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INTERTWINING OF UNREASONABLY LOW-COST TENDERS AND PERFORMANCE OF PUBLIC PROCUREMENT CONTRACTS IN TECHNOLOGY PROCUREMENT

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ABSTRACT

Due to the general principles of public procurement, the European Union directives[1] and the Public Procurement Act[2] of Estonia, the procurer is obliged to comply with transparency, proportionality, equal treatment, guaranteeing competition and economical use of financial resources. According to the general procurement rules, unreasonably low value of a tender is considered to be unacceptable and in case of doubt, the procurer must identify whether it is an underbid and then justify its decision.[3]

Author of the current paper opened the subject of abnormally low tenders for research in her bachelor thesis paper.[4] Adopted in 2014 public procurement directives give to both sides of the contract the possibility to modify the contract during its performance on certain conditions.[5] Within the current paper the author goes deeper on the subject matter of the bid pricing and investigates possible collusions of low or unreasonably low tenders and modifications of the the contract in the field of the technology tenders.

This paper will tackle the question if there are possible collusions of pricing the bids and afterwards modifying the contract in a past couple of years in Estonia. In this work, the author uses a qualitative method, the analysis of legal scientific literature, court decisions and questionnaire.

Keywords: public procurement, abnormally low tender, underbid, competition, contract modification, transparency, European Union, Estonia

[1] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, art 3; Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, art 18; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, art 36

[2] Public Procurement Act RT I, 01.07.2017, 1, § 3

[3] *Ibid,* § 115

[4] Sonk-Bahharev, N. (2020). Põhjendamatult madala maksumusega pakkumuste määramise õiguslikud vahendid – nende olemasolu või puudumine. *Bakalaureusetöö*. Tallinna Tehnikaülikool

[5] Directive 2014/23/EU, *supra nota* 1, art 43; Directive 2014/24/EU, *supra nota* 1, art 72; Directive 2014/25/EU, *supra nota* 1, art 89

INTRODUCTION

One of the general principles for public procurement entities is to use funds economically and expediently and award the public contract based on the best price-quality ratio.[6] Lowest price of the tender may *prima facie* seem to serve the purpose of the general principle of the procurement. The author has investigated the issue of the abnormally low tender in her bachelor paper and within current paper is trying to analyse deeper the existance of potential issue of transparency specifically through investigating different practices of conracting authority bodies, signed and modified public procurement contracts, court cases and questionnaire. Current paper examines possible obsticals connected with determination of abnormally low bids, possible modification of the contract and, as a final result, proper performance of the contract in the field of the technology tenders.

The contracting authority must be convinced that a tenderer which has submitted unreasonably low tender can perform a contract in a high-quality manner. At the same time where the public interests are involved, the contracting authority must insure that a tenderer which has made the low bid can pay the national taxes in full, complete a signed public procurement contract correctly and accordingly to the purpose of the agreement. There were many changes in Europe and in the world generally past couple of years. Changes were fast, unpredictable and tremendous, covering all possible areas. The problem author researches in this paper is the lack of clear list of indications that show the low price bid, which has been having additional complications within geopolitical changes in the world during the last two years. Author investigates tenders of European economic area and precisely Estonian economic area.

The author of the paper does not set herself the goal of clarifying again the bases of unreasonably low cost tenders, however it is needed to briefly bring the main indications out to get better assessment of intertwining between the price of the tender and modification of the contract. For that reason author uses some extracts of her bachelor work. At the same time as the price is an economic term, author uses mixed research methods of law and a little bit of economics.

[6] *Supra nota* 2, § 3 point 5

According to the general principles of the European Union Directives 2014/24 (Public Sector or General Directive), 2014/25 (Utilities Directive), 2014/23 (Concessions Directive) and the Public Procurement Act (PPA), the contracting authority is obliged to observe transparency, proportionality, equal treatment, ensuring competition and sustainable use of funds. Accordingly to the PPA, a tender with an unreasonably low value is considered to be abnormally low and the contracting authority is obliged to investigate whether tender is abnormally low or not.

Article 115 of the PPA requires public authority to check whether the price is abnormally low in case specific criteria are met. Once such check is done, the public authority must acquire and analyse specific data to identify whether the tenderer is probably able to fulfil its contractual obligations with such price or not. At the same time Article 123 of the PPA allows to make changes in the contracts, including price, and through this it is possible for a tenderer to get higher remuneration. Modifying a contract after it has been signed, leads to a risk of having to pay additional fees. The research contributes to identifying which criteria usually indicate that the price may be abnormally low and what data must be analysed in more detail to make such conclusion and what is more important – to do it before signing the contract, insuring the contract will be fullfilled properly. Through this connection and possible identifications could it lead to proposals to amend both of the Articles 115 and 123 of the PPA. It may lead to proposals to amend Article 115 and/or Article 123 of the PPA.

The aim of the work is to find out the existance of means of awarding abnormally low tenders and collusions in modifying the contract during the past couple of years, i.e. taking in focus latest pre-pandemic, pandemic and geopolitical changes. Author investigates whether it is possible to define some additional criterias for the technology tenders within the fulfilment of the requirements listed in the Article 3 of the PPA throughout the tendering procedure and performing the contract both, insuring the fulfilment of the requirements of Artcile 3 and EU competition principles.

The question of the paper is what are, if any, the indicators of abnormally low tender price specific to the public procurement procedures in the technology and later reasons to modify the contract in Estonia and should such criteria be added to Article 115 or Article 123 of the Estonian Public Procurement Act in a way that strategic pricing, as seen in the low bid situations, is handled in accordance with Article 3?

The author uses a qualitative questionnaire survey and analytical methods to answer the question whether there are possible collusions and/ or obsticles of pricing the bids and afterwords modifying the contract in a past couple of years in Estonia in the technology field. In the course of the methodology, the author examines the process of identifying abnormally low tenders and modifying the contract through a case study, case comparison and questonnaire as a method of empirical research. Questonnaire details, how the sample was created, etc are explained in more in-depth manner in the corresponding chapter.

Author is using qualitative research method and within the thesis, the author investigates collusions of tender prices and modifications of the contract through a case study. The author uses generally accepted methods to interpret the law: grammatical, historical, teleological and systematic.

When writing the work, the author draws inspiration from well-known legal author's academical books (Arrowsmith, Bovis, Bogdanowicz, Caranta, Graells, Ølykke, Trepte, etc.), academical articles, guidelines of the European Commission and the Estonian Ministry of Finance, and several European Union and Estonian court decisions.

In the first chapter, the author discusses collusions of several aspects like competiotion law, tender process and price forming. In the second chapter, the author takes in focus contract modifying matters. Third chapter of the paper covers some important aspects of EU and national law regulations and case-law study. Forth chapter of the thesis describes the results of the questionnaire done by the author. The forth chapter is important in terms of the conclusions made in the author's work.

1. TENDER' PRICING AND COMPETITION RELATED MATTERS

1.1. Relevance of competition law in addressing abnormally low price issues and contract modifying

Within this chapter the author of the paper shall bring out main aspects of importance of competition law, Treaty on the Functioning of the European Union[7] (TFEU) and public procurement regulations and their connections in procurement procedures.

European Union (hereinafter EU or Union) Member States (MS) are obliged to comply with the Union's goals, operating principles and legislation and to use as much as possible economic promotion opportunities, including the free movement of goods and within it ensuring competition, equal treatment and transparency.[8] These principles are based on the TFEU.[9] In the legal space of the EU, the legal basis are directly related to the TFEU, supporting the growth of economic indicators, both within the MS and across borders.[10] The requirement of transparency is the basic principle of public procurement binding procurers to the principle of equal treatment, where all bidders are given equal opportunities.[11]

The Directives establish the evaluation of tenders on the basis of equal treatment, including the determination of tender evaluation criteria.[12] The interpretation by the General Court suggests that

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[7] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012

[8] Gerber, D. J. (1998). *Law and Competition in Twentieth Century Europe: Protecting Prometheus*. Oxford: Oxford University Press; Chirita, A. D. (2014). *International & Comparative Law Quarterly*. Cambridge: Cambridge University Press; as cited in Sonk-Bahharev, N. (2020), 7

[9] Baudenbacher, C. (2016). *The Handbook of EEA Law*. Swetzerland: Springer, 121, 523-657

[10] The Court of Justice of the European Union, 07.12.2000, Telaustria and Telefonadress, C-324/98, EU:C:2000:669; Schebesta, H. (2016). *Damages in EU Public Procurement Law*. Swetzerland: Springer, 13-14; Trepte, P. (2007). *Public Procurement in the EU: A Practioner's Guide*. Oxford: Oxford University Press, Preface viii; as cited in Sonk-Bahharev, N. (2020), 7

[11] Simovart, M. A., Parrest, N. (2018). Põhimõttest lex specialis derogat legi generali riigihankeõiguse näitel. *Juridica*, 4, 228; Minumets, D (2016). Ettevõtja seisundit kirjeldavate dokumentide kohta selgituste nõudmine riigihankemenetluses. *Juridica,* 1, 13; as cited in Sonk-Bahharev, N. (2020), 8

[12] 2014/24/EL, *supra nota* 1, art 35 p 6, art 67 p 4-5

a tender appears abnormally low if there is a risk of nonperformance of the contract.[13] The importance of detecting abnormally low tenders is not limited only by a procuring entity of public sector. For instance, European Bank for Reconstruction (hereinafter EBRD) seeks for the ways to avoid of concluding a non-viable contracts. EBRD is owned by 71 countries, as well as the European Union and the European Investment Bank. It shows, that the influence of the EBRD is remarkable. In 2019 EBRD issued guiadance „Assessment of Abnormally Low Tenders for Works Contracts“.[14] The author of the work will use the analysis of tender prices made by the bank, showed in the guiadance in the other chapter of the paper.

As it was already revealed in the author's bachelor work, there are relatively few guidelines in legislation regarding the evaluation and definition of abnormally low offers. There are no corresponding provisions, specified formulas or other guidelines for defining underbids in the laws nor this concept has been interpreted in detail by the judicial system.[15] Aspects of abnormally low tenders can be considered the relative share when comparing the bids in terms of price level, the state of the market, the bidder's business model, the purpose of participation in the tender, the weakness of the technical description, the bidder's ability to read the procurement documents of the public procurement as a whole, the submission of a bid by some competitive bidders at a higher price, etc. In the current work the author uses previously made analysis and goes deeper to examine collusions between pricing and modifying the contract.

There are two opposing sorts of unfair price cases that are dealt with by the Competition Authority and the courts. First, there are instances where a dominating corporation sets an unfairly high price for a good or service, and second, there are instances where a price is established for a good or service that is unfairly low.[16] In the current work, the author mostly omits the prices set by the dominant company and only briefly discusses this topic of that matter, focusing on low-cost

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[13] *Abnormally Low Tenders* (2016). Public Procurement Brief, SIGMA, 35, 2. Accessed: http://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-35-200117.pdf, 05.08.2022; as cited in Sonk-Bahharev, N. (2020), 8

[14] Guidance of EBRD (2019). Assessment of Abnormally Low Tenders for Works Contracts. Accessed: https://www.ebrd.com/documents/procurement/assessment-of-alt-for-works-august-2019.pdf?blobnocache=true, 17.08.2022

[15] Arrowsmith, S. (2014). *The Law of Public and Utilities Procurement: Regulation in the EU and UK*. Volume 1. Third Edition. London: Sweet & Maxwell; Bovis, C. (2007). *EU Public Procurement Law*. Cheltenham: Edward Elgar Publishing, 68; *supra nota* 13; as cited in Sonk-Bahharev, N. (2020), 8

[16] Tamm, E. (2007). Ebaõiglane hind. Turgu valitseva ettevõtja kohustuste analüüs konkurentsiseaduse rakenduspraktika alusel. *Juridica*, 4, 264

procurements and the completion of procurement contracts. Nevertheless both of the pricing sorts are directly connected to the Competition law.

