

## The “Morality” of Practices in Public Procurement

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**Abstract:** In the sector of public procurement we can observe many typical attitudes of a living society. The most interesting part of tendering procedures is the award of a contract. The choice of a contractor is sometimes a matter of “pure” competition, but it happens to be also a result of a less transparent procedure. Such rewards are difficult to discover and certainly the main purpose for avoiding the foreseen procedure is profit making. However, the existence of these practices in a sector (public procurement) which constitutes 14% of global GPA should not only be examined as an illegal attitude, but also as a dangerous one, because the award of contracts in sensitive areas such as health, security or education is required to receive the highest protection. Having the phenomenon of corruption described above as a basis, this paper attempts to reach the source of the problem. Which reasons could urge a contracting authority to decide and award a contract to a person or a company which does not fulfil all the requirements? Is this only a problem of human greed or is it something even bigger?

**Key words:** public procurement; competition; transparency; corruption

**JEL codes:** K120, O1, O35

### 1. Preamble

The sector of public procurement in the EU represents around 14% of GDP and it may refer to contracts of goods, services and public works. The main Regulations for public procurement<sup>1</sup> have been recently changed and have come in force on 18th April 2016. This change had been necessary for the modernization of Regulations on public procurement and has been combined with a new Directive, which has been issued for the first time on the award of concession contracts. In order to deepen in the practices, we should firstly define the notion of a contract governed by the rules of public procurement.

Public procurement could be called the process that any government departments or agencies of the public sector choose in order to purchase goods, services and works. Only candidates of the private sector (e.g., companies) have the right to participate in the tender procedures. This choice of seeking offers from the private sector can be explained by the necessity for innovation, competition and quality. Taking into consideration that every contracting authority prefers to find the most qualified and effective contractor, when fair competition is established, the possibilities for achieving this goal are maximized.

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<sup>1</sup> Directive 2014/24/EU (“Classical” Directive on contracts for public works, public supply and public service, which has replaced the Directive 2004/18/EC) and Directive 2014/25/EU coordinating the procurement of entities operating in the water, energy, transport and postal services sectors.

From all the above, it is presumed the significance of this sector in the growth of a society. What cannot be directly estimated is the social impact that a public contract may have on a specific society and especially, in the field of public works, because for these contracts the implementation of European Directives is obligatory. For example, there are several public contracts for which the Directives are not applicable because the value of auctioned contract is under the thresholds<sup>2</sup>. For this type of contracts only the national law is applicable.

During the period of application of the previous Directives on public procurement, it has become necessary to have an electronic system for public procurement, in order to simplify all procedures. E-procurement, as it is called, contributes to a more transparent and eligible for all contracting parties system. There are several European rules which boost this initiative<sup>3</sup>.

This paper focuses on how the tendencies in the sector of public procurement are related to the quality of a society. In other words, it will be proved that public procurement has not only a crucial economic aspect, but a social, as well. The hypothesis will be supported by several examples, deriving from past infringement cases. In the conclusion, there are proposals for reinforcing the “social profile” of tendering procedures and giving the opportunity to SMEs for an easier access in European Market.

## **2. The Main Procurement Procedures**

### **2.1 A sense of “Morality”**

The concept of “morality” is connected with this of ethics and it refers to basic moral principles, such as transparency and fairness, which regulate the procurement procedures. What is more important to understand, is the fact that “morality” corresponds to a certain type of conduct, which includes commitments to respect the rules, to avoid any practices against law in order to take advantage of others and in general, behave in a way that ensures the protection of rights for all the persons participating in a procedure.

During all procurement procedures, there are cases when parties face moral dilemmas that are never easy to be resolved. A first restraint to these dilemmas is the budget of the contract without a doubt. In other words, the offer should be under the cost of the tendered contract. In case of the criterion of the “lowest price”, for example, do we have always the expected quality of the final product?

Moreover, the limits between a fair and a self-righteous procedure are sometimes really subtle. And somewhere in the middle, we can find also the protection of human rights. The violation of human rights may happen in any sector of every society, in business, in employment and in procurement, as well<sup>4</sup>. That is why the rules for public procurement should have a social approach. Respectively, in Europe of the free circulation of products, services and persons, there are already rules for procedures, more “green” or “moral”, so that a fair distribution of public resources is established. Of course, these rules should be adapted to the legislation of every member-state<sup>5</sup>, in order to have more effective measures.

