

**PROFESSIONAL BUYING ORGANISATIONS,  
SUSTAINABILITY AND COMPETITION IN PUBLIC  
PROCUREMENT PERFORMANCE**

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**ABSTRACT**

The substantial purchasing power of public organizations has been recognized only recently and to-date it is not oriented effectively toward specific strategies. This seems to be linked to the fragmentation of procuring entities. The paper deals with an analysis of the organizational models for collaborative procurement and their role as stimulators of innovation. The aim is to clarify the changing structure of public procurement procedures awarded by Professional Buying Organisations (PBOs) in relation to market-driving, ICT tools, social and environmental strategies.

Purchases aggregation entails reduction of human resources involved in the award procedures, thus allowing them to be assigned the task of monitoring contracts performance and possible infringements. Any breach of contract in the performance phase if not challenged by the procuring entity - who accepts partial or less costly fulfilment-, turns into an amendment to the subject matter of the contract, hence hindering free competition rules and principles. It seems important to allow unsuccessful bidders to have a role in monitoring the execution of the contract, so as to guarantee compliance with the contract conditions set in the award, as well as end users by means of customer satisfaction surveys and monitoring.

## **1. FRAGMENTATION OF PUBLIC CONTRACT AS A LOSS OF PURCHASING POWER OF PROCURING ENTITIES: PROFESSIONAL BUYING ORGANISATIONS AS STRATEGIC TOOLS FOR INNOVATION.**

The public expenditure for goods, services and works takes up a relevant percentage of GDP across the world and one of the key aspects to monitor and assess it is the framing of the contractual autonomy of procuring entities. Government procurement is an important aspect of international trade as the size of the procurement market can reach 10-15% of GDP, and the benefits for domestic and foreign stakeholders in terms of increased competition are considerable (Arrowsmith, Kunzlik 2009)<sup>1</sup>. The public procurement market in the EU, covering all levels of government and public agencies, is estimated to be worth around one-sixth of total GDP in the EU (Poulain, 2009). More specifically, the substantial purchasing power of European public organizations is due to the fact that public procurement represents around 16% of EU's GDP<sup>2</sup> or about €1,800 (Nyiri, Osimo, Özcivelek, Centeno, Cabrera, 2007)<sup>3</sup>.

Nonetheless, an overall vision of public organization strategic power is still missing, probably as a widespread fragmentation of procuring entities is still present. This is often an obstacle to a complete and comprehensive vision of the possible strategies of public procuring policies (Edler, Georghiou, 2007). Thus, the promotion of every form of collaborative procurement to obtain instruments to orient the use of such considerable resources<sup>4</sup> is of the utmost importance.

Generally, every government, local authority and public organisation, utility and agency at any level is endowed with contractual autonomy and can purchase according to the international, European, and national rules depending on the case (Arrowsmith, 2005). This means that a considerable number of separate procuring entities exist (Burgi, 2010). Such entities can carry out single procuring procedures and must assure the necessary professional skills. The value of these single award procedures can be very limited, if we consider, for example, a small Italian mountain community. On the contrary, such value can also be very high for a city hospital (Racca, 2010). The procedure implemented can be the same when the value is above the European threshold, but in both cases the target to achieve is the best value for money as foreseen in the contractual document of the single procuring entity (e.g. in construction, transport, education and healthcare). On the contrary, any form of collaborative procurement and of professional buying organization changes the perspective and can achieve a deeper vision of the

different market conditions and characteristics, and of the possibility to orient innovation or promote sustainability policies.

Various models of collaborative purchases are starting to be implemented. A first step of joint procurements can be possible without any structural change. Procurements are awarded on the basis of a contract of cooperation between several procuring entities (“contractual model”, Racca, 2008). This normally leads collaborative procurement to determine solely a sum of separate procuring procedures or the sum of lots included in them. What can really modify the aim of public procuring activity is the “corporate model”, where a Central Purchasing Body (CPB), also known as Professional Buying Organization (PBO) is created to this aim with separate legal status (Vogel, 2009; Dimitri, Piga, Spagnolo, 2006, 94, 315 et seq.; Bovis, 2008; Chard, Duhs, Houlden, 2008; Arrowsmith, 2009; Knight, Harland, Telgen, Thai, Callender, McKen, 2007). Central Purchasing Bodies (Caranta, 2008, Della Cananea, 2007) are created to purchase goods, works or services for other public administrations without themselves having to comply with the public procurement rules (Cavallo Perin, Casalini, 2009; Comba, Treumer 2010<sup>5</sup>). The European directive on public procurement 18/2004/EC only recently considered that certain centralised purchasing techniques have been developed in Member States<sup>6</sup>. Several contracting authorities are responsible for making acquisitions or awarding public contracts or framework agreements for other contracting authorities (Arrowsmith, 1999). Even if some European countries have created Central Purchasing Bodies and have been using framework agreements for a long time, regulatory rules at European level have been introduced only recently, slowing down experimentation in other countries, including Italy. In view of the large volumes purchased by these organizations, it has been considered that those techniques can help increase competition and streamline public purchasing (Albano, Carpineti, Dini, Giamboni, Russo, Spagnolo, 2007, 13 et seq.). In the light of the above, the directive provided a European definition of Central Purchasing Bodies as a new tool for contracting authorities. A definition has also been given of the conditions under which, in accordance with the principles of non-discrimination and equal treatment, contracting authorities purchasing works, supplies or services through a Central Purchasing Body may be deemed to have complied with the Directive prescriptions<sup>7</sup>. The directive leaves the discretion whether to create Central Purchasing Bodies and the choice of how to use these instruments<sup>8</sup> to Member states. The idea of creating specific entities with the task of procuring for other contracting authorities was normally pursued with the aim of economy of scale and scope<sup>9</sup>. But as the substantial purchasing power of public organizations has been recognized only recently, it has yet to be clarified how such