1.2. Competition law, public procurement and their four main principles

Competition policy focuses on market behavior, the fight against cartels, while mainly (except for the issue of state aid) leaving the public sector out of focus. Competition law and public procurement regulations and policy[17] have been intertwined and interconnected.[18] Four main principles of competition are transparency, equal treatment, non-discrimination and proportionality – this all insures a free market at EU level. These four principals are transfered to public procurement. There is a certain contradiction between competition and ensuring societal goals, which can partly be attributed to the limited scope of EU public procurement legislation.[19] Nevertheless, the provisions of the directives regulate the public procurement procedure in a way that creates competition between companies.[20] The TFEU controls all public procurement conduct, which must be followed at all times and at all phases of the procurement process. The only exception may be in the field of security, confidentiality and similar to these fields, where must be consideration on balancing of security and above mentioned four main principals of competition. By its very nature, the Competition law is a set of broad guidelines with numerous limits and prohibitions, the meaning of which cannot be determined just reciting the legal acts.[21] To have a better interpretation of Competion law and/or public procurement it is important to examine case studies to get better overview of circumstances. Public procurement has the same outcome and case study is important part of interpreting the law.

Transparency in competition at the beginning and later transparency of the competition in public procurement gained its weight tremendously during the functioning of EU. Such measures strive

[17] Directive 2014/24/EU, *supra nota* 1, Article 18 Point 1
[18] Ojasalu, T. (2007). Euroopa Ühenduse riigihankeõigus. Konkurentsi tagamise põhimõte. *Juridica,* 8, 564; Saar, K. (2014). Kas Eesti riigihangete reeglid põhjustavad konkurentsimoonutusi? *Juridica*, 6, 423; as cited in Sonk-Bahharev, N. (2020), 8
[19] Arrowsmith, S., Kunzik, P. (2009). *Social environmental policies in EU procurement law: new directives and new directions*. Cambridge: Cambridge University Press, 192-193; as cited in Sonk-Bahharev, N. (2020), 9
[20] Ojasalu, T. (2007), *supra nota* 18, 565;
[21] Ashton, D. (2018). *Competition Damages Actions in the EU: Law and Practice*. Cheltenham: Edward Elgar Publishing, 10-17; Reuder, B., VerLoren van Themaat, W. (2018). *European Competition Law*. Cheltenham: Edward Elgar Publishing, 192-256; Colomo, P. I. (2018). *The Shaping of EU Competition Law*. Cambridge: Cambridge University Press, 23-82

to limit the use of public discretion to protect the integrity of the procurement function through open, competitive processes that operate as control and safeguards on the acts of the contracting body. Tenderers are motivated to distort competitive tendering processes in order to obtain benefits from the contracting authority or entity, i.e public funds.[22] Authors of the article "Strengthening the Efficiency of Public Procurement" are saying that it is important to improve the accountability of public decision-maker and additionally in the same article' authors are analising the risk-sharing between public and private entities. Above all, the inequality of information that exists between these two participants must be taken into consideration when risk-sharing between them.[23] Contracting entities are obliged to use public procurement to obtain any services or goods, but at the same time contracting entity does not have knowledges or skills in every single field. That's why it is natural that entrepreneurs, i.e. tenderers, has better knowledge about the technology available, the price of providing what is needed, and even the level of demand for the goods and services covered by the particular public procurement procedure.[24]

Deformation of the balanced competition could be upon the tenderer's lack of experience in participating in public tenders. By submitting a low cost bid, it is also feasible to defeat a competitor or maintain the company's market share. One of the factors could be the wish to join a new market. Of course, an erroneously estimated cost-to-income ratio should not be lefted a side from the contributing factors.[25]

Competition law with last decade and especially past couple of years took a new round of development. The COVID pandemic changed business models in different industries and modified their business as more and more consumers made their purchases online. The sector of digital marketing and the responsibilities of digital marketers were significantly impacted by this transition. Big Data has a great value since it enables big tech companies to serve enormous numbers of customers. Big Data is the term for data sets that typical data-processing application software cannot handle because they are too sizable or complex. That's why recent changes demonstrate how digital markets raise new issues because the services provided to consumers are

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[22] Caranta, R., Graells, A., Halonen, K.-M. (2019). *Transparency in EU Procurements: Disclosure Within Public Procurement And During Contract Execution*. Cheltenham: Edward Elgar Publishing, 34

[23] Saussier, S., Tirole, J. (2015). Strengthening the Efficiency of Public Procurement. *Notes du Conseil d'Analyse Économique*, 22

[24] *Ibid,* 22

[25] Graells, A. S. (2011). *Public Procurement and the EU Competition Rules*. Oxford: Hart Publishing, 361-362; as cited in Sonk-Bahharev, N. (2020), 10

not entirely based on pricing, which is frequently a key factor in competition law.[26] Instead, they are based on Big Data. In February 2020 European Commision published communication "Shaping Europe's Digital Future",[27] which among other digital future matters, relates to the competition policy.[28]

The change in general digital marketing coincided with higher demand for different kind of technological developments and supplies. The global geopolitical status in the world during the 2022 increased the demand of digital supplies even more, in particular, it is due to the unavailability for delivery of individual components. Many supliers due to the COVID pandemic and the present global geopolitical scenario are suffering from the effects of supply chain interruptions. Additionally as a consequence of the present global geopolitical situation the price for electicity and gas has grown tremendously and affecting stability of the private sector entities.

Above mentioned pandemic and geopolitical set of circumstances leeds to an issues of the competition and pricing in tenders, and later on performances of the contracts. The EU's Competition law have frequently come under fire for being excessively rigid, which prevents businesses from responding effectively to market and industrial shocks. Again, some of the reasearches belive, that soothing the competitive regulations is the incorrect course of action, saying that reviewing previous crises which took place in EU shows, that soothing the norms did not help to resolve the crises itself and, in some cases, rather made it worse.[29]

Focusing on public procurement and for the moment of writing the paper author of the work can not agree with that opinion. Author believes, that there is a huge need for cooperation between competition authorities and any other parts involved to develop and put solutions forward. Within past couple of years the changes affected the whole world were unpredictable and never seen before. World pandemic and lock-down situation never happened before in history and therefore old methods might not work anymore as well, as they were planned to. Dialoge and cooperation

[26] Breur, T. (2016). Statistical Power Analysis and the contemporary "crisis" in social sciences. *Springer. Journal of Marketing Analytics*, 4, 61-65; Cappa, F., McCarthy, I.P. eta (2020). Big Data for Creating and Capturing Value in the Digitalized Environment: Unpacking the Effects of Volume, Variety and Veracity on Firm Performance. *Journal of Product Innovation Management*, 38(2), 49-67; Jain, A. (2016). *The 5 V's of big data*. Accessed: https://www.ibm.com/blogs/watson-health/the-5-vs-of-big-data/, 05.08.2022

[27] European Commision (2020). Shaping Europe's digital future, https://ec.europa.eu/info/policies/public-procurement/tools-public-buyers/public-procurement-and-non-eu-participation_en, 10.08.2022

[28] Van de Gronden, W. J. (2021). *Competition Law in the EU. Principles, Substance, Enforcement*. Cheltenham: Edward Elgar Publishing, 6-8

[29] Wardhaugh, B. (2022). *Competition Law in Crisis. The Antitrust Response to Economic Shocks*. Cambridge: Cambridge University Press

with competition authorities might be possible to develop and put solutions forward, but it takes time. Meanwhile, the competition issues and rigid public procurement system requires an immediate response. Lack of flexibility in competition and especially in public procurement rules, brings out several complications, which public entities and private sector has to face now.

In addition to above mentioned, the Union' competition has been raised to a point where very high standards of quality are required. Public buyers in the EU must be prepared to deal with bidders from outside the EU because markets are becoming more and more international.[30] Public buyers in the EU can benefit from the instructions on the participation of bids from third countries. Public entities should make sure that every tenderer is treated fairly and according to the same standards, regardless of their country of origin.[31]

Nowadays economic entities are cautious of submitting tenders and afterwords signing a contract with fixed unit prices until the expiration of the contract. This behaviour is relevant especially in case of the long term contract or a framework agreement. At the time when the author of the work started writing current paper only pandemic concern appeared, but later additionally to pandemic there appeared geopolitical supply issue and fast growing inflation crisis, worsening the global situation. All previously said leads author to weight and think if there is possibility for a healthy competition in tenders and could it be so, that economical entities rather avoid participating in tenders being cautious to fix the price within the contract, or is there any abnormally low offers left anymore.

By the 2019 the procurement market in the EU concedered to be the biggest in the world and was worth an estimated two trillion euros annually. Contracting auhtorities in the EU must be prepared to deal with bidders from outside the EU because markets are becoming more and more international. Public entities can benefit from the instructions on the participation of bids from third countries.[32] Latest instructions concern sunctions, which are restrictive measures, and one of the EU's tools to promote the objectives of the Common Foreign and Security Policy (CFSP).[33]

[30] European Commission (2019). New Guidance On The Participation Of Third Country Bidders In The EU Procurement Market. Accessed: https://single-market-economy.ec.europa.eu/news/new-guidance-participation-third-country-bidders-eu-procurement-market-2019-07-24_en, 02.08.2022
[31] *Ibid*
[32] *Ibid*
[33] European External Action Service. European Union sanctions. Accessed: https://www.eeas.europa.eu/eeas/european-union-sanctions_en, 28.07.2022; European Commission (2022). Question

Although to the United Kingdom EU treaties have no longer direct effect under the threshold tenders, same EU market priniples still remain important to follow in the tenders over the threshold.[34] As a set it shows that four key principles – transparency, equal treatment, non-discrimination and proportionality – are crucial in the EU maximizing the value for money in public procurement.[35]

1.2.1. Collusions of tender bids and state aid

As it was earlier said, the competition policy focuses on market behavior, the fight against cartels, leaving the public sector out of focus. Though, there's one element which directly connects competition policy and public sector – the state aid and issues related to it. In public procurement state aid is one of the possibilities to offer a lower price in tendering process, though there's some variations of allowed level to do so.

One of the possible factors to distort the fair competition is a state aid. When receiving state aid, it is considered inappropriate by the Member State, regardless of the form of aid, in case it harms competition and favors certain companies.[36] State aid and relying on it during the tender in public procurement is allowed if it stimulates companies to carry out projects of importance in the public interest all over the Europe. Both Competition law and Public Procurement law place a premium on duty of care.