When, the sense of “morality”, as described above is missing, we have to face another phenomenon in the

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<sup>2</sup> Commission Delegated Regulation (EU) 2015/2170 amending Directive 2014/24 of the European Parliament and of the Council in respect of the application thresholds for the procedures for the award of contracts.

<sup>3</sup> Directive 2014/55/EU on electronic invoicing in public procurement, but also Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC.

<sup>4</sup> Global Business Initiative on human rights, State of play, the Corporate responsibility to respect human rights in Business Relationships, p.49.

<sup>5</sup> For example, Netherlands by its constant strategy in public procurement and UK by governmental Act on the protection of human rights in the sector of public procurement, they have developed a protective system in this field.

world of public procurement, which is called corruption. It refers to this kind of personal or collective effort of an authority or a powerful party through illegitimate means to satisfy mainly selfish interests (A. Papakonstantinou, 2014). This is a general definition, which can be specified depending on the procurement procedure that the contracting authority chooses. Most of times, it is pretty tough to find out who is responsible for such disorders.

In Greece, the phenomenon of corruption is not something new and unfortunately it is commonly found in business activities. In addition, the rules for public procurement in Greece are not codified properly, causing as a result difficulties in their implementation. According to report<sup>6</sup> of OECD concerning corruption, the establishment of an independent authority had been necessary for monitoring the procurement procedures. Consequently, the Hellenic Authority for Public Procurement (HSPPA) had been established by the Greek 4013/2011 and it created two main registers, where all the contracting authorities should publish the forecoming contracts. At the same time, there are other decentralized authorities, which have also the task of monitoring the procurement procedures and have the right to intervene, if any rule is violated.

There are three types of procurement procedures: the open, the restricted and the negotiated procedures. The choice of the appropriate procedure depends on the provisions of national legislation. However, in all cases, transparency and equal participation for all economic operators should be assured. It happens, though, sometimes the conflict of interests to be too strong that the access of smaller economic factors may become difficult.

Another procedure of awarding a public contract is concessions. This procedure refers to partnerships between the public sector and mostly private companies. Until today the rules on concession have been complex and different in every member state. For the first time with the Directive 2014/23/EU the award of concession contracts has a common legal frame that gives the opportunity for a better monitoring of European public procurement, if the contracts overcome the threshold<sup>7</sup>.

## **2.2 “Dark” Places in Open Procedures**

Open procedure is a tendering process whereby any interested economic operator may participate. Although an open procedure should guarantee the transparency, it happens to have lack in publicity and mainly at the national level. For example, there are public authorities, which are not informed for their obligation to publish all the stages of ongoing procurement procedures<sup>8</sup> (the decision, the contract notice and finally the award). As a result, many interested parties are excluded in the beginning and they lose their right to submit a tender. There are, also, other cases when a contracting authority “forget” to publish all the stages of a procedure and consequently the interested parties are not well informed for business opportunities.

Moreover, another controversial issue in this procurement procedure may be the choice of criteria for a contract. According to the Directives, the contract award criteria should be precisely defined and guide the participants to prepare their tenders. Most confusing of the criteria is this one seeking for the “most economically advantageous” tender. In this case, there should be a balance between price and quality and also the evaluation of other factors, such as the life cycle of the products used. Furthermore, the “environmental” criterion is very important, especially in constructions. The reports in estimating the above features of a tender are not always clear in the award decision.

Even if the criteria in a procurement procedure are clear and the interested economic sectors are well

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<sup>6</sup> <http://www.oecd.org/daf/anti-bribery/Greecephase3reportEN.pdf>.

<sup>7</sup> For all works and services concessions over the amount of 5.225.000,00 Euros.

<sup>8</sup> In Greece, it is obligatory for the public contracting authorities to publish any procurement procedure for supplies over 1000,00 Euros.

informed, they may not have in time all the necessary documents for participating. In other words, when a contract notice is published, only the obligatory fields by law are completed and if an interested bidder has any questions, there is usually a form whereby clarifications are given. However, it happens that these guidelines are given after the deadline for submission of tenders. As a result, their tenders may be excluded.