power can be better used within the professional buying organizations' activities. This is a specific power left to the discretion of each Member State to implement horizontal policies (Arrowsmith, Kunzlik, 2009). It is not always possible to impose mandatory regulations on single procuring entities to pursue specific aims, while it is easier to define objectives of public policies with a network of Professional Buying Organizations. These networks could be initially national, depending on the choices of each legal system, but the most interesting future challenge would be to link in a network different countries' PBOs.

The lack of a demand-side orientation in innovation policy is presently well known not only in European countries (Myoken 2010)<sup>10</sup>. Demand-side innovation policies have been defined as “all public measures to induce innovations and/or speed up diffusion of innovations through increasing the demand for innovations, defining new functional requirement for products and services or better articulating demand” (Edler, Georgiou, 2007)<sup>11</sup>.

Central purchasing bodies or PBO can play a substantial role as stimulators of innovation for undertakings that participate in bids and for their relevant markets as well. At European level the presence of a number of barriers for public organisations to buy innovations is becoming evident. To this aim, the European union<sup>12</sup> is promoting European public procurement networks, and recently three new trans-national specialised networks of public procurers<sup>13</sup> have been launched under the European Union's Lead Market<sup>14</sup> to address this issue. The network will serve the needs of public procurers at all levels – national, regional, metropolitan and local. A common thread to all networks will be to increase their market-specific knowledge of the innovative solutions in some of the lead market sectors. This could lead to developing joint or coordinated public procurement actions.

This is surely a signal of the importance of cooperation among procurement entities of different member States of the European Union. All networks have planned actions to disseminate information about progress made to their sectors' stakeholder communities. Nonetheless, the choice of creating networks between single procuring entities may lead to noteworthy but limited effects. Such option could have indeed a positive outcome even if reduced. The possibility to involve Central Purchasing Bodies in the network would have amplified the results significantly, both in terms of scale of innovation and with reference to public expenditure policies choices, particularly towards sustainable development. Innovation, market-specific knowledge, promotion of participation of bidders from different member States might have been amplified by the widespread of their progress within a larger amount of public

organizations that adhere to Central purchasing bodies framework agreements (Chard, Duhs, Houlden, 2008).

## **2. THE CHANGING STRUCTURE OF A PUBLIC PROCUREMENT PROCEDURE IN A PROFESSIONAL BUYING ORGANISATION: MARKET-DRIVING, ICT TOOLS, SOCIAL AND ENVIRONMENTAL STRATEGIES.**

The presence of the governments in the market does present unique opportunities for them to pursue strategic procurement policies (Edler, Georghiou, 2007; Rothwell, 1984) and influence market behaviour (McCrudden, 2007, 114 et seq.), often neglected due to the fragmentation of procuring entities. The change in public procurement procedure entailed in the activity of Professional Buying Organizations and Central Purchasing bodies consists in the considerable higher overall value and in the further effect of the rationalization of public needs. The procurement process must be preceded by a spend analysis and rationalization and prioritization, or a demand review. When a professional buying organization defines the subject matter of a framework agreement it drives the public administrations to purchase a product or service that might be different from the one they would have bought with a single procurement procedure. The change also influences the relationship with the relevant market as a professional buying organization can choose how to design contract documents in order to address a specific market. This can be envisaged with the definition of smaller lots or single product/service lots to favour SMEs, excluding the possibility of being awarded more lots of the same contract. The organization of framework agreement as any other forms of collaborative procurement can foster competition by crushing cartels and abuse of dominant position (Arrowsmith, 2009; Chard, Duhs, Houlden, 2008)<sup>15</sup>. A professional complex organization can better resist the interests of powerful groups that put pressure on procuring entities and even governments to act in their narrow interest. The discretion and absence of transparency contributes to the risk that procuring entities will succumb to corruption, vote buying, or protectionist pressure (McCrudden, 2007, 118, Garcia, 2009). The high professionalism of such organizations linked with transparency connected with the use of electronic tools and electronic archives that allow comparison of prices, performance, quality and customer satisfaction can counteract said pressures. This policy can be carried out effectively by Professional Buying Organizations considering the high amount of the value of the contract that can involve a considerable number of undertakings. Consequently, the limit to free

competition considered to be a risk involved in the aggregation of purchases can thus be safeguarded (Racca, 2010). This requires in-depth knowledge of the specific market and needs good organizational design and a strategic hierarchy for local, regional, and national procurement.

The aim of promoting competition, transparency and enhanced value for money is consistent and reinforced by the objectives of WTO Agreement on Government Procurement, that shows growing recognition of the contribution of efficient and competitive procurement regimes to development (Anderson, 2007; Marchetti, 2010). Depending on the substantial choices of each country governments' buying power, each national procurement strategy should define which procurement should be national, according to the value and to the characteristics of a product, in order to achieve greater improvement in standards and cost reduction. This proves to be easier when the requirements are broadly similar across several procuring entities; moreover, it will probably face highly concentrated supply markets amongst national and multi-national suppliers (Williams, Chambers, Hills, Dowson, 2008). In this case collaborative procurement at a national level can improve buying power and drive the relevant market to achieve economy of scale and a long-term value for money or other horizontal policies, such as rising social and environmental standards. At regional level a procurement policy can be more flexible and meet local needs and circumstances. The form of collaboration in order to improve collaborative procurement can also be pursued with sub-regional consortia.