Within the events happened during past couple of years many economic entities need a contribution and support, *inter alia*, state aid. Focusing on competition rules, and mainly on equality the European Commission worked out several so called "fitness checks". For instance, one of them focues on equality of online and offline services, which is getting more and more

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and answers on the fifth package of restrictive measures against Russia, 08.04.2022. Accessed: https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_2333, 28.07.2022

[34] United Kingdom Government Digital Service (2021). *Public-sector procurement Guidance*. Accessed: https://www.gov.uk/guidance/public-sector-procurement, 15.08.2022; Kotsonis, T. (2022). *Public procurement law: the basics*. Accessed: https://www.pinsentmasons.com/out-law/guides/public-procurement-law-the-basics, 15.08.2022

[35] European Commission. *Policy Areas: Public Procurement*. Accessed: https://single-market-scoreboard.ec.europa.eu/policy_areas/public-procurement_en, 15.08.2022

[36] Solidoro, S. (2020). EU State Aid Law – Emerging Trends at the National and EU Level. *Europe University Institute*, 16. Accessed: https://cadmus.eui.eu/bitstream/handle/1814/66829/PB_2020_16_FCP.pdf?sequence=1&isAllowed=y, 15.08.2022

important in the digital era.[37] Directly connected to state aid fitness check has been launched by European Commission in 2019.[38] European Commission revising fitness checks upon need and one of the latest communications concerns the state aid for reasearch, development and innovation.[39] Following the COVID epidemic, the Commission updated its regulatory framework to better serve and streamline the demands of Member States.[40] Additionally certain modifications in the rules of state aid has been provided.[41] This all shows, that there's enough of tools for stakeholders in the state aid issues.

As an example of the state aid and public procurement collusions author would like to bring up an example of infotechnological development in Estonia. In this case the state is giving a grant, i.e. state aid, where the aim of the aid is to find beneficiary who, with the help of the grant, would create the possibility of connecting as many address objects as possible (residences, companies, institutions, etc.) to the passive broadband infrastructure of the access network, which would technically be able to offer a download speed of up to 1 Gbit/s. Due to the capital-intensive nature of investments in electronic communication networks, communication corporations create networks primarily based on corporate objectives. Therefore, in rural or sparsely populated areas, a high-quality and fast internet connection may remain unavailable. Estonia is a so called e-state and that's why it is crucially important to have high-speed internet connection which is, *inter alia*, an important basis of the modern e-state and is a necessity of every person's daily activities. Investment grant, and the network to be built, remains with the grantee, who is responsible for ensuring wholesale access to the network being built on an equal basis for other communication companies. Further network management and operation costs will not be reimbursed.[42]

Above mentioned example is important to show the connection between competion law, state aid and public procurement. Any public tender within the rapid deployment of broadband networks

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[37] European Commission. *Digital fairness – fitness check on EU consumer law*. Accessed: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13413-Digital-fairness-fitness-check-on-EU-consumer-law_en, 15.08.2022

[38] State aid: Commission publishes results of evaluation of EU State aid rules. Accessed: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2008, 15.08.2022

[39] European Commission (2022). *Communication from the Commission. Framework for State aid for research and development and innovation*

[40] Commission Staff Working Document. *Fitness Check on the EU framework for public reporting by companies Accompanying the document Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the review clauses in Directives 2013/34/EU, 2014/95/EU, and 2013/50/EU*

[41] Hancher, L., Ottervanger, T., Slot, P. J. (2021). *EU State Aids*. London: Sweet & Maxwell, Chapter 28

[42] Järgmise põlvkonna elektroonilise side juurdepääsuvõrgu passiivse lairibataristu rajamise toetusmeetme tingimused ja kord. RT I, 26.02.2019, 10

conducted by the Consumer Protection and Technical Regulatory Authority and any tender within the broadband infrastructure project must be organized in accordance with Public Sector Directive' general principles. According to the paragraph 78 c of the Broadband Guidelines,[43] whenever the granting authorities select a third-party operator to deploy and operate the subsidised infrastructure, the selection process shall be conducted in line with spirit and the the principles of the EU Public Procurement Directives. This ensures transparency for all investors who wish to participate in the implementation or management of the subsidized project. The inevitable condition is equal and non-discriminatory treatment of all providers and objective bases for evaluation.

When it comes to state aid in public procurement, the economic entity must exercise diligence and confirm that the aid received is lawful and that the aid-granting process has been followed.[44] A tenderer acquires an advantage by underbidding on long-term contracts, driving away competitors in the market, and therefore gaining a dominating position, similar to how an entrepreneur gains an advantage in the distribution of unlawfully obtained state aid.[45] The relationship between Competition law and the procurement procedure is clearly defined.[46] In public procurement though the responsibility of proving the legality of the state aid rests with the tenderer. Above shown example within the received grant could be sufficient justification to the economic entity on argument and basing the tender price as the European Commission recognises certain types of aid as compatible with the internal market.

1.3. Tender pricing and abnormally low tenders

When planning public procurement, it must not be based on the goal of excluding it from the scope of the Public Procurement Directives or artificially restricting competition. Competition is considered artificially limited if public procurement is planned with the intention of inappropriately favoring or putting certain companies at a disadvantage. Participation must be available to all interested parties, and the evaluation of applications must be based on specific

[43] Communication from the Commission – EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks. OJ C 25, 26.1.2013
[44] Jakobson-Lott, K. (2019). Riigiabi ergutava mõju hindamine ja ebaseadusliku riigiabi tagasinõudmine liikmesriigi asutuse poolt. *Juridica*, 3, 171-177; as cited in Sonk-Bahharev, N. (2020), 16
[45] Graells, A. S. (2011), *supra nota* 25, 361-362
[46] Ølykke, G. S. (2010). *Abnormally Low Tenders: With an Emphasis on Public Tenderers*. Copenhagen: DJØF Publishing, 65

quantitative indicators.[47] Meanwhile, the competition might be distorted by offered abnormally low bid.

Since there is no easy or clear way to spot 'abnormally low tenders' and it is has not been defined yet by the law neither by court,[48] evaluating excessively low bids can be difficult for contracting entities. When an economic operator offers a price that raises questions about whether the bid is feasible and economically viable, it is referred to as an abnormally low bid.

In the case of the tender for an air navigation services at Gatwick Airport in 2014 High Court of Justice, Queen's Bench Division Technology and Construction Court provided, that the key aspect of competition and competitiveness "is price and tenderers who are keen to secure a project will want to pitch their prices at a level which will be the lowest. They might be keen to break into a market or establish their market share. There is nothing wrong with that for them or for the utilities or contracting authorities, who are (almost) always keen to place contracts at the lowest price and, preferably, at lower than they have budgeted. One needs to consider how, commercially, a tenderer, which is not the incumbent provider or not the market leader, will ever get a contract unless it puts in attractively low prices".[49] The author agrees with the consideration made by the court and thinks that at the one point there's nothing wrong with desiring to lower the budget for contracting entity and, as the author was characterising means of abnormally low tender in her bachelor work, there can be several reasons where tenderers lower their price at a minimum, for instance, the bidder may be in dire need of the contract, and even if it may turn out to be unprofitable, it is more valuable for reputation building or experience. It is possible that there may also be a lack of tender participation experience or an estimated cost-benefit ratio, also, by submitting an underbid, the desire has been to push out a possible competitor or to protect the company's position in the market or as a possibile cause there could be incompletely written technical description of the tender.

Notwithstanding that the reasons to offer a lower bid may be different, but when the financial bid of a tender appears abnormally low, the evaluation committee should ask the bidder to clarify in writing that the bid is economically viable and can be properly carried out. The bidder should explain why its tender offer is low and if there are any argumentations that could properly explain

[47] Hancher, L., Ottervanger, T., Slot, P. J. (2021), *supra nota* 41; CJEU, 28.05.2020, Informatikgesellschaft für Software-Entwicklung, C-796/18, EU:C:2020:47
[48] Bovis (2007), *supra nota* 15, 287; as cited in Sonk-Bahharev, N. (2020), 20
[49] UK Royal Courts of Justice, 12.11.2014, NATS (Services) Limited v Gatwick Airport Limited, HT-14-281

the low offer. The evaluation committee should decide whether or not to accept the tender based on its consideration of the justification offered by the tenderer.[50] An unusually low bid needs more analysis since it may indicate dangers including a lack of technical or commercial competency, an intention to disregard some or all specifications and/or standards. It could be an intention to break labor or environmental policies.

The price is an economic term, so in author's opinion, mixed methods of law and economics should be used to indentify the issue with the pricing. Different sources give several quidlines how to define the price as abnormally low. It could be a tender where the hourly rates are substantially below the labor costs that the tenderer would be required to pay;[51] or the tender, that is more than 15% lower than the adjusted avarage price and exceeds the proximity margin, that is more than 1% lower than the lowest qualifying price.[52] EBRD has developed a "mathematical formula to identify the risk baring offer – the formula may be used in MS Excel, or similar applications, by entering the array of data (say A1…AN), the mean can be calculated by using the following function AVERAGE (A1:AN), and the standard deviation by using the formula STDEV(A1:AN). Thus the formula for calculation of the abnormally low tender is: AVERAGE(A1:AN)-STDEV(A1:AN)".[53]

To avoid possible low bids here is an example coming from Nepal, where Federation of Contractor Associations of Nepal (FCAN) requested that the law be changed so that bidders who proposed an average price would be chosen to conclude the contract. The benefits of encouraging competition among contractors and maintaining transparency are obvious, but the main drawbacks include delays in meeting contract deadlines, increases in final project costs, a propensity for compromising project quality, and adversarial relationships between contracting parties. Within the average bid, the contractor chooses the proposal with a price that comes the closest to being the average of all the submitted bids. At a reasonable cost, it is anticipated that they will fulfill the

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[50] European Commission (2018). *Public procurement guidance for practitioners*. Luxembourg: Publications Office of the European Union. Accessed: https://ec.europa.eu/regional_policy/sources/docgener/guides/public_procurement/2018/guidance_public_procurement_2018_en.pdf, 10.09.2022

[51] Ølykke, G.S., Nyström J. (2017). Defining abnormally low tenders—a comparison between sweden and Denmark. *Journal of Competition Law & Economics*, Volume 13, Issue 4, 666–709

[52] Abnormally low tender. Accessed: https://www.designingbuildings.co.uk/wiki/Abnormally_low_tender, 17.09.2022

[53] EBRD Guidance. Assessment of Abnormally Low Tenders for Works Contracts, 01.08.2019. Accessed: https://www.ebrd.com/documents/procurement/assessment-of-alt-for-works-august-2019.pdf?blobnocache=true, 17.09.2022

project's quality standards, complete it on schedule, and get along well with the employer's consultant.[54] As a practioner of public procurement law and relying on the practice in public procurement sector in the role of the contracting authority the author of the paper could not more agree with this proposal, especially if it is when it comes to work of construction. Though, author would like to emphasise that in case of using possible varieties of awarding contract methods, *inter alia*, by the average bid method, then clear, understandable and unambiguous awarding criteria must be set. Yet in the European legal space no variants for awarding the tender are allowed except the lowest price or the economically most advantageous tender (EMAT) where the price and quality criteria are combined.

Next to the above-mentioned issues and concedering the global world situation, economical entities has faced tremendous increase of cost for electricity, gas and quite many issues within the supply chain, additionally as a result of increesing cost of life and inflation there's higher labor cost appered. This leads to the situation, where some of the bids may be abnormally high. Through high bids the tenderer might wish to lower all possible risks in future. An adequately offered price may seem unreasonably low compared to the abnormally high price.

There have been more unfairly low price cases in the Competition Board's proceedings than unfairly high price cases and the author of the current work hasn't met any court cases of abnormally high bid within the framework of public procurement law. The situation of unfairly high prices has not been investigated within the framework of the article „Analysis of the obligations of the dominant undertaking on the basis of the application practice of the Competition Act", but the effect of unfairly high prices and unfairly low prices on competition is different and they must also be treated differently.[55] The author of this work shares and concurs with the stated viewpoint. Meanwhile, fast changing geopolitical situation makes public procurement entities experience complications of estimating the contract value and economical entities – in calculating the proper offer. The determination of unreasonably low cost offers are still difficult and undefined by legal acts or courts and next to it public and private sector have to be compliant in the world situation.