Having, also, an open procedure does not mean that a contracting authority cannot communicate with possible suppliers (for services, goods or even works). That is to say, that there is no way to control if this has happened during the procurement procedure. This is a disfunction of the rules and a lack in supervision, very difficult to be covered by the existing legal frame. This certain practice inevitably leads to the violation of free access to all economic operators and convert an open procedure to a restricted one.

### **2.3 “Alterations” in Restricted Procedures**

If a contracting authority prefers to limit the number of candidates, it may follow a restricted procedure with publication of a contract notice. In this case, the limitation of the candidates should take place using objective criteria. In fact, every interested economic operator may ask to participate in the procedure, but finally the contracting authority invites those which are more suitable according to the criteria to submit a tender. The restricted procedure may be chosen by the contracting authority, in case that the contract may be implemented only by companies specialized.

The most ambiguous stage of a restricted procedure is the list of the invited candidates and how it results. In this list, the contracting authority chooses and at the same time excludes economic operators for the award of the contract. Although the criteria are defined in the contract notice, there is no publicity in the preparation of the list and as a result, any “dilemma” about the invitation to specific economic operators is never known. On the contrary, the contracting authorities avoid having any risk in this decision and it is very common to observe the same cooperations even in different types of contracts. Consequently, the right of fair competition is eliminated and such procedures have nothing to contribute in transparency.

On the one hand, it is expected by the contracting authorities to choose the most “secure path” for materializing a project. On the other hand, the choice of a certain partner for the most of the contracts, gives no chance to innovation or competition for a better result. This fact jeopardizes the effectiveness of the contracts, as we have one main player in the procedure. However, it is necessary to enrich the list of economic operators, in order to have a proper functioning of public finance.

Furthermore, another lack of publicity and control can be found in such procedures concerning the prices of supplies. Especially in cases of important public work contracts<sup>9</sup>, the tenders that are finally submitted by the “chosen” partners cannot be compared or checked with other competitors in the same sector. It is common though the results of such cooperations, when the works do not function well or they are not suitable to serve their purpose.

This phenomenon of having a well-known partner in certain projects may cause bigger problems in society. In particular, this kind of companies may obtain such power that sometimes leads to manipulation of public finance, not only in public procurement awards, but also in stock exchange for example. This situation creates opportunities for economic operators that may detour the legal system and take advantage of this “gap” in control.

From all the above, a restricted procedure in public procurement may have multiple impacts on the economy of a society. The lack of competition is one of the problems, but not the only one, as it has been proved that

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<sup>9</sup> The construction of a bridge, court or national road.

corruption may blossom also in a competitive environment (M. Celentani, Juan-Jose Ganuza, 2002). So, the respect of the rules belongs to a field not so economical, but sociological, as the observation of a not so “moral” conduct, and even corruption has the character of a “fake” ethic that undermines the public good and underlines the personal interests (R. Nielsen, 2001).

#### **2.4 The Case of Negotiated or Procedures of Competitive Dialogue**

There is a special type of procedure called “negotiated” or this one that takes place with competitive dialogue. The procedure of competitive dialogue is used when the contracts are complex and the corresponding requirements in quality and technical features are extremely specific<sup>10</sup>. In this procedure, the contracting authority publishes the notice of contract and defines its needs. It is important to be noted that in these cases, only the criterion of the most economically advantageous tender is used. After the contract notice and within the relevant deadline, there is a dialogue between the contracting authority and the interested economic operators, in order to clarify the most suitable “modus operandi” for the requirements of the contract.

During this dialogue, the right of equality among the candidates should be ensured and the responsible one for this task is the contracting authority. In other words, the information given to every participant should be the same, in a way that does not affect confidentiality among tenderers. The competitive dialogue is completed only when the contracting authority finds a suitable proposal for the needs of the project.

In the negotiated procedures, we should distinguish two possibilities. In the first one, there is a published contract notice, whereas in the second one there is no obligation to publish the contract notice. In particular, this procedure is exceptional and is usually followed by the contracting authority, when a prior open or restricted procedure has not been successful and there were no candidates who fulfilled the requirements of the contract. It is also very common to have a negotiated procedure without a contract notice, in cases of additional works for example in public works or public services contracts<sup>11</sup>.