Local procurement teams, freed up from the bigger and repetitive procurement procedures, can thus focus on developing local markets and participate in strategic contracts such as PPPs, in order to improve local and sustainable procurement opportunities (Williams, Chambers, Hills, Dowson, 2008). They can also play an important role in checking that national and regional procurement organizations are delivering quality and benefits on their behalf.

Another field where relevant changes take place compared to procurements carried out by single entities is the implementation of the use of ICT tools (Yukins 2009). A professional buying organization can use these instruments for the digitalisation of procuring documents and particularly to implement new procedures of selecting bidders such as e-auctions and framework agreements. To-date the fragmentation of procuring entities has limited their use due to the fact that they are more suitable and affordable for professional buying organizations' complex structures. Nowadays only 5% of public procurements in Europe are carried out by means of electronic procedures (e-procurement), whereas a previous European forecast<sup>16</sup> predicted that all procurements should have been

carried out as through e-procurement instruments by 2010. This aim was the logical outcome to the policy of the European Union<sup>17</sup> as the Directive 18/2004/EC, implemented some new purchasing techniques like framework agreements and electronic auctions to “increase competition and streamline public purchasing, particularly in terms of the savings in time and money which their use will allow”<sup>18</sup>. Nevertheless, these purchasing techniques require procedure standardisation amongst Member States improvement of adequate professional skills and ICT tools – not only in the award procedure, but also in the performance phase. In this regard, a key issue to be solved is the divergent level of technical sophistication and regulation harmonization. (Arrowsmith, 2009; Guijarro, 2009; Graux, Dumortier, 2007). The Governments’ implementation of information technology and suitable electronic communication tools represents an expensive investment that will be balanced with economic savings linked to the dematerialization of procedures, especially if such investments are carried out through professional buying organizations. The interoperability of the different purchasing processes is necessary to maximize the economic and quality’s benefits resulting from the use of framework agreements<sup>19</sup>, electronic auctions and perhaps also dynamic purchasing systems in the future.

The European e-Procurement landscape is characterized by different development models, influenced by the institutional and administrative structure of each country. The main difference is whether or not there is a mandatory National procurement platform. A recent European research has classified the EU27+ in four main groups<sup>20</sup>, even though each country has its own specificities in the use of such instruments. In a first group of countries, the eProcurement policy is centralized and the use of the National Platform is mandatory either for all contracting authorities<sup>21</sup> or solely for national contracting authorities<sup>22</sup>. Such a centrally steered approach encourages centralization and coordination but does not *per se* exclude the development of independent regional, local platforms or private platforms<sup>23</sup>. Nonetheless, the key issue of assessing the number and value of procurements awarded through these platforms is not underlined in this European research. Italy, for example, is included in the first group in which the National Platform is mandatory for national contracting authorities. Anyhow, only around 8% of the value of supplies of good and services are awarded by the national Central Purchasing Body (Consip s.p.a.). Consip s.p.a. is the Italian public procurement agency awarding National Frame Contracts (NFCs), basically, Framework Agreements with one economic operator and all conditions laid down at the outset - and managing the Electronic Marketplace (MEPA) on behalf of the Ministry of Economy and Finance (MEF). By using raw data from the Italian National Statistical Institute (ISTAT) and MEF, Consip’s

Research Unit computed the following ranges for the 2007 and 2008 centralization indices: CI\_2007 is between 4.2% and 5%; CI\_2008 is between 7.4% and 8.9% . (The measure of centralization in year t can be defined as follows:  $CI_t = V_t / \text{Max } V_t$  where,  $V_t$  = value of purchases through (NFC + MEPA) in year t;  $\text{Max } V_t$  = public sector's overall purchases of goods and services that could be handled by the NFCs and MEPA system) (Broggi, 2008). E-procurements are even less. The other procurements are awarded by national entities too, but separately. The mandatory use of the platform is thus overcome<sup>24</sup>.

Development of ICT tools is also very important for the safeguard of transparency, non-discrimination criteria and free competition principle (required by International and European legislation<sup>25</sup>) in transborder public eProcurement (Van Eylen, Oor, Schmitz, 2002). Member States face two considerable problems in their purchasing activity to reach the objectives of the Manchester ministerial declaration of 24 November 2005<sup>26</sup>. First of all, the widespread inability of public authorities, and of undertakings as well, to manage the entire purchasing process electronically. The second challenge is the lack of common standards for electronic data exchange between Member States. This led to a European project pursuing interoperability between different systems of eProcurement: Peppol (Pan-European Public eProcurement On-Line project of Borderless e-Procurement). The project began on May 1, 2008 with an estimated duration of 42 months. Peppol promoted the creation of a consortium of public procurement authorities with 14 participants from 8 different countries (Austria, Denmark, Finland, France, Germany, Hungary, Italy, Norway). Italy participates with 6 different authorities: Ministry of Economy and Finance, Consip S.p.A., National Centre for IT in Public Administration (CNIPA), Intercenter, CSI Piemonte, InfoCamere. On November 1, 2009 Peppol's activity involved 4 other countries (Greece, Portugal, Scotland, Sweden). The aim of this project is to create a pan-European pilot solution to facilitate EU-wide interoperable public eProcurement for SMEs and to improve the opening of the market of goods and services, as the lack of common standards for electronic data exchange is considered at present an obstacle to cross-border participation<sup>27</sup>. The investment and human resources needed to participate in electronic tendering is a structural barrier for the full development of the electronic procurement market, especially among SME's. However, generally, the problem in the development of the electronic public procurement market is not the cost of buying a functioning PC, because most of the businesses that compete in non-electronic public tenders over the threshold values will have a PC for writing tenders. "Lack of cross-border interoperability of electronic signatures creates obstacles to the free movement in the Internal