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[54] Shrestha, S. K. (2014). Average Bid Method – An Alternative to Low Bid Method in Public Sector Construction Procurement in Nepal. *Journal of the Institute of Engineering*, Volume 10, No 1, 125–129
[55] Tamm, E. (2007), *supra nota* 16, 271

One of the ways to lower the price in a supply of digital content and digital services is through the Directive 2019/770.[56] Sharing software and services in exchange for personal data, i.e. for free, is used as a business model. The extension of the scope of application proposed in the proposal for the directive to include contracts in which the consumer does not pay the price in money, but provides his personal data, met with a generally positive response. European Data Protection Supervisor (EDPS) found, that "fundamental rights such as the right to the protection of personal data cannot be reduced to simple consumer interests, and personal data cannot be considered as a mere commodity". In addition, the EDPS found that remuneration has a specific meaning and function in contract law, but the provision and processing of personal data are primarily subject to the general principles of personal data protection.[57] Possible remuneration has not been revieled during the currect research paper as possible business model in public procurement tenders. The reason could be same as EDPS draws attention to – general principles of personal data protection, which are complicated and could "unintentionally lead to confusion regarding the regime applicable".

Frequently technology field is connected to a sensitive data for instance national defence data, any kind of classified data, personal data, *inter alia*, health data. Health and classified data became even more significant within past two and a half years. That is one of the reasons why procuring technology and infotechnology safe solutions, services and/or goods is important and at the same time complicated process for public entities. For the same reason it narrows the scope of an economic tenderers who are participating in the tenders and puts difficulties to the determination of the level of the bid (high/low).

Considering world situation and a rapidly changing environment nowadays, author came to the idea that could it happen so, that determination issues of high and low bids might be twisted in the closest future of public procurement for the reason that tenderers probably would prefer to submit a high price bids, buffering the possible increes of rapidly changing environment' prices. Or the other way around – it will be even more difficult for the procurer to define the high or low level of the bid, because the price growth in the market is so fast that contracting entity does not know

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[56] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, OJ L 136, 22.5.2019

[57] Kull, I. (2019). Digisisu üleandmine ja digiteenuste osutamine isikuandmete esitamise vastu. *Juridica*, 8, 579-580; European Data Protection Supervisor opinion 4/2017 on the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content. Accessed: https://edps.europa.eu/sites/default/files/publication/17-03-14_opinion_digital_content_en_1.pdf, 17.09.2022

whether the offer presented today is a real, low or high price? As it was said earlier, when determining the abnormally low tender, the contracting entity is based on the feasibility of the contract at this price and its purpose. What is the prognosis for the level of modifying the contract under the Article 72 of the General Directive and is it possibile to prognose the modifications at a minimum level at all; if the prices are changing so fast, is it even possible for the economic or/and contracting entity to forecast the estimated value of the contract, especially if it is a long term contract or framework contract – all these questions arises at the moment.

In any case, the same way that an entrepreneur gains an advantage in the allocation of illegally obtained state aid, a tenderer gains an advantage by underbidding in long-term contracts, thus driving the industry's competitors out of the market and may be achieving a dominant position in the market. The hidden purpose of such behavior may be the desire to agree on modifications to the contract in the future and to increase the fee for the service through negotiations at the stage of contract performance.[58]

[58] Public Procurement Brief (2016), *supra nota* 13

2. CONTRACT MODIFYING RELATED MATTERS

Less frequently acknowledged is the possibility that transparency in procurement processes, particularly during the post-award debriefing and lawsuit phases, can lead to distortions and limits of competition.[59] In the opinion of the author it is not remaining the same within late couple of years and the reasons are the same, as mentioned above – pandemic and geopolitical circomstances. There's no clear statistics about the changes of the contracts made under the Article 72 of the General Directive (Article 123 of PPA) yet. A number of modifications to awarded procurement contracts are allowed under the regulation of Article 72 without initiating the start of a new procurement process. During the contract fulfillment Article 72 of the General Directive gives some amount of flexibility to the contracting auhtority and, of course, to the economic operator to find legal measures and, as a result, to update the price of an offer made at a lower cost in the beginning.

Public procurement law is rather young law[60] and practice under the regulations is still forming. In its background, new EU regulations on contract implementation were adopted by the 2014 Directives. Before the adoption it was not possible to legally change the public contract.[61] Generally the only possible change was the modification which does not alter the overall nature of the contract was concedered basically just the contact data of the contract parties.

Contract implementations under the General Directive must meet specific criteria, for instance, modifications shall not provide for modifications or options that would alter the overall nature of the contract or the framework agreement; contracts may equally be modified without a new procurement procedure in accordance with the Directive being necessary where the value of the modification is below the threshold and 10% for service and supply contracts and 15% for works contracts (the list is not exhaustive). Some changes can be made for even 50% of the value of the original contract, for instance, the need for modification has been brought about by circumstances

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[59] Caranta, R., Graells, A., Halonen, K.-M. (2019), *supra nota* 22, 34

[60] Arrowsmith, S. ed (2010). *EU public procurement law: an introduction*. EU Asia Inter University Network for Teaching and Research in Public Procurement Regulation

[61] CJEU, 29.04.2004, Commission v CAS Succhi di Frutta, C-496/99 P, EU:C:2004:236

which a diligent contracting authority could not foresee and in case or where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses. However, the modification may not alter the overall nature of the contract or framework agreement. Where several successive modifications are made, the value shall be assessed on the basis of the net cumulative value of the successive modifications.[62]

Amended Directive gives awaited for a long time and necessary for public procurers flexibility to modify the contract without a new procurement procedure. It is essential for success and improves comprehension of their roles for tenderers and procurers to communicate, *inter alia*, during the performance of the contract. If the value of communication is the joint outcome of the parties, each participant cares for the result.[63] In author's opinion the latest amendment of the Directive solves a huge amount of issues contract parties had regarding the flexibility during the performance of the contract. Before the amendment they had lacked an opportunity to react promptly and in time on changes of the European market, and through this to lower the risks of quality on contract performance. In the author's opninion, next to valuable flexibility there's the other side of the coin, where both parties can take advantage of this flexibility and distort purpose of the changes alowed in the contract. Below, the author provides a brief illustration of this.

There's not so many academical materials regarding public procurement, especially regarding changes of past two years happened in public procurement space. Preparing of updated academical materials takes time, but the changes in the world are much faster. Published first in 2019 in Polish and later in 2021 in English book of Piotr Bogdanowicz "Contract Modifications in EU Procurement Law"[64] has reflection of the law until March 2021. Different scholars of public procurment law has valued the book high, saying that the book is "the first full monograph dedicated to this topic in all its aspects, including remedies, it will help all procurement professionals to navigate a very new and complex area of the law", "has complete, analytical and comprehensive account of such issue, of vital importance in real life", "the EU rules on the modification of public contracts continue to pose a wide array of normative and practical

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[62] Directive 2004/18/EU, *supra nota* 1, Article 72
[63] Jullien, B. (2006). Pricing and other business strategies for e-procurement platforms. In: Dimitri, N., Dini, F., Piga, G. (Eds.), *Handbook of Procurement*. Cambridge: Cambridge University Press, 249-266; as cited in Sonk-Bahharev, N. (2020), 14
[64] Bogdanowicz, P. (2021). *Contract Modifications in EU Procurement Law*. Cheltenham: Edward Elgar Publishing

difficulties. In this book, Piotr Bogdanowicz systematically and carefully identifies all issues arising from the current rules".[65] These comments show us, that well known scholars in the field of public procurement law assess the importance of the issues of modifiyng the conract and that there's no other sources on this matter.

Before bringing out the example and to understand the situation in a more clear manner it should be brought out the responsibilities and obligation of each of the public contract parties. First, one of the distortion reasons could be insufficiently prepared technical description of the tender, i.e. the subject of the contract, and as a consequence parties shall have to sign the contract while having a wrong imagination of it, which, *inter alia*, is one of the reasons for submitting abnormally low tender by the tenderer. Within this instance both parties are bearing the risks,[66] whereis second distortion reason is Estonian Review Committee's opininion. Estonian Review Committee has come to a conclusion that in the event of an incompletely prepared technical description, a greater duty of care is transferred to the tenderer.[67] Duty care transfer to the tenderer has confirmed by Administrative Board of the District Court.[68] Consequently, in the event where there's insufficiently prepared technical description of the tender, the economic oprator has significant role to refer to mistakes made by the contracting authority.[69]

Above described can be connected to the reason of submitting abnormally low tenders, but on the other hand it can be vice versa and the economical operator within the tender may submit much higher price. In case it is the only submitted tender, then it will be hard for the contracting authority to wieght the realistic price. In case there shall be submitted more than one or two offers within the same procurement procedure, then submitted higher price tender can distort the competition balance and at the same time bring additional burden to the contracting authority, since it is the responsibility of the procurer to check whether the offer submitted at a suspiciously low price is unreasonably low or not.[70]

[65] Caranta, A., Mario Comba, M., Sanchez-Graells, A. (2021). Critical acclaim to the book "Contract Modifications in EU Procurement Law"
[66] Rahandusministeerium (2017). *Kontrollakt*, 21.04.2017, nr 12.2-4/11 riigihangete teostamise kontrollimise kohta Majandus- ja Kommunikatsiooniministeeriumis, 6; as cited in Sonk-Bahharev, N. (2020), 20
[67] *Ibid* 66
[68] Administrative Board of the District Court, 3-19-1501, p 4-6
[69] Simovart, M. A. (2010). Lepinguvabaduse piirid riigihankes: Euroopa Liidu hankeõiguse mõju Eesti eraõigusele. *Doktoritöö*. Tartu Ülikool, 53; as cited in Sonk-Bahharev, N. (2020), 14
[70] Ølykke, G. S. (2010), *supra nota 46*, 126-127

Nevertheless, in case if the tenderer is not fulfilling its obligations to read the whole set of the public procurement documents it can be an additional burden for both the bidder itself and the procurer, as well as for the bidder who submitted a competing bid. All of it in its broadest sense – the procurer must check whether the cost is unreasonably low, the other must respond to inquiries, in the event of a dispute, all parties have the burden to express and defend their opinions.

Hereby we got closer to the example mentioned above. What happens if the technical description was incomplete, but the bidder failed to read the entire set of the public procurement documents and submitted the bid based on the partially read documentation and discovered the unread details only at the time of signing the contract or after its signing? As one example of a case that happened in an author's practice, the author can point out to a situation where the original offer for the maintenance of information technology equipment was three or four times more expensive. Accordingly to the explanations the reason to offer a high price were same as mentioned above – pandemic, geopolitical situation in the world and drastic inflation. The bidder calculated and mitigated the risks by submitting the bid for an amount that was several times bigger than it should be. After signing the contract, the bidder turned to the procurer and frankly admitted that at the time of submitting the tender the contract accompanying the procurement documents was not read. The contract provides for an opportunity to adjust the cost once a year based on the market situation, so right afterwords the contract conclusion the tenderer wished to change the contract. In times of rapidly changing economic conditions, it was difficult for diligent authority to predict such situation or to weight the proposed offer high level, no competitive tenders were submitted as well. By the moment of wirting the thesis this situation has not come to a solution and author does not know which solution was chosen and what decision made by the contracting authority at these circumstances.[71]

This simple example shows us, the fast changing geopolitical and market situation nowadays confusing contracting authorities in making decisions and in weighting whether the offer is realistic and commonsensical or not. In the situation described above, the contracting authority probably may find a legal way to change the contract without starting a new procedure. In this case the author could say, that it is a clear benefit on amendments of the Directive made in 2014.