In the above procedures is more likely to find a less “moral” conduct, because in the beginning they lack of transparency. How easily, for example, can a contracting authority be controlled for an urgent need in supplies?<sup>12</sup> In such situations, it is imperative for the contracting authority to follow a negotiated procedure. Moreover, this procedure is the only way to procure special categories of products, such as very important from scientific or technological aspect. In fact, it is inevitable to overcome the risk of corruption in these cases, as the provisions of law allow contracting authorities to use this procedure.

Closing the brief presentation of the different procedures in procurement, it results that no procedure may secure the protection of equality among all candidates and transparency. What should be underlined is that lack of these two basic principles is not only an economical issue, but concerns all the factors involved and the quality of society in general. Furthermore, the consequences in a contract, which has been awarded without the legal process, may be disastrous even for human lives (in case of the health sector). The only solution derives from the “heart” of society, and especially people working in economic operators and contracting authorities, but not only them. Everybody can contribute to a more “moral” procurement system by learning the rules and having the relevant information. Nowadays, there are particular websites, where there are all the ongoing procedures and all people

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<sup>10</sup> For example contracts for medical high-tech products or constructions based on specific supplies, which a few companies may provide.

<sup>11</sup> Articles 31 and 32 of the Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public services contracts.

<sup>12</sup> A typical example in Greece is the public procurement in national hospitals.

may have access to these<sup>13</sup>. In any case, everyone should feel responsible for these cases and has the right and obligation to declare them to the competent authority.

### **3. Infringement Procedure**

#### **3.1 The Legal Scope**

According to the article 258 TFEU<sup>14</sup>, if the Commission realizes an infringement of European Law or a complaint is reported, it tries to resolve the underlying problem by procedure of a structured dialogue with the Member State. In fact, the Commission requests from the Member State (MS) to provide all information on the possible infringement and if the MS fails to comply with EU law, the Commission may impose financial sanctions, as well.

Greece has participated many times in this procedure and it has been very difficult sometimes to comply with the underlying rules. In particular, there are many cases in the sector of public procurement, but most of them are resolved before the procedure to the Court of Justice, which is the last stage of the infringement procedure. However, the letter of formal notice is followed most of times by the reasoned opinion of the Commission.

From the year 2010 until 2013, in Greece there has been a reduction in the infringement cases, but then in 2014<sup>15</sup> there has been a rise. From the examples presented below, it can be assumed that procurement contracts on supplies and services are more vulnerable than work contracts. In fact, the rules for supplies are applied proportionally to contracts of services and this may cause inconvenience to the proper functioning of procurement.

#### **3.2 Cases of Infringement Procedures**

##### **3.2.1 Contract of Information System**

A first case of violation of Directive 2004/18/EC refers to the award of contract for ICT by a Greek contracting authority<sup>16</sup>. In 2007, Greek authorities awarded a contract to a company after a public procurement procedure for the development of a national portal, which citizens and companies may use for their dealing with Greek authorities. Thereafter, a new information system should be used by the staff in Centers for citizen's services (KEP), such as providing birth certificates or licences, and a supplementary contract of 1.5 million Euros should be awarded in order to develop this information system. The Greek authorities, instead of publishing a contract notice, they awarded the contract to the same company of the national portal, following a negotiated procedure.

However, according to the Commission's view, the development of the portal in the first contract has nothing in common with the development of the information system of KEP and as a result, the negotiated procedure should not have been followed by the Greek authorities. On the contrary, a new open tender should have taken place, so that all interested companies are informed and submit a tender. Consequently, the contract has been directly awarded, violating the principles of transparency and equal treatment. As Greece has not corresponded to the formal notice of Commission in 2010, the infringement procedure reached the second stage with a reasoned opinion.

In the above case, we can observe the failure of choosing a negotiated procedure, as the Greek contracting

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<sup>13</sup> <http://www.ted.europa.eu>, [http://ec.europa.eu/growth/single-market/public-procurement/index\\_en.htm](http://ec.europa.eu/growth/single-market/public-procurement/index_en.htm), and there are relevant sites for every member-state.

<sup>14</sup> Treaty on the Functioning of the European Union.