Market and can prevent confidence in electronic transactions. Several Member States plan to introduce a requirement for an advanced digital signature in relation to electronic procurement, which will create even further obstacles for cross-border electronic procurement”<sup>28</sup>. Peppol serves the purpose of implementing the Commission’s policy to improve e-procurement standards, with a view to facilitating e-communication between all private companies in the EU (in particular Small Medium-sized Enterprises) with all EU governmental institutions for all procurement processes. More specifically, its aim is to improve the interoperability of common e-procurement infrastructure (Kallas, 2008). The project is subdivided into eight work packages including five building blocks that cover the entire procurement process from eTendering to ePayment (eSignature, Virtual Company Dossier, eCatalogue, eDossier, eOrdering, eInvoicing, Solutions architecture, design and validation) temporally divided into 3 phases (design, development, pilot project). It is evident that in this case the involvement of Central Purchasing Bodies could have amplified the effect of the project (Bertini, Vidoni, 2007, 37 et seq.; Piga, Thai, 2007, 63 et seq.; Knight, Harland, Telgen, Thai, Callender, McKen, 2007; Bulow, Klemperer, 1996; Klemperer, 2002; Che, 1993)<sup>29</sup>.

In a wider perspective, the successful use of framework agreements, electronic auctions, and perhaps dynamic purchasing systems, requires a detailed analysis and collection of information on the purchasing needs of the public administrations concerned. Such data should be stored in on-line databases to ensure quick and easy data processing and management<sup>30</sup>. This detailed data collection permits a precise outline of terms and technical specifications of the upcoming procurement, also by means of a more complex framework agreement with more economic operators. This is indeed an important opportunity to ensure transparency, economy of scale and market driving. It may also imply spend analysis and rationalization of costs and the consequent reduction of the range of contracting authorities’ demand. The choice of how to design high value framework agreements contract documents also orients the specific relevant market. This can allow each Member State to favour sustainable production or to foster competition by crushing cartels and defining small lots to be awarded to SMEs.

Creation of networks between procuring entities and Professional Buying Organisations - in particular - may further enhance the varied skills of the public officials involved in public procurement strategies. To that aim, the opportunity for contracting authorities to evaluate a benchmark and to join a contract agreed upon by foreign professional buying entities could be of growing importance. It would imply a transnational cooperation among public authorities in relation to a set benchmark to open up the public procurement market

further on. In the e-procurement model, contracting authorities could directly choose services and products available pursuant to a previous call for tenders issued by national or regional Central Purchasing Bodies, or even by a Professional Buying Organization of a different European country, thus enjoying the benefits arising from the fact that the contracting authority itself does not need to launch a new award procedure, and can obtain the best value for money. Furthermore, contracting authorities could choose among several kinds of goods and services and they could identify the contractual terms that best meet their own needs in compliance with the relevant EC competition rules.

Linkages between procurement and social policies (McCrudden, 2007, 115 et seq.) can surely be further effectively performed by professional organizations rather than by each procuring entity. This can happen when governments make a choice in this direction to favour sustainable development. The aim of such kind of policies implemented through public procurement strategies is not only to pursue value for money, but their objective becomes a kind of “social or environmental value for money” (Racca, 2009). The GPA also explicitly allows the inclusion of non-economic factors – such as environmental and social aspects – in procurement decisions (Turner, 2009). In this perspective, the costs of incorporating secondary considerations can be afforded and often it will not be higher considering a long term evaluation or balancing the connected benefit in driving the private market choices as well (Racca, 2009; Caranta, 2009). As the use of secondary considerations increases, the criteria used by Member States should be compatible to avoid a distortion of the single market and a reduction of EU-wide competition. Having a single set of criteria would considerably reduce the administrative burden for economic operators and for public administrations. Common social and green public procurement criteria would be particularly beneficial for companies operating in more than one Member State as well as SMEs (whose capacity to master differing procurement procedures is limited). Secondary consideration can be formulated as minimum technical specifications that all bids have to comply with.

Secondary considerations may also be incorporated in the award criteria, to stimulate additional sustainable performance without being mandatory and therefore without foreclosing the market for products not reaching the proposed level of performance (Caranta, 2009). Award criteria, if given a significant weighting, may however give an important signal to the market place. Depending on the type of product or service and the number and importance of the other – non social or environmental- award criteria, a weighting of 15 % or more was considered “significant”<sup>31</sup>. Secondary considerations incorporated in public procurement and framework agreements by

Professional Buying Organizations according with the aims of procurement policies of the governments can become a powerful instrument for stimulating innovation and encouraging companies to develop new products with enhanced environmental performance and sustainable development. The prices set in CPBs' open framework agreements can become a benchmark for other contracting authorities and define a standard performance to be required to all bidders (Racca, 2009; Ponzio, 2009)<sup>32</sup>. If the assessment of the benchmark includes social or environmental considerations these will become part of the benchmark parameter for other procuring entities and a way to drive the market choices of production.