[71] For the reasons of confidentiality author of the paper can not reveal the number of the tender

General public procurement standards are derived from national policies, which frequently help people comprehend the goals, conditions, accountability, and control of public procurement.[72] Raising awareness of the negative effects and the significance of procurement performance indicators in performance effectiveness and in procurement management in general is an important area where public procurement legislation and practice may make a difference.[73]

An error detected by the tenderer or procurer regarding the cost of the tender may be detected after the submission of tenders, but there is no possible way to correct such a mistake within the same procedure (unless it is a calculation error[74]). However, the example described above shows that in case if the conditions for the amendment of the contract specified in the General Directive are met, the price can be changed legally after the evaluation of the tenders and signing the contract. Either way, both parties must take into account that in the case of incorrectly estimated services, works, goods or construction costs, both – the procurer and the tenderer – may suffer a financial loss.

The other side of the coin is the abnormally low tender. When submitting an unreasonably low bid there is a risk of getting an unreliable partner during the performance of the contract. This risk is also borne by the tenderer, as the proper performance of the contract may be threatened. In this case, the risks are borne by both, but the consequences for the provider may have a longer impact in participating in public procurement tenders.

Accordingly to PPA Article 95 clause 4 subsection 8 (Article 57 point 4 (g) of the General Directive) the contracting authority or entity may exclude from the procurement procedure a tenderer or candidate who has been in a fundamental or constant breach of a material term or condition – or several such terms or conditions – of a previously awarded public contract or contracts, such that the breach has resulted in withdrawal from or termination of a contract, a reduction of the price, compensation for harm or payment of a contractual penalty. In Estonia accordingly to PPA until the mid of the 2022 the contracting authority had a choice whether to report such a violation to electronic Public Procurement Portal (eRHR). After the amendment of PPA entered to force on 1st of June of 2022 the contracting entity is obliged to report the contract

[72] Graells, A. S. (2011), *supra nota* 25, 155
[73] Caranta, R., Cravero C. (2019). Sustainability and Public Procurement. In: La Chimia, A., Trepte P. (Eds.), *Public Procurement and Aid Effectiveness: A Roadmap under Construction*. Oxford: Hart Publishing, 175-177; Graells, A. S. (2016). Public procurement and competition: some challenges arising from recent developments in EU public procurement law. In: Bovis, C. (Eds.), *Research Handbook on EU Public Procurement Law*. Cheltenham: Edward Elgar Publishing, 425; as cited in Sonk-Bahharev, N. (2020), 15
[74] Public Procurement Act, *supra nota* 2, § 117(3)

breaches. According to the Article 83 clause 7^1 the contracting authority or entity files with the register information concerning any breach of the public contract by the economic operator which in the view of the authority or entity corresponds to the exclusion ground provided by clause 8 of subsection 4 of Article 95 of the PPA, within 30 days following application of a legal remedy. Where the authority's or entity's claim has been contested, it adds the corresponding particulars within 10 days following contestation. Such provision gives up to date overview of the public contract performances by each particular tenderer compared to the time before this provision entered to force, it was rather difficult for the procurer to find and obtain this information. Starting the 1st of June 2022 this information reaches the procurer within a short period of time, i.e. could happen that even within one procedure the information may be updated and the tenderer will thereby lose its position in the procurement process.

For the tenderers such provision means that they might be cut out of participating in tenders for three years. According to PPA Article 95 clause 5 such measurments are applied in procurement proceedings that have commenced within three years following commission of the act or occurrence of the ground mentioned in clause 4, *inter alia*, subsection 7 of the Article 95 of the PPA. Article 95 clause 4 of the PPA remains as a descreetion of the contracting authority and that means that the procuring entity must justify its decision. Even so, there is a high probability that the tenderer may be left out of the procedure and thus lose the opportunity to compete with other tenderers.

The provision of the Article 95 clause 4 subsection 8 of PPA (Article 57 point 4 (g) of the General Directive) is also in line with principle of a good faith of the international law, as a norm of *pacta sunt servanda*.[75] The principle of the good faith as a legal norm is the highest norm in the European and international law.[76] Good faith behavior includes, among other things, cooperation and consideration of the interests of the other party.[77] Next to it mentioned article is in line with the general principles of the EU where Court of Justice of the European Union (CJEU) stated, that

[75] Kolb, R. (2019). *Good Faith in International Law*. Oxford: Hart Publishing, 15-28

[76] Varul, P., Kull. I., Kõve, V., Käerdi, M. (2007). *Võlaõigusseadus I. Kommenteeritud väljaanne*. Tallinn: Juura, 25; Kull, I. (1999). *Lepinguõigus I*. Tallinn: Juura; as cited in Sonk-Bahharev, N. (2020), 14, 29; McCrudden, C. (2022). *The Law And Practice Of The Ireland – Northern Ireland Protocol*. Cambridge: Cambridge University Press, 99-103 and 145-146

[77] Varul, P., Kull. I., Kõve, V., Käerdi, M. (2007), *supra nota* 76, 25; Kull, I. (1999), *supra nota* 76

Member States are subject to special duties of action and abstention as well as close cooperation, they aren't only obligations.[78]

Refering to the tenderer exclusion article and as both parties must observe the principles arising from the Law of Obligations Act and the principle of a good faith as well as international law's fundamental rule, i.e. good faith,[79] author of the work belives that concluding the contract with potentially unreliable partner brings heavy doubts and concederations during the procurement procedure.

Ministry of Finance of Estonia generally relies on the norm of *pacta sunt servanda* as a norm of the contract and fundamental rule in public procurement, and considers this to be impossible to avoid. The contracting authority bears a big responsibility on using the public funds and that is why it is important to declare non-compliant performance of contracts and, among other things, demand fines resulting from the contract without reducing them. While one or both contracting parties have already breached the procurement contract, it is not possible to simply amend the procurement contract, but must be based on the provisions of the procurement contract and the Law of Obligations Act of legal remedies if the violation is not excusable.[80] It is not possible for the procurer and the tenderer to reach a compromise and to bring an end to a dispute the outcome of which is uncertain, which arose from the difficulties encountered in the performance of that contract.[81]

Author's opinion of current work is that contracts concluded as a result of procurements carried out starting from 2022 cannot be changed even on the basis of the *force majeure* provision. *Force majeure* must be related to three circumstances: a) the occurrence or course of which cannot be influenced by a party; b) the circumstance must be unforeseeable and occur suddenly; c) if the party cannot reasonably be expected to be able to avoid this effect on the performance of the obligation or to overcome the circumstance or its consequence. Consequently, in the case of long-lasting procedures, tenderer should consider whether the submitted bid is still adequate and further avoid concluding a contract which is not realistically enforceable. As the author already pointed out above, in the geopolitical situation it has become a difficult task to assess the realism of the

[78] CJEU, 20.04.2020, Commission v Sweden, C-246/07, EU:C:2010:203, 74-75
[79] Kolb, R. (2019), *supra nota* 75, 3-38
[80] Rahandusministeerium (2022). *Hankelepingute ja raamlepingute muutmine kriisiolukorras. Vääramatu jõud. Leppetrahv*. Accessed: https://fin.ee/media/5992/download, 02.10.2022
[81] CJEU, 07.09.2016, Finn Frogne, C-549/14, EU:C:2016:634, 40

submitted tender, especially to assess whether it is an unreasonably low or high cost offer. Tenderers submitting their bids based on different aspects, and as a result in comparison, it may happen that a bid with a high price and which has most likely mitigated all possible risks leaves an adequate bid with the impression that it is an unreasonably low.

Before accepting obligations and signing the public contract, both parties must assess the realism of contract execution, and in the event (especially in the case of a long-lasting procedure) that the tenderer finds that the situation has changed since the moment the tender was submitted, it is reasonable for the tenderer to withdraw from the signing the contract. Author would address this issue to a precontractual liability – precontractual matters which are considered elsewhere than matters relating to the contract phase.[82] Though, in a public procurement this is a consideration moment of risk for the tenderer, because in such case, the procurer has the right to demand payment of the difference in bids from the bidder based on PPA Article 119 clause 3, according to which the contracting authority has a right to claim compensation for harm from the successful tenderer to the extent of the difference between the value of the tender that was initially declared successful and the value of the next-ranking successful tender as well as to the extent of any additional costs which the authority or entity must bear in connection with the award of the public contract based on the tender that was declared successful after a new assessment of the tenders, as well as to the extent of the costs that arose from the new assessment of the tenders.

However, in regard of the performance of the contract, the Ministry of Finance has assigned a more important role to the procurer, according to which, even during the execution phase of the procurement contract, the procurer should not forget that there are public funds are used and that is why contracting entity must behave differently from a private entity in the contractual relationship. Due to the above, the procuring entity must require the tenderer to fulfill the contract under the conditions stipulated in the contract and, if necessary, apply legal remedies against the tenderer, *inter alia*, penal fines. If legal remedies are not applicable, the contracting entity must consider whether it is a permissible change to the procurement contract in the light of Article 123 of the PPA.[83] Contracts are more complex than tort[84] and in regard of public procurement the procurement contract is even more complex: it is believed that entrepreneurs have greater knowledge and a stronger position in the market, and that is why contracts concluded between

[82] Geest, G. (2011). *Contract Law and Economics*. Cheltenham: Edward Elgar Publishing, 9-30
[83] Rahandusministeerium (2022), *supra nota* 80
[84] Geest, G. (2011), *supra nota* 82, 1 and 148

entrepreneurs are not regulated in detail by law. It is mostly based on principles such as good faith, reasonableness, customs and well-established practice, meanwhile “public procurement policy is generally recognised as being characterised by an unstable tension between the public expectations of transparancy and accountability, and of efficiency and effectiveness pursued by public management”.[85]

2.1. Intellectual property as a factor influencing the bid and contract price

The main purpose of the intellectual property (IP) protection is to secure royalties for authors.[86] Consequently, the cost may be different with the transfer of copyrights specified in the contracts. As an asset, IP has its own characteristics that make it difficult to consider the reasonableness of the price of offers related to it and that’s why it is important as one of the apsects in current work.

In the article “Intellectual property rights in information technology” is specified, that “practitioners know how voluminous a sufficiently precise IT development contract can be and how difficult it is to conclude it, including ensuring that the parties understand each other and have a uniform understanding of things. Failure to achieve this can result in costly disagreements and disputes over contract performance”.[87] For this purpose the expected characteristics of the infotechnological system to be developed like functions, working principles, efficiency, user-friendliness, schedules, etc must be noted in a comprehensive and understandable manner.[88]

Meanwhile, procurers are not IT specialists generally and it is difficult to write everything down in sufficient detail and get a custom made software development or solution. When it comes to software the intellectual property rights are protected by the Software Directive,[89] which protects the form and expression of an idea. In case the procurer need to use developments made within the procurement contract it is common to get the indefinite and free exclusive license to the works created by the tenderer during the execution of the work, to use the work and, if desired, to further develop the work without geographical restrictions and, *inter alia*, the right to sub-license the exclusive license to third parties for a fee or free of charge. Usually custom software development’s

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[85] Piga, G., Tunde T. (2018). *Law and Economics of Public Procurement Reforms*. New York: Routledge, 11
[86] M.Rosentau (2020). Intellektuaalse omandi õigused infotehnoloogias. *Juridica*, 5, 360
[87] *Ibid*, 361
[88] *Ibid*, 361
[89] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, OJ L 111, 05.05.2009

tender'evaluation criteria is an hourly rate and as a result – concluded framework contract for four years. Next to this for the next tender and a contract period there will be a liability question to solve – who of the partners (previous or the next one) shall be responsible for any bugs found. As a result all of this should increase the price of the work, but shall not give the guarantee for the quality of the work.

