reasonable assurance as regards the achievement of the objectives and prevention of frauds.

**Sound financial management:** compliance, on the part of the competent authority when carrying out its activities, with the principle of economy, the principle of efficiency — finding the best ratio between resources employed and results achieved — and the principle of effectiveness in attaining the specific objectives set.

**Suspected fraud:** pursuant to Article 2 of Commission Delegated Regulations (EU) 2015/1970, 2015/1971, 2015/1972 and 2015/1973<sup>43</sup> an irregularity that gives rise to the initiation of administrative or judicial proceedings at national level in order to establish the presence of intentional behaviour, in particular fraud, as referred to in Article 1(1)(a) of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests<sup>44</sup>. Since 2006, Member States have been required to specify whether the irregularity gives rise to a suspicion of fraud.

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<sup>43</sup> JO L 293, 10.11.2016.

<sup>44</sup> The Convention entered into force on 17 October 2002 together with its First Protocol and the Protocol on interpretation of the convention by the Court. The Second Protocol entered into force on 19 May 2009.