It could also be interesting to consider the possibility for European contracting authorities to adhere to other countries' CPBs open framework agreements - particularly the French and British ones, which are often very advantageous - in order to benefit from better conditions and save a considerable amount of money. As a result, procuring entities could save money to meet the costs of secondary considerations, compensating such costs, if any, in other contracts, or in other social policies. The funds saved as a result of the cut in prices and structural costs can then be assigned to police possible breaches of contract and delivery delays by economic operators. A stricter control of the execution phase can be achieved through the complex contractual structure of framework agreements that entail the possibility of choosing more than one bidder and promote forms of competition among them in the performance stage. Nonetheless, collaborative procurement still has a long way to go both at international level and in Europe in order to attain the necessary savings whilst assuring a sustainable quality of works, goods and services.

### **3. THE SAFEGUARD OF COMPETITION PRINCIPLE IN THE AWARD PROCEDURE AND IN THE PERFORMANCE PHASE.**

All the efforts to assure transparency, competition and objective criteria in decision-making, as fundamental principle and instruments to prevent corruption, must be assured from the beginning of the procurement procedure to the conclusion of the performance phase. Otherwise, after the award, the procuring entity may accept a different and less costly performance in violation of free competition and equal treatment principle (Cavallo Perin-Racca, 2010, a/b). This can happen as a consequence of malice and corruption (Garcia, 2009; Auriol, 2006; Transparency International, 2006) (i.e. offering, living, receiving or soliciting, directly or indirectly, anything of value to

influence the action of a public official in the selection procedure and in the contract execution), but frequently it can be due to ineffective instruments in the performance phase that do not ensure the achievement of the public interest as defined in the contract conditions. When serious infringements are tolerated by the public procuring entities with no application of penalties or termination of the contract, a violation of the competition principle takes place, as another bidder could have assured not only a better tender but a real better performance. For this reason, the performance phase must be well monitored in order to prevent infringements that can nullify the entire complex and objective awarding phase of public procurement. Any violations, change, or worsening of the quality of the execution of the awarded contract may entail further profit for the winner, a loss for the public procurement entities and subsequently give rise to a change in the contractual equilibrium and in the conditions set in the award. This entails a violation of the competition principle as one of the fundamentals (Garcia, 2009) of public procurement. More specifically: fairness, openness, competition, transparency, accountability and adequate conflict management.

In accordance with these principles a bidder has the right to obtain the evaluation of its offer and this right does not end with the award procedure but must be safeguarded in the subsequent phase as well. The winning undertaking will have the obligation to perform exactly what it included in its offer and evaluated as the best offer in accordance with the award criteria. The rejected bidders should have the certainty that they lost because of the winner's better offer and its better execution of the contract. Otherwise, the fair competition principle would be undermined and the whole equilibrium of the ranking of the bids would be undermined as well. Only the fairness in the execution phase and perfect compliance with contract conditions set in the award ensure a real and effective competition in the entire process of public procurement. This key issue has not been sufficiently pointed out neither at a national, European nor international level. At European level all the attention is focused on the award procedure and the performance phase is nearly forgotten. This limits the choice of undertakings taking part in public procurement procedures and drains public confidence in public procurement fairness. If the winner has the possibility of not performing correctly what he promised in its offer, without being subject to claims, the idea that procuring procedures are "arranged" or "compromised" (Garcia, 2009) in favour of cartel or other cooperating groups will spread further. For the above reasons, starting from the Italian experience, but within a wider perspective, we are presently studying the ways to face this problem (Cavallo Perin, Racca, 2010, a/b). More specifically, since the economic operators that participated in the bid have an in-depth knowledge of

the field of the subject matter of the contract, they could be the ideal subjects to be involved in the control of the exact execution of the contract of the winning bidder<sup>33</sup>. Allowing unsuccessful bidders to have an active role in the control of the execution of contracts would serve as a further effective instrument to guarantee the winning bidder's compliance with contract conditions. Rejected bidders also have a specific right to be safeguarded. More specifically, the subsequent bidder in the ranking has the right, in Italy, to replace the winner in case of serious infringement of the contract (Palmieri, 2008; Fertitta, 2005)<sup>34</sup>. For these reasons, differently from other contracts, third parties can claim the infringement of the procurement conditions set in the contract, as they have participated to an award procedure that must safeguard the principles of non discrimination, equal treatment, transparency and effective competition. Moreover, the control of the exact execution of the contract could also be carried out with the contribution of end users by means of customer satisfaction surveys and monitoring.

Public officials would not be led to accept contractual infringements thus better securing the principle of free competition and the quality of contractual performances. Thus, the importance of improving professionalism in public procurement officials becomes evident. This can be obtained with the improvement of collaborative procurement, with networks of procuring entities and particularly with networks of Professional Buying Organizations with considerable and varied professional skills. Such organizations can cooperate to achieve and spread the best experiences and practices in public procurement. This will assure value for money, the benefits of competition in the market as a whole and attainment of the public interest also in order to reach a "social and environmental value for money" to achieve a better and sustainable quality of life for citizens and taxpayers, "the true stakeholders in any procurement system" (Garcia, 2009)<sup>35</sup>.