Author finds that as a helping tools for the procurer there could be used Public Private Partnership (PPP),[90] preliminary market consultations (General Directive Article 40) with important actions undertaken to ensure equal treatment,[91] competitive procedure with negotiation (General Directive Article 29) or competitive dialogue (General Directive Article 30) as well as a framework concluded with a several tenderers.

Framework contracts concluded with multiple bidders are seen to be the most practical in industries where it is unclear at the time of framework contract signing which bidder will make the best offer at the time of procurement contract signing. For instance, certain technological initiatives may be so dynamic and quickly altering that the current technology leader may not exist in another year or two.[92]

One of the principles of the organization of public procurement is the avoidance by the procuring party of a conflict of interest that harms competition.[93] Author of the work finds preliminary market consultations, competitive procedure with negotiation, competitive dialogue and/or PPP are the best solutions to procure technological and infotechnological developments, though to procurers the main obstical to use these solutions is time procurers have. These solutions, exept preliminary market consultations, are time-consuming and average time should be planned for the realisation is nine months or more. In the author's opinion, considering the performance of these procedures may prevent the failure to fulfill the purpose of the contract and/or submition a low bid and/or the possible need or desire to modify the contract later.

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[90] Arrowsmith, S. (2000). Public Private Partnerships and the European Procurement Rules: EU Policies in Conflict? *Common Market Law Review*, Volume 37, Issue 3, 709-737

[91] Koroljov, D., Simovart, M.A. (2019). Ettevõtja kõrvaldamine riigihankest turu-uuringus osalemise tõttu. *Juridica*, 7

[92] Rool, M., Simovart, M. A. (2020). Raamlepingu alusel korraldatud minikonkurss. *Juridica*, 4, 276

[93] Ojasalu, T. (2007), supra nota 18, 570

The benefit of the market research is the chance to communicate with professionals and economic entities in the area and utilize the knowledge learned to organize and plan public procurement more effectively. Participating in market consultations also offers advantages to the tenderer, such as the chance to provide the procurer with non-binding ideas and alternatives.[94] Also, the subject of the market research may be the conditions of the procurement contract: options for sharing contractual risks, intellectual property issues.[95] Procurers at the same time should be cautious – any of the communication with the market considered to be market research[96] and procurer must assure to all possible interested entities equal treatment, i.e. sharing the information collected within the research.[97]

However, it all boils down to the economic entities' trade secrets and their IP protection. None of the companies operating in the private sector, whose one of the incomes is to make an honest profit, are not ready to reveal the secret of all their business ideas in such a way that the procurer could possibly use them in a best manner. Also, the procurer generally does not have an expert opinion on whether specifically that proposed solution is narrowing the circle of potential tenderers or not. It is also complicated by the fact that, for example, in the case of a custom software development work, maintenance work also follows. Procurers have the obligation to comply with the public procurement regulations and, *inter alia*, keep competition open which in the light of custom developments is rather complicated to solve.

Within the framework of this work, the author does not analyse or assess whether there have been disputes over the validity of these contracts and in what cases (validity, cost, performance, restriction of competition, IP, etc.), but certainly in the light of the contracts, it must be noted that the most crucial thing is to comprehend that in the case of a disagreement, the contract's substance will be exactly as explicit and unambiguous as it is stated.[98]

[94] Koroljov, D., Simovart, M.A. (2019), *supra nota* 91, 483
[95] Arrowsmith, S. (2018), supra nota 15, chapter 6, section 13
[96] Steinicke, M., Vesterdorf, P. L. (2018). *EU public procurement law: Brussels commentary*. München: Nomos/Hart Publishing, 517; Graells, A. S. (2011), *supra nota* 25, 373
[97] Koroljov, D., Simovart, M.A. (2019), *supra nota* 91, 490
[98] M.Rosentau (2020), *supra nota* 86, 368

2.2. Maintenance as a factor influencing the bid and contract price

One additional obsticle is the duration of the contracts. Mainly contracting authority's need is to develop software first, which takes time, and afterwords need to keep software properly working, i.e. to have the maintenance service. Maintenance is a long-term process and reasonable contract period should be longer than standard framework agreement – four years, which including the development of the software and its maintanance is too short period according to the author's opinion. It is easier to perform a maintanance by the same party who did the development of the software and within this arrises several issues: a) as developer knows the software better the competitive offer for the next awarded contract could be lower; b) offered price by the other economic entity most likely will be done accordingly to the risk management and the offered price will be higher to cover the risk of responsibility; c) in case of need both – further development and maintanace – there could be a slight infringement of a fair competition as one of the possible tenderers already been involved with development and maintanace during the previous contract which gives him better overview of works.

There is insufficient precision for the technical description of the service to enter into a long-term procurement contract, and framework contracts are limited to four years, save in exceptional cases duly justified. It is unlikely possible to duly justify the need of a longer framework contract for the software program maintanace – it is unlikely that there is no competitive specialists on the market, though it is possible to conclude longer than four years framework agreement, for instance where economic operators need to dispose of equipment the amortisation period of which is longer than four years and which must be available at any time over the entire duration of the framework agreement.[99]

One of such cases can be the maintanance of a medical equipment. Medical imaging equipment, such as magnetic resonance imaging, computed tomography, X-Ray, ultrasound, has to be renewed or upgraded at a minimum of 5 years period and reasonable upgrade or renewal should be done every 10 years.[100] The economic crisis had an impact on medical imaging equipment even before

[99] Directive 2014/24/EU, *supra nota* 1, preamble point 62
[100] European Society of Radiology (2014). Renewal of radiological equipment. *Springer Online: Insights Imaging*, 5, 543–546; The European Coordination Committee of the Radiological, Electromedical and Healthcare IT Industry (2021). Medical Imaging Equipment: Age Profile & Density. Accessed: https://www.cocir.org/fileadmin/Publications_2021/COCIR_Medical_Imaging_Equipment_Age_Profile_Density_-_2021_Edition.pdf, 21.10.2022

the pandemic,[101] but now due to geo-political crisis the issue of competitive procurement is even more sharp. As a result, the life cycle of the medical imaging equipment considered by the procurers varies between 7 to 10 years. This period should cover the maintance service as well as spare parts for that medical device. The obligation of the procurer to determine the scope of the framework contract follows from several provisions of the directive,[102] where the expected quantity and/or cost and the maximum quantity and/or cost of the items to be purchased under the framework contract must be stated in the tender notice of the public procurement organized for the conclusion of the framework contract.[103] It is challenging for the procurer to follow all these guidelines of the court and to predict needed scope of maintanance for the complex devices, same as it is challenging to the economic entity to submit and fix prices for a such long period. Eventually it could happen that submitted bid turns out to be abnormally low when looking back at it 5 years later and the only way to change it is through the modifying the agreement accordingly to the Article 72 of the General Directive.

[101] European Society of Radiology (2015). The consequences of the economic crisis in radiology. *Springer Online: Insights Imaging*, 6, 573–577
[102] CJEU, 19.12.2018, Autorità Garante della Concorrenza e del Mercato - Antitrust and Coopservice, C-216/17, EU:C:2018:1034, 61
[103] CJEU, 17.06.2021, Simonsen & Weel, C-23/20, EU:C:2021:490, 80

3. INTERPRETATION OF THE LAW THROUGH THE CASE STUDY

Within this chapter the author shall analise case studies within the past two years putting it on a weight of competion transparancy and shall try to indicate main issues and arguments parties and courts had. Author shall examine the case-law study of the COVID and post-COVID period bearing in mind intertwining of abnormally low price and performance of the contracts.

Before analising the case-law study main principles of law regulations should be overviewed first. The preservation of competition is the primary goal of public procurement law and that’s why it is legally controlled. Public procurement law evolved from competition law. The legislation is not effective if it does not aid in preserving competitiveness.[104] The state must make sure that no unjustifiable barriers to doing business are put in the way of entrepreneurs based on the idea of the basic right. The state must maintain the legal framework necessary for the free market to operate in order for this freedom to be realized.[105] That’s why it is important to analise intertwining of COVID and post-COVID period, recent geo-political situation and case-law of the last years.

There have been more unfairly low price cases in the Competition Board's proceedings than unfairly high price cases.[106] Within the scope of this work, the author has not investigated the situation of unfairly high prices, but tried to examine collusions between offered prices and later on modifications of the contracts. That is why in this research, judgments with two orientations have been taken – abnormally low price and modifications of the contract.

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[104] Saar, K. (2014), *supra nota* 18, 423
[105] *Ibid*, 424
[106] Tamm, E. (2007), *supra nota* 16, 267

3.1. Importance of case-law studies of CJEU

Author of the paper has given a comprehensive overview of EU and national law regulations in her bachelor paper and for that reason shall not do it in current paper, though some important points should be brought out to show the importants of the case-law study.

The national legislator determines which laws need to be amended and which state administrative structures need to be reorganized during the transposition of the directives. The CJEU has evolved a system wherein directives can have direct legal effect in specific circumstances, notwithstanding the fact that the practice of transposing directives has been uneven and occasionally with mistakes in the member states.[107] That's why the opinions of the court are crucial in determining how domestic law is to be interpreted.

In the case of legal issues, the CJEU weighs up immediate legal effect of the directive and the interpretation consistent with the directive, i.e. the indirect legal effect, must be taken as a starting point. If it is not possible to use both, it is possible to search whether the right arising from the directive is perhaps present in the TFEU itself, and solve the legal question by directly applying the TFEU.[108] This leads to the conclusion that the TFEU serves as the foundation and mandates guaranteeing competition, which would then be done so by the contracting authority in a transparent, equitable, and proportionate manner. When exercising the right of discretion in public procurement, the procurer must follow the general rules for the exercise of the right of discretion.[109]

Previously said leads author to the thought that the contracting authority should keep in mind not only procurement directives, but the TFEU main principles of keeping healthy competition not only during the procurement procedure, but after awarding the contract as well. For instance one of the discution points regarding the Article 123 of PPA is a framework agreement and the level of allowed changes during the performance of the agreement – should it be taken a maximum cost of the agreement as a starting point or an estimated level and up to the maximum.

[107] Ginter, C., Schasmin, P. (2021). Euroopa Liidu direktiivide mõistmine ja mõju. *Juridica*, 2, 140
[108] *Ibid*, 140
[109] Simovart, M. A., Parrest, N. (2018), *supra nota* 11, 231

Public procurement regulations are comparatively young (started with the regulation of public works in 1971, then supply of goods in 1977 and then procurement of services directive followed in 1992; all of them were in 2004 and then in 2014 under the major overhaul[110]) and still in the line of improvements. Adopted in 2014 directives in general aimed to make the regulations more adaptable, unambiguous and not that much bureaucratic. Important case-law, like Succhi di Frutta,[111] has also been included into EU procurement rules as a result of the changes. While the costs of unreasonably low tenders have remained largely unchanged in the provisions of the law, the part of the directives that came into force in 2014 regarding the changes of the contract is new, and therefore the court's interpretations of the law regarding changes of the contract are might be more under attention.