<sup>15</sup> Staff working document 2014 Annual Report (Part II: Member States).

<sup>16</sup> Case IP/10/1441 of Commission.

authorities considered the second contract relevant to the first one and gave no publicity to the second procurement procedure. Monitoring this practice, it is difficult to decide how this choice has been made, if it has happened on purpose or was a result of ignorance of the underlying rules. Both explanations underline the lack of control in procurement procedures and at the same time the complexity of relevant rules that should become clearer for their application.

### 3.2.2 Contracts for Cadastral Mapping and Planning Services

Another case in Greece, which has reached the last stage of infringement procedure by referring the violation of procurement rules to the Court of Justice took place in 2009<sup>17</sup>. In particular, the Commission has decided to refer Greece over the direct award of public service contracts for cadastral mapping and planning services of Vassilika, Kassandra, Egnatia and Arethousa. Before that, Greece has failed to comply with European rules even after the reasoned opinion of the Commission.

In the beginning, the municipalities of the above areas awarded directly six public service contracts for cadastral mapping and planning services to one company, but soon afterwards, the object of these contracts had been broadened and as a consequence, their value increased, in some of them even 300%. Such an increase in the scope of procurement rules should be considered significant and means a substantial change of the contract. In this case, the contracting authorities should launch an open or restricted procedure. Instead of that, Greek authorities awarded directly the new contracts to the same company.

As a result, all the possibly interested companies were excluded from participating in the tender and this practice directly violates the European procurement rules and has an important impact on the access of SMEs in procurement procedures. So Greece, after the above decision of the Commission, faces financial sanctions that may be converted in public debt, which finally will influence all Greek citizens.

### 3.2.3 Contracts in Sector of Public Health

In the vulnerable sector of public health, we may refer to a case, in which Court of Justice has imposed financial penalties on Greece<sup>18</sup>, as it has breached the rules on public procurement by not respecting the safety standards for medical products during the award of contracts. Since 2003, Commission was informed that several public hospitals in Greece rejected offers from suppliers of medical equipment bearing CE certification marking, which is guarantee that the products fulfill the environmental, health and safety requirements. Products with a CE marking cannot be accepted only in case of suspected forgeries or concerns of public health. Otherwise, the contracting authority should award the relevant contract to companies fulfilling the safety requirements. Moreover, it was found that the technical specifications in the tender notices have been discriminatory, excluding any interested supplier of CE-certified medical products from submitting a tender. As a result, all supply contracts have been awarded by using a procedure that does not comply with the European rules of public procurement and secures the principles of fair competition and transparency.

### 3.2.4 Contracts in Software Services

In 2009, the Greek Social Security Foundation (IKA) followed an open procedure for the provision of services for an operating information system. The contracting authority (IKA) set in the necessary requirements for the bidders to have project references for successfully implemented contracts in Greece which has the same profile as the one for the IKA. However, such a condition in a tender leads to a direct discrimination of interested

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<sup>17</sup> Case IP/10/1242 of Commission.

<sup>18</sup> Case IP/10/1552 of Commission and relevant Court judgment C-489/06.

candidates and as a consequence, violates the European rules (Directive 2004/18) for public procurement.

This practice of the Greek contracting authority did not allow to companies of Member-States with similar services to participate in the procedure and minimized unlawfully the competition that should be established in a procurement procedure. The Commission has already started the infringement procedure, by sending to Greece a reasoned opinion, as the public money<sup>19</sup> were not spent in the most effective way and the Greek taxpayers had not the opportunity to get greater value of it awarding the contracts to other companies with less money.

#### **4. The Social Cost of Public Procurement**

What is evident in the cases presented, is that although there is a legal frame in public procurement, there are also important problems in implementation of the rules. These problems derive from people and economic operators involved in the procedures, which appear to be “unlawfully” careless. In fact, people take always their decisions comparing the cost and benefit in every situation for them and as a result, their conduct may change if the interests are modified. In other words, people correspond to the relevant motives.

However, persons may react to the same motives in a different way. That is why, the conduct cannot be foreseen, even though the economic and legal frame is strictly defined. The sector of public procurement has a prominent place in the economy of a society. Main priority of public procurement rules is to achieve the best value for money and of course this may happen not only by using the criterion of “lowest price”, but also by the “most economically advantageous” tender.