#### **4. CONCLUSIONS**

The article points out the substantial purchasing power of public organizations and the important chances to orient it towards specific strategies. This requires the overcoming of the fragmentation of procuring entities and the enhancement of collaborative procurement. The joint management of aggregated demand by Professional buying organizations (PBOs) as well as by European Central purchasing bodies (CPBs) can permit a better use of digital convergence, sharing of information and archives to deliver true value for money and even to drive the market to sustainable aims. Each organizational model for collaborative procurement can play a role as stimulator of

innovation for undertakings that participate in bids and for their relevant markets as well. Public procurement award procedures issued by Professional Buying Organisations entails new method in defining the public needs and consequently the public demand. The choice of how to design high value framework agreements' contract documents affects also the economic operators' behaviours in the relevant markets. This can allow each Member State to favour sustainable production or to foster competition by crushing cartels and defining small lots to be awarded to SMEs. The establishment of networks among procuring entities and Professional Buying Organisations particularly may further enhance public officials' varied skills involved in public procurement strategies. To that aim, the opportunity for contracting authorities to evaluate the PBOs' benchmarks and to join a contract agreed upon by foreign Professional buying entities could be of growing importance. It would imply a transnational cooperation among public authorities to set shared benchmarks and thus open up the public procurement market further on. Purchases aggregation entails reduction of human resources involved in the award procedures thus allowing - with a view to improving the control of the performance phase - their assignment to the task of monitoring contracts performance and possible infringements.

Competition is usually regarded as a principle of the awarding phase of public procurement. Yet, it is not taken into due account in the procurement process as a whole, particularly in the execution phase. The "monopoly" that follows the awarding of a contract is not always combined with effective provisions to safeguard and to effectively police the exact performance of the contract. There are few effective instruments to ensure the achievement of the public interest as defined in the contract documents. Therefore the contractual equilibrium can be distorted after the awarding of the contract, thereby undermining the principle of free competition. Serious infringements can be tolerated by the public authorities that do not apply the penalties or do not state the termination of the contract. Only the fairness in the execution ensures competition in the entire process of public procurement. The economic operators that participated in the award procedure could be involved in the control of the exact execution of the contract by the winning bidder. This would serve as a further effective instrument to guarantee compliance with contract conditions. Any breach of contract in the performance phase, if not challenged by the procuring entity - who accepts partial or less costly fulfilment -, turns into an amendment to the subject matter of the contract, hence hindering free competition principles. More specifically the subsequent bidder in the ranking (second best bidder) could have the right to replace the winner in case of serious infringements of the contract. Consequently, bidders

would have a specific interest in monitoring the execution of the contract, so as to guarantee compliance with the contract conditions set in the award. This would assure an effective competition in the performance stage too, as the winner that doesn't perform the contract correctly could be replaced. In conclusion, public bodies would not be led to accept contractual infringements thus better securing the principle of free competition and the quality of contractual performances, for the benefit of competition in the market as a whole and as a mean to achieve the public interest and to improve the quality of life of citizens.

Gabriella M. RACCA

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## NOTES

<sup>1</sup> For a comparative analysis of public expenditure see: Commission (Ec) A report on the functioning of public procurement markets in the EU: benefits from the application of EU directives and challenges for the future, 3 February 2004; Commission (Ec) Commission staff working paper – implementation report SEC(2003)33, 14 January 2003.

<sup>2</sup> Commission (Ec), 'Public procurement for a better environment' COM(2008) 400 Final, 16 July 2008, "Each year European public authorities spend the equivalent of 16% of the EU Gross Domestic Product on the purchase of goods, such as office equipment, building components and transport vehicles; services, such as buildings maintenance, transport services, cleaning and catering services and works. Public procurement can shape production and consumption trends and a significant demand from public authorities for "greener" goods will create or enlarge markets for environmentally friendly products and services. By doing so, it will also provide incentives for companies to develop environmental technologies."

<sup>3</sup> Public procurement in the EU as a whole accounted for 16.3% of GDP in 2002, at around 1,500 billion Euros. However, there is a wide variation among the Member States of between 11.9% (Italy) and 21.5% (the Netherlands).

According to both EC and OECD statistical data, regional and local (sub-central) governments have a larger share in total procurement than central governments. EC (1997), also quoted in the recent expert group report on public procurement for research and innovation [EC (2005d)], estimates that "procurement by sub-central governments is larger than procurement by central governments by an estimated margin of two to three times depending on the ratios measured". These facts highlight the importance of sub-central government in procurement policy, and pinpoint the reasons behind the high fragmentation of implementing public procurement processes".

<sup>4</sup> Commission (Ec), 'European code of best practices facilitating access by SMEs to public procurement contracts' SEC(2008) 2193, 25 June 2008.

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<sup>5</sup> If the arrangement is between a purchaser and an “in-house entity” which satisfies the Teckal line of ECJ case law, *Teckal v Comune di Viano* (C-107/98) [1999] E.C.R. I-8121 at [51]; then the public procurement rules will not apply, otherwise, it will be necessary to consider whether the procuring entity can make purchases from a central purchasing body (CPB) or under a framework agreement. See art. 11 (2) of European Parliament and of the Council Directive 18/2004 of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] O.J. L134/114: “Contracting authorities which purchase works, supplies and/or services from or through a central purchasing body in the cases set out in Article 1(10) shall be deemed to have complied with this Directive insofar as the central purchasing body has complied with it”. See also art. 29 (2) of European Parliament and of the Council Directive 17/2004 of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] O.J. L123/1: “Contracting entities which purchase works, supplies and/or services from or through a central purchasing body in the cases set out in Article 1(8) shall be deemed to have complied with this Directive insofar as the central purchasing body has complied with it or, where appropriate, with Directive 2004/18/EC”.