The decisions of the Competition Authority and the courts, particularly the Supreme Court, have a much greater impact on Competition law than they do in other areas of the law. Even though the Estonian legal system cannot be considered to be based on precedent law and the positions of various agencies and courts in the implementation of the law cannot be binding, the role of the court decisions is big.[112]

Next two sub-chapters of the paper shall give an overview of recent European and Estonian court cases and, where both sub-chapters are divided into two main categories of the court cases – court decisions regarding unreasonably low cost and court decisions regarding modifications of the contract.

Author has made a comprehensive research of the court decisions of last two years and tried to get a connections between unreasonably low cost tenders and afterwords contract modifications.

3.2. Case-law studies of CJEU

Author of the paper studied in total 42 CJEU cases, from which made a summary overview of the most important aspects that clearly come from these court cases. There's only few cases in past two years which addresses the subject matter of the modification of the contract and more of them

[110] Steinicke, M., Vesterdorf, P. L. (2018), *supra nota* 96
[111] CJEU, C-496/99, *supra nota* 61
[112] Tamm, E. (2007), *supra nota* 16, 263

addresses the issue of unreasonably low cost found, nevertheless doing this reasearch the author found some older cases which give additional light on the subject matter of the work.

3.2.1. Unreasonably low cost court cases

In current sub-chapter the author first brings out the court cases that are outside of the set time scope, but which, in the author's opinion, provide additional starting points for comparing the price levels of the tenders.

Main approach after the tender appearing to be low and later while weighing the price level of the tender is that it is necessary for the contracting authority to determine if a tender is unreasonably low. The CJEU found, that it should be taken into account not only the circumstances outlined in the legislative acts, but also all the criteria that are pertinent in light of the services in question when examining the unreasonably low nature of a tender. This is important in order to ensure healthy competition.[113] That shows again that there's a big descretion left to the contracting authority and as well the posibilities to the tenderer to weigh the level of the offered price.

Tenders with unreasonably low cost may also be found in the case of several tenders within a single procedure, so the contracting auhtority should ask the tenderers for explanations about all these offers. In case of rewarding the contract to the tenderer whose offer was low and afterwords getting requiry to provide justifications for not considering a bid to be unreasonably low the contracting authority is not obliged to provide accurate details on the technical and financial aspects of that bid, but "must set out the reasoning on the basis of which first, it concluded that, on account primarily of its financial characteristics, that tender complied, inter alia, with the national legislation of the country in which the services were to be provided in respect of the remuneration of staff, contributions to the social security scheme and compliance with occupational safety and health standards and, secondly, it determined that the proposed price included all the costs arising from the technical aspects of the successful tender".[114] In the light of the foregoing, the contracting authority should be able to give comprehensive answer, i.e. the contracting authority should reason its answer before awarding the low bid tender succsessful.

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[113] General Court, 28.01.2016, Agriconsulting Europe v Commission, T-570/13, EU:T:2016:40, 55
[114] General Court, 10.09.2019, Trasys International and Axianseu - Digital Solutions v EASA, T-741/17, EU:T:2019:572, 50 and 62

It can also be clearly read from the recent judgment that if an unsuccessful tenderer requires any explanations, these explanations must be given thoroughly, including if the tender didn't appear to be unreasonably low, then also explaination why the tender didn't appear to be unreasonably low should be provided. According to case-law, it is not enough if the procuring entity simply states that the tender declared successful in the procurement procedure is not unreasonably low in cost, or states that, in its opinion, the relevant tender was not unreasonably low in cost.[115] Court's approach once again supports four basic principles – transparency, equal treatment, non-discrimination and proportionality.

In court practice, it has usually been found that at least three offers must be submitted when comparing the underbid. Nevertheless, the directives also allow comparison of the costs while only two tenders are submitted. In any of the cases, as the court has previously found and as it is already stated in the work, all possible relevant factors must be taken into account.[116]

In any tender procedure, and later on after concluding the contract, both parties have an interest in the performance of the contract, and thus a zero-euro offer cannot be considered suitable for the performance of the contract. However, such an offer cannot be rejected due to non-compliance, but it must be found whether it is an unreasonably low offer.[117]

In author’s opinion foregoing are the main possible ways to keep the healthy competition which is not affecting the performance of the contract. Taking into account all possible factors and given justifications of the tenderers should be sufficient basis to weigh the level of offered bid and through that to guarantee a proper performance of a contract.

3.2.2. Contract modification court cases

As it was already previously noted there’s only few CJEU cases regarding the modification of the contract. None of them directly connected to the subject matter of the current work, though it is worth to mention two cases.

[115] General Court, 1.12.2021, Sopra Steria Benelux and Unisys Belgium v Commission, T-546/20, EU:T:2021:846, 52, 54
[116] CJEU, 15.09.22, Veridos, C-669/20, EU:C:2022:684, 39-40
[117] CJEU, 10.09.2020, Tax-Fin-Lex, C-367/19, EU:C:2020:685, 27-28

The referring court in one of the cases questions "whether the condition of universal or partial succession of the original contractor following insolvency is satisfied where the new contractor takes over only the rights and obligations arising from the framework agreement concluded with the contracting authority and does not take over all or part of the business of the original contractor falling within the scope of that framework agreement".[118] The court found that it must be interpreted "as meaning that an economic operator which, following the insolvency of the initial contractor which led to its liquidation, has taken over only the rights and obligations of the initial contractor arising from a framework agreement concluded with a contracting authority must be regarded as having succeeded in part of that initial contractor, following corporate restructuring," within the meaning of the provision of a contract modification.[119] This case shows that the new contractor can take over either all or part of the assets of the original contracting party, which are only initial party's assets. This option lowers down some risks for the public entity in case the public contractor prefer to proceed with the same contract without having a new procurement procedure.

The second case is giving a behavior assessment to both – the contracting authority and the successful tenderer. According to the CJEU supervisory authority may initiate a supervision related to the modification of the contract, and in case of the infringement may penalty a fine on both contracting authority and the tenderer. The amount of the fine shall be depending on the specific conduct of each of those parties.[120] In author's opinion this kind of approach can prevent unlawful contract modifications and thus violations of Competition law.

3.3. Case-law studies of Estonian courts

Author of the paper studied in total 72 Estonian court cases regarding abnormally low tender and contract modifications, from which made a summary overview of the most important aspects. Similarly to CJEU cases in Estonia there's more cases regarding the abnormally low tender price than the contract modification cases.

[118] CJEU, 03.02.2022, Advania Sverige and Kammarkollegiet, C-461/20, EU:C:2022:72, 22
[119] *Ibid*, 38
[120] CJEU, 14.05.20, T-Systems Magyarország and Others, C-263/19, EU:C:2020:373, 55 and 75

Similar to the previous subsection, the author of the work couldn't find direct connections of the cases to the subject matter of the paper, though all cases provides interpretation of the law which may lead to particular conclusion author is looking for.

3.3.1. Unreasonably low cost court cases

Generally similar keywords are coming from all court cases to determine the abnormally low tender: the cost of the tender should have significant difference, though it is not possible to identify exactly what is 'significant difference'. Sometime it is observed through the estimated value of the tender, in some cases through the difference between the bids, in some cases both of them, sometimes the percentage difference of the bids is being taken into account, or possible market dominance factor, or sate aid etc.

Further the author gives a short analise of what court has indicated as a significant difference in cases of last two years. It seem easy to indicate a significant difference through the percentage difference of the submitted tenders, but within the court practice it is rather confusing. 17,3% difference is not concedered to be remarkable difference. The cort stated that such a difference can be justified by the providers' different experience in developing similar information technology solutions, teams of different sizes and their salaries, different prices of the offered software and components, etc. The desired profits and fixed costs of entrepreneurs may also differ.[121] At the same time 20% difference by way of analogy with construction work abnormally low tender' indicator is confusing. The decisions varies: once it is held, that this approach is not correct[122] and within the other dispute it is being brought out by the Public Procurement Review Committee (Review Committee) as an indicator.[123] Review Committee stated, that 13% difference between the estimated value and the bid is not a significant difference where at the same time other bids are higher than the estimated value of the tender.[124] It is not enough to compare only the estimated value, the difference of the bids should be taken into account.[125] At the same time it is not enough to make a conclusion about doubts of unreasonably low tender relying only on the difference of the bids, additionally there could be taken in account consumer price index.[126]

[121] Tallinn Administrative Court, 16.01.2020, 3-19-2248, 14
[122] Review Committee, 12.06.2020, 104-20/219382, 15 (3)
[123] Review Committee, 16.10.2019, 154-19/210682, 20.3
[124] Review Committee, 12.06.2020, 104-20/219382, 15 1) and 2)
[125] Review Committee, 29.06.2022, 77-22/248547, 9.3.2.
[126] Review Committee, 14.06.2022, 68-22/246628, 9.4.1.

It is important to bring out, that even though the provisions of unreasonably low cost regarding simple procurement are not directly applicable, due to Article 3 of the PPA, performing the inspection of unreasonably low cost is the general responsibility of the procurer.[127]

Underlining all above mentioned, the term "object of the procurement contract" should be taken as a startpoint and understood as broadly as possible, i.e. in such a way that any factors and indicators that may designate the unreasonableness of the offered price are relevant in the event of a suspicion of an underbid. However, as follows from the past practice of the case-law, comparison with the costs of competing tenders, the estimated value of the procurement contract or any other typically used figures may not always be appropriate. In each individual case, one must make sure that the comparison is appropriate.

Cases of last two years covers all above mentioned factors of abnormally low tenders. Nevertheless estimated value of the tender is still used as one of the indicators, though adopted in 2014 directives does not see it as an indicator. In other words, an estimated value should not be the only indicator. In the case of appeal an unreasonably low cost, the court's position regarding the burden of proof have remained the same since 2011 – the person who filed the complaint has the burden of proof to prove that the price stated in the contested offer is too low.[128]

In the light of the foregoing, on one hand it is complicated to appoint the unreasonably low bid, but from the other hand there's big descretion left to the scope of indication. Main thing should be taken into account is that all possible factors and examination should be considered. Author believes that this soluton could guarantee the proper performance of the contract.

3.3.2. Contract modification court cases

One of the main questions about contract modification admissibility is what is and what is not substantial modification. The fact that the overall nature of the contract originally contained in the basic documents was changed and that different offers could have been received in the procurement procedure with the changed conditions shows that the change is important in terms

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[127] Review Committee, 4.02.2020, 5-20/217805, 12.1-12.2; Tallinn District Court, 3.09.2021, 3-21-1809, 16; Review Committee, 22.06.2022, 75-22/246028, 11; Review Committee, 10.01.2022, 220-21/243943, 18

[128] Supreme Court, 14.03.2011, 3-3-1-87-10, 19; Administrative Board of the District Court, 04.11.2020, 3-20-924, 29; Review Committee, 28.11.2018, 130-18/196592, 17; Review Committee, 13.04.2022, 136-20/220835, 14; Review Committee, 19.08.2021 124-21/234323, 15; Tartu District Court, 13.01.2022, 3-21-2077/26, 17.2

of content, but it does not prevent the application of the *de minimis* exception. A substantial change in the nature of the contract does not necessarily mean a change in the general nature of the contract, though later changes to the contract may undermine transparency and equal treatment. Nevertheless deviations from general principles are knowingly allowed by the legislators.[129]

As it was previously said there's not so many contract modification court cases. In the light of the foregoing, the author of the work brings out couple of cases which is not covering technology tenders nor period of two years, but are important in the light of current paper.