The procurement rules may function better if they were developed in a social-centered scheme (Swedberg R., 2003), where the law is subordinate to the development of society (including the economy), rather than having law and its evolution as primary notion, independent from society. According to this approach, all changes in law depend usually on what happens in a society, including the economy. So the social aspect of award a contract should be neglected.

In particular, there are five main principles in procurement procedures that should be respected, such as non-discrimination on grounds of nationality, transparency, equal treatment of candidates, proportionality and free movement of goods, services and workers. Based on these principles, the tender notices issued by the contracting authorities should ensure the minimum standards for a fair competition. The search for best value for money in procurement demands a balanced combination between quality and cost for the contracting authority. Every contract should adjust the requirements of the tendering service or product and establish a minimum quality standard.

This social aspect of procurement is usually referred as “social added value” that the contracting authorities should include in every procedure. A typical example could be the sustainable procurement procedures in cases of urban regeneration projects. The contracting authority should spend time for planning the tender notice, in order to serve a society for many years and provide environmental protection and economic efficiency at the same time. Thanks to this approach, many social, economic and environmental objectives can be fulfilled, but firstly the public sector authorities should be organized. A solution would be the better cooperation in public sector, which may raise the standards and maximize the efficiency of the contracts. The European procurement Directives are the guidelines for the proper award of contracts, but every Member State, may encode in national laws the “temper” of every given society, which inevitably influences the procurement procedures.

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<sup>19</sup> The value of the contract was almost 7.5 million Euros.



It would be also helpful the national laws to give motives to the contracting authorities, if they choose economic operators which can correspond better to the needs of sustainability described above. In fact, many small and medium size companies or social enterprises do not even have the opportunity to take part in procurement procedures, because they are not usually informed about the ongoing tenders or they believe that larger and more experienced companies will be chosen and their offer will against all odds. This practice, though, undermines the innovation that is necessary to the evolution of a society and prevents certain economic operators from having access in internal market.

Furthermore, during the selection phase, the contracting authority is obliged to conduct transparently and fairly without any suspected discriminatory practice. If the requirements are defined clearly in the tender notice, then the candidates can submit a legitimate offer and the contracting authority is limited to exclude potential suppliers only for specific reasons, such as criminal offence related to the company’s activities. It is, also, very important the correct performance of the contract after its award. In other words, the contract is not completed by the award, but the contracting authority should have a permanent cooperation with the selected company, so that the procurement may contribute to the social objectives.

## 5. Conclusions

This presentation attempts to outline the hidden relation between public procurement and society and the embracing of economy in society. Procurement procedures are vital for the evolution of a society and as a consequence, they should function in the most effective way. It is remarkable, though, that there is a detailed legal frame for this sector, but its implementation is insufficient.

Besides, one of the main targets of Europe 2020 strategy is to invest in sustainable growth and activate private financial resources. A branch of this strategy could definitely be public procurement of Research and Development (R&D) products or pre-commercial procurement<sup>20</sup>. This whole background is more ready than ever to adopt social policy during all the phases of public procurement.

As global population is increasing and consumption rates are growing rapidly, the resources should be preserved and the idea of sustainable and “greener” procurement procedures seems very promising. Within these terms, all players will benefit from the procedures and in particular, the public authorities will be able to promote social, economic and environmental well-being, and at the same time all citizens will be ensured that public money are invested in long-term projects. As a result, the trust of people to government policies is restored and the society is more aware of the benefits of the sustainable procurement procedures. In this struggle, there are several barriers that should be overcome and the most important of them are the organization and cooperation among the public procurement operators. Greece has made a great progress in this sector by the establishment of the Hellenic Public Procurement Agency in 2011 and the creation of electronic registers for the monitoring of public procurement procedures. However, it is necessary all the contracting authorities to have the required training in order to be informed and capable of elaborating the stages of every given procedure. Finally, the presence of human is inevitable in all economic phenomena, such as public procurement and it should be taken into consideration from the very first time of planning the relevant strategies.

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<sup>20</sup> Pre-Commercial Procurement (PCP) is the procurement of research and development of new innovative solutions before they are commercially available. PCP works in conjunction with Public procurement of Innovative Solutions (PPI).

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