<sup>6</sup> Whereas n. 15 European Parliament and Council Directive 18/2004 [2004] O.J. L134/114.

<sup>7</sup> Art. 1, para. 10 European Parliament and Council Directive 18/2004 [2004] O.J. L134/114 A “central purchasing body” is a contracting authority which: – acquires supplies and/or services intended for contracting authorities or – awards public contracts or concludes framework agreements for works, supplies or services intended for contracting authorities.

<sup>8</sup> Whereas n. 23 European Parliament and of the Council Directive 17/2004 of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] O.J. L123/1.

<sup>9</sup> DG internal policies of the UE ‘The Applicability of Internal Market rules for Inter-Communal Co-operations’ September 2006.

<sup>10</sup> The Japanese government discussed the significance of an innovation orientated toward a new approach for public procurement. And through comparison with procurement strategies employed by the US, the UK and the Netherlands it proposes: (1) intermediary professional actors to appraise prototype technologies; (2) interactive dialogues between suppliers and users before tendering; (3) fair and transparent competition focussing on new social and economic values of emerging technologies are the absolute essence of public procurement for innovation.

<sup>11</sup> It may be seen that demand-side policies can be presented in four main groupings, systemic policies, regulation, public procurement and stimulation of private demand.

<sup>12</sup> Commission (EC), DG Enterprise and Industry, “The lead market initiative” (2009).

<sup>13</sup> The three trans-national network are: “Enprotex” with the Objective to spark innovation of protective textiles through public procurement to meet the future needs of fire and rescue services using a number of methodologies including; establishing and sustaining a specialised platform of European



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Network of Public Procurement Organisations; developing cooperation among public procurers; providing an interface with both end-users and manufacturers. In particular, the project will aim to provide industry with forward commitments for the procurement of protective textiles products so as to encourage innovation in the sector (about “Enprotex” see: <<http://www.firebuy.gov.uk/home.aspx>>. “Sci-Network” for help public authorities exploit and drive sustainable innovations in public construction and regeneration projects across Europe by bringing a large group of public authorities together with other key stakeholders in the construction sector with the aim to help combat the cross-border fragmentation of the sector. Specific working groups will focus on 3 topics: renovation of existing building stock, innovative building materials, and the use of life-cycle analysis (LCA) and life-cycle costing (LCC) (about “Sci-Network” see <<http://www.iclei.org/index.php?id=796>>). “Lcb-Healthcare” seeks to stimulate innovative low-carbon building solutions for the healthcare sector. A platform for a network of public procurement stakeholders that wish to be proactive in stimulating innovative low-carbon building solutions for the healthcare sector will be created. Demonstration pilots will be done in all consortium countries aiming at collating, testing and developing further the tools created and enabling the spread of best practices (about “Lcb-Healthcare” see <http://www.bis.gov.uk/>).

<sup>14</sup> The public procurement networks became operational in September 2009. This is the first time that the Commission funds specialised procurement networks dedicated to innovation. Each receives about €1 million in funding.

<sup>15</sup> Commission (Ec), ‘European code of best practices facilitating access by SMEs to public procurement contracts’ SEC(2008) 2193, 25 June 2008.

<sup>16</sup> The Manchester ministerial declaration of 24 November 2005 defines the following target: “By 2010 all public administrations across Europe will have the capability of carrying out 100 % of their procurement electronically and at least 50 % of public procurement above the EU public procurement threshold will be carried out electronically”. The PEPPOL project is strongly supporting this target.

<sup>17</sup> Commission (Ec) ‘Public procurement – Commission sets out Action Plan to move public purchasing in Europe online’ IP/05/66, 19 January 2005. See also: Commission (Ec) ‘Action plan for the implementation of the legal framework for electronic public procurement’, 13 December 2004.

<sup>18</sup> Whereas n. 12 European Parliament and Council Directive 18/2004 [2004] O.J. L134/114..

<sup>19</sup> For an analysis of framework agreements see: Commission (Ec) ‘Explanatory note – framework agreements -classic directive’ CC/2005/03 14 July 2005.

<sup>20</sup> Commission (Ec), Smarter, Faster, Better eGovernment, 8th Benchmark Measurement, November 2009 il documento contiene anche un’analisi dello sviluppo del benchmark dell’eProcurement nei paesi dell’UE.

<sup>21</sup> Luxembourg, Lithuania, Malta, Slovenia, Switzerland.

<sup>22</sup> Austria, France, Italy and Portugal.