During the last two years it is recommended to forsee indexation in the public procurement contracts. Indexation is one of the ways to low down the risks for tenderers in the fast changing economic situation. Indexation cannot be required by the tenderer within the public procurement procedure, i.e. it could be only as a suggestion to the contracting entity. Requiring indexation is the way to achieve a situation where the submission of the tender would be as risk-free as possible for the entrepreneur, which is not the matter of illegality of the tender documents, but rather expediency of the terms of the procurement contract and which is the discretion of the procurer.[130]

Author of the paper believes that considering the tremendous economic changes within past two years, the indexation is rather obligatory to foresee in the contracts. Annual indexing does not violate the principles of equal treatment and competition, does not place in an unequal position compared to the tenderers who participated in the procurement procedure, herewith the important nuance is that annual indexing does not violate the principle of competition only if such a provision was explicitly stated in the contract. In case it was not forseen in the contract, then the tenderer must prove this change on the basis of his economic activity data.[131]

Successful tenderer generally has to bear the risk that the offered price is realistic,[132] though if the undercompensation is due to circumstances that even the diligent procurer, in addition to the tenderer, could not foresee during the procurement procedure, PPA Article 123 clause 1 subsection 4 can be applied. The provision allows to modify the contract up to 50 per cent of its origin value. The amendment of the procurement contract can only be exceptional, can only be carried out in

[129] Supreme Court, 30.05.2022, 3-20-1150
[130] Tallinn District Court, 21.06.2018, 3-18-587, 10
[131] Supreme Court, 31.03.2022, 3-19-312, 24
[132] Supreme Court, 11.11.2021, 3-18-1946, 28

strict accordance with the conditions stipulated by law and must not harm the public procurement transparency or equal treatment of entrepreneurs. Termination of a procurement contract is much less problematic compared to its amendment from the point of view of the general principles of Public Procurement act.[133]

Important flexibility to the procurer has been given by the court in 2018. If the procurer has been diligent and did everything possible to ensure that the procedure be successful (e.g. started the procedure on time, but due to a dispute the procedure was prolonged and the time of signing the contract was significantly delayed), then the procurer has the right to use the contract amendment up to 50% of the scope, but in such case the general nature of the contract must remain unchanged.[134] At the same time, it should be remembered that not any change of contract performance is permissible. For instance, even though the procurer was diligent, but the work was divided into stages disproportionately and the tenderer submitted his offer regarding deadlines in the procurement procedure, then later on it is not correct to ask for the contract modification.[135]

Within last couple of years quite many goods delivery difficulties or withdrawal of products from production has appeared. In such case the modification of the contract is possibile. The court considers it inappropriate to base the financial assessment of the amount of replacement (i.e. how many % of the procurement cost were the changes) on the total cost of the replaced items, instead of evaluating the price difference between the equipment provided in the original project and the replacement equipment.[136]

3.4. Case-law summary

Summarising up researched case-law of unreasonably low bid and modifying the contract, the author of the paper could not find any direct connections of submitted low price tender and afterwords need of modifying the contract. The issue of weighing unreasonably low bid remains the same and there’s still no clear guide how to prevent awarding of the contract to the tenderer whose bid might not be realistic. There’s huge discretion left to the contracting authority to take into account any possible explanations of the tenderer and the subject of the contract. At the same

[133] *Ibid*, 29-30
[134] Tallinn District Court, 03.09.2021, 3-21-1809, 14
[135] Tallinn District Court, 04.03.2022, 2-19-10964, 12.2
[136] Tallinn District Court, 3.10.2018, 3-17-982, 19

time it has become even more unclear regarding the last two year changes – what and at what extent should be taken possible justifications of unreasonably low bid. Regardless of weighing and aspects of underbid the process remains complex and the modification of the contract is sometimes confusing. That is why both, the tenderer and the contracting authority, should keep in mind all possible consequences, inter alia, fines imposed on both and as well the obligation to think thoroughly through all the tender' and contract' conditions. Author believes that at least indexation foreseen in the contract could be one of the possibile ways to lower down the risks of both.

4. QUESTIONNAIRE SURVEY AND RESULTS

4.1. Justification for using the questionnaire as a research method

Academical literature neither case studies most likely can not give an overview of the thoughts, issues and real problems specialists of the procurement field faced nor their personal opinion regarding the last couple of years in public procurement. Academical literature neither case studies might not show the situation what is hidden ‘behind the doors’ during the public procurement procidure. The author of the work has used a questionnaire to find out if the academical literature and case study are reflecting already known possible standpoints and issues or if there are some more opinions and outlooks which are known to the parties, but stays unrevealed to public.

4.2. Questionnaire design and overview

For the reason to get most wide outlook of the problems the author has questioned various perties involved in public procurement, like different contracting authorities, tenderers, lawyers and other specialists of the field, like academical persons of educational insitutions and some financial managers. Totally 20 persons has been questioned who shall stay anonymous and will not be revealed in the work.

Questionnaire has been done as an interview within personal meetings or during phone calls within several weeks. As the questionnaire was done in interview form with parties who are involved in public procurement process in the tehcnology field, it turned more into a discussion or conversation about last year changes, it was not narrowly as a ‘question and answer’ questionnaire. The questions of the interviews can be seen in the appendix 1 of the paper, nevertheless the questions reflects main direction of the interviews and are not exact and final question as some of the questions has been slightly corrected during the conversations depending on the respondents profile.

4.3. Questionnaire analysis

The questions evoked different emotions in the respondents and the way the respondents were ready to answer and their long and detailed answers indicate that the topic is relevant to the respondents. It is clear that the respondents come into contact with the pricing and modifications of the contract in their work closely and on a daily basis and it is a ‘hot’ topic nowadays. The questions of the questionnaire were rather easy to answer, but some of the questions, like “does the modification of the contract been clear and easy to understand and do” or “has relying on the consumer price index in the contracts made the costs of the tenders more realistic” put respondents to analyse their answers before giving the final answer. All answers were given in their most thorough way.

4.4. Questionnaire results

The answers given by the resondents reflects similarity and deffers only within some given responds to the questions. The difference in answers mostly denepends on the respondent profile. Supervisory authorities, especially dealing with the structural funds, are stricter in their considerations of contract modifications allowed, especially about changes under the PPA Article 123 clause 1 subsection 2 are not that often accepted or allowed. To use this ground of contract modification it is really important to forsee this change in the contract in the most comprehensive way. It is not enough of just pointing out that indexation is possible, but should state what is exact way of that kind of change, what is the maximum percentage, the frequency and it must indicate that in case of using the consumer price index the indexation shall be used both ways – in case the prices increase or goes down. From the answers it is clear, that supervisory authorities are not accepting the changes under the PPA Article 123 clause 1 subsection 2 – usually there’s not enough modification details marked in the contracts, though supervisory authorities believe that this ground of the modification of the contract is usufull to both parties (procurer and tenderer) and gives more posibilities to reflect economic changes of the world.

Mainly on all questions respondents answered similarly. The modification of the contract has become an important part of performace of the contract especially in past two years. It has been used a lot and as for now it is not that much confusing anymore as in the beginning. The contracting authorities use indexation in their contracts often, especially consumer price index has been used a lot. Previuosly done market research (PPA Article 10) has given a better result to submit or to get

realistic bids. Tenderers have certain risks regarding the answers given during market research, nevertheless they are rather cooperative and willing to open their thoughts to the contracting authority. From the given answers it is clearly coming out that the bids are not realistic unless it was not previous market research done. Market research helps to make a better prognosis to the estimated value of the contract and it is nowadays even more important to do as the situation is changing fast and tremendously. Market research helps to avoid high price offers as well. Sometimes high price offers exceeded the estimated value of the contract and therefore has been rejected, though the prices were probably adequate.

All the respondents has agreed, that Ministry of Finance' position that the legal remedy specified in the contract must be implemented to the full extent without compromise in case the contract wording is set as there's no discretion left. In case there's discretion for the contracting authority and the contracting authority 'may' implement legal remedies, then there should be done an analysis to the extent of contract breach.

Starting 1.06.2022 improper performance of the contract must be noted in short time given by the PPA when the corresponding circumstance has occurred. All of the responents can not yet answer the question if it has affected the market or prices or the contract performance somehow. It is hard to answer that question because it is not that much time passed since this provision has been adopted.

4.5. Questionnaire summary

Concluding the answers given by the respondents the situation as they see is similar. Comparing to previous period before COVID time it has been a lot of contract modifications done and there's an obvious need for the contract modifications nowadays. It is dificult to predict the market change and set up a realistic price, especially without proper market research and contract modification posibilities.

CONCLUSION

The author of the paper were looking for the answer on the question what are, if any, the indicators of abnormally low tender price specific to the public procurement procedures in the technology and later reasons to modify the contract in Estonia and should such criteria be added to Article 115 or Article 123 of the Estonian Public Procurement Act in a way that strategic pricing, as seen in the low bid situations, is handled in accordance with Article 3.

Case-law study showd, that there's no direct connections of the tenders, where there were disputes about the tender cost and later the contract modification within the same procurement procedure. Author also did not find any connections in matters concerning the performance of the contract. It was not possible to find an answer to the question from the case-law, but it was possible to get an overview of the collusions through the questionnaire. Nevertheless case-law give to the parties guidelines and directions for both – procurers and tenderers – and it helps to weigh their actions during the tender procedure and the contract performance. In the event that the cost of the tender has been mistaken to such an extent that the tender should have been recognized as unreasonably low and should therefore lead to an illegal contract amendment and thereby harm competition, the consequences may concern both parties if the contract amendment is made in violation of the law.

It is obvious that calculating the realistic price and minimising the risks of both parties has became challenging during the last two years to both – to the contracting authority as well to the tenderer. One of the way to minimise risks and get a realistic price and somehow guarantee the proper performance of the contract is to carry out a market research and mark indexation into the contract. Nevertheless there still may happen unforseen circumstances like product withdrawal by the producer which is happening due to COVID or geopolitical issues.

In the light of the foregoing author has come to a conclusion that there's obviuos collusions between the tender prices and later on contract modifications. In author's opinion some of the modifications are probably distorting the fair competion and therefore are unlawful, but which are possible to correct in close future through adopting certain behavior of the parties. The contracting

authorities should carry out more often market researches and tenderers should be more pro-active in giving their feedback to procurement documents.

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APPENDICES

Appendix 1. Questionnaire

1) Was there a lot of contract modifications done under the RHS 123?

2) Do you tent to use given possibilities by RHS 123?

3) Does the modification of the contract been clear and easy to understand and do?

4) Considering the latest geo-political changes in the world and compering to the practice 3 years ago have you had to make a lot of changes under the RHS 123?

5) Do you use modifications under the RHS 123 lg 1 p 2?

6) Comparing to past 3 years while drafting the public procurement documents do you try to mark possible modifications under the RHS 123 lg 1 p 2?

7) Do you use the consumer price index for cost changes in the contract?

8) Has relying on the consumer price index in the contracts made the costs of the tenders more realistic?

9) Have you faced a problem where an abnormally high offer has been made?

10) How do you assess Ministry of Finance' position that the legal remedy specified in the contract must be implemented to the full extent without compromise?

11) From 1.06.2022 improper performance of the contract must be noted immediately when the corresponding circumstance has occurred – does this potentially help to avoid an unreliable partner and, among other things, to avoid submitting an unreasonably low offer?

12) Does the procurer use the right arising from PPA §10 (conducting market research)?

13) Are the tenderers willing to openly participate in the market research and share ideas and thoughts fearlessly in front of their competitors? (in the case of market research, all information received by contracting authority must be published in the subsequent procurement procedure to ensure equal treatment)

14) How do you assess the market situation – have the offers been realistic in the last year? Has it been easy to compare offers and ascertain the realism of the offered price?

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