<sup>23</sup> For the other three group: “2) Mandatory National eProcurement *Portal*: it is mandatory to publish tenders on a single National Portal (Estonia, Bulgaria, Cyprus, Czech Republic, Croatia, Finland and Romania). This obligation can be bound to certain criteria: European tenders, or tenders

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above a national threshold, or tenders within a specific sector such as ICT. Portals normally do not provide for eProcurement services beyond publication. Notice that countries in this group may also have a national eProcurement platform in place which can be used by authorities on a voluntary basis. 3) Non-Mandatory National eProcurement *Platform/Portal*: there is a National eProcurement infrastructure, whose use is recommended but not mandatory for contracting authorities (Ireland, Denmark, Germany, UK, Poland, Sweden, Norway, Hungary, Netherlands, Belgium, Latvia, Slovakia and Spain). There are some nuances within this group of countries. For example, Belgium and The Netherlands both strongly encourage the publication of notices on the central portal and provide a wide range of services. Ireland mandates the use of the national platform only for ICT products and services. In Spain the National eProcurement Platform is mandatory for Central Government Contracting authorities. In the case of Germany and The UK, the eProcurement infrastructure is strongly decentralized. In the Scandinavian countries, The Netherlands and The UK public service providers are in competition with private ones to provide eProcurement services. For example, The UK's National eProcurement Portal 'Buying solutions' offers consulting support and links to more than 600 service providers. 4) No National eProcurement *Platform/Portal* (yet): This is the case for Greece and Iceland only": Commission (Ec), Smarter, Faster, Better eGovernment, 8th Benchmark Measurement, November 2009. The document presents also an analysis of the development of the eProcurement benchmark in EU Member States.

<sup>24</sup> Commission (Ec), Smarter, Faster, Better eGovernment, 8th Benchmark Measurement, November 2009. There is no doubt that these initiatives have created the conditions for a shift from traditional to electronic procurement in the entire EU.

<sup>25</sup> Commission (Ec) 'Modernising ICT Standardisation in the EU – The Way Forward' WHITE PAPER COM(2009) 324 final, 3 July 2009, Standardisation awareness thus needs to be considered early in the research life cycle and should be an integral part of strategic research agendas developed by European Technology Platforms (ETPs).

<sup>26</sup> Ministerial Declaration November 24, 2005, Manchester on the occasion of the Ministerial eGovernment Conference "Transforming Public Services" of the United Kingdom Presidency of the European Council and of the European Commission, Ministers of European Union (EU) Member States, Accession States and Candidate Countries and Ministers of the European Free Trade Area (EFTA) Countries, responsible for eGovernment policy, under the chairmanship of Minister Jim Murphy, representing the UK Presidency and in the presence of European Commissioner for Information Society and Media Mrs Viviane Reding. When on affirm that "by 2010 all public administrations across Europe will have the capability of carrying out 100 % of their procurement electronically and at least 50 % of public procurement above the EU public procurement threshold will be carried out electronically."

<sup>27</sup> About the e-Procurement development models and for a study of e-Procurement Benchmark in EU Member State see: Commission (Ec), Smarter, Faster, Better eGovernment, 8th Benchmark Measurement, November 2009.

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<sup>28</sup> Commission (Ec) Study on Impact Assessment: Action Plan on electronic Public Procurement, December 2004.

<sup>29</sup> In Italy, CONSIP S.p.A. can also provide for ICT tools for *e-procurement* and can coordinate the choices of the regions to assure easy interoperability. Art. 1, para. 450 of Law n. 296 of December 27, 2006. The establishment of new regional CPBs cannot be separated from the use of technological platforms suitable to run electronic auctions and award procedures as contemplated by the EC directives. The improvement of ICT tools could also be assured by the development of e-marketplaces (MEPA) – managed in Italy by CONSIP S.p.A.

<sup>30</sup> Art. 2, para. 569 et seq. of Law n. 244 of December 24, 2007.

<sup>31</sup> Commission (Ec), ‘Public procurement for a better environment’ COM(2008) 400 Final, 16 July 2008

<sup>32</sup> It will be more difficult for the single contracting authority to incorporate social or environmental clauses, as, at the end of the awarding procedure, as a congruence assessment of the quality/price ratio relative to the framework agreement of the central purchasing body must be carried out, as provided by the Italian law: Art. 26, clause III, law 488 of 1999, in replacement, first, of art. 3, clause 166, of *Law no. 350 of December 24, 2003*, and later of art. 1, *L.D. no. 168 of July 12, 2004*, as amended by the relative law of conversion no. 191 of 30.7.2004: “Public administrations may resort to the agreements stipulated pursuant to clause 1, or use its parameters of price-quality, as maximum limits, for the purchase of goods and services pursuant to *Presidential Decree no. 101 of April 4, 2002*. Stipulation of a contract in violation of this clause is cause of administrative liability; for purposes of calculation of the fiscal damage account shall be taken of the difference between the price foreseen in the agreements and that indicated in the contract. The provisions of this clause do not apply to municipalities with a population of less than 1,000 inhabitants and mountain municipalities with fewer than 5,000 inhabitants”. 3a. The provisions with which the public administrations shall resolve to proceed independently for individual purchases of goods and services are communicated to the structures and offices in charge of management control, for the exercise of functions of surveillance and control, also pursuant to clause 4. Any employee who has signed the contract shall enclose a specific declaration certifying, pursuant to and by the effects of art. 47 and thereafter of *Presidential Decree no. 445 of December 28, 2000, and subsequent amendments*, respect of the provisions of clause 3.

<sup>33</sup> Peppol’s project Virtual Company Dossier will provide interoperable solutions for economic operators in any European country to utilise company information already registered somewhere in order to submit certificates and attestations electronically to any procurement agency. [http://www.peppol.eu/work\\_in\\_progress/wp2-virtual-company-dossier/vision](http://www.peppol.eu/work_in_progress/wp2-virtual-company-dossier/vision).

<sup>34</sup> D. lgs, 12 aprile 2006, n. 163, art. 140. See also: Cons. St., sez. VI, 7 gennaio 2008, n. 4, in *Foro amministrativo - C.d.S.*, 2008, 866, with comment of Palmieri, V.

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