Public Procurement World - Italy

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# 1. The Laws

## a. What is the applicable legislation?

*Decreto Legislativo 18 aprile 2016, n. 50 ("Codice dei Contratti Pubblici"* - Code of Public Contracts*)* implements and transposes into Italian legislation Directive 2014/23/EU on the award of concession contracts, Directive 2014/24/EU on public procurement and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors.

In addition, specific laws and regulations may apply depending on the relevant industry, the contracting authority and the awarding procedure.

## b. Does the legislation relate to or interact with any applicable trade agreement, such as the European Union procurement rules, WTO Government Procurement Agreement (GPA) or the procurement requirements of the North American Free Trade Agreement (“NAFTA”)?

Italian public procurement legislation is based largely on the EU Directives on public procurement. These in turn are influenced by the WTO Government Procurement Agreement (GPA) as the European Union and each of its 28 Member States are signatories to the GPA. The scope of the GPA covers any law, regulation, procedure or practice regarding any procurement by any contractual means as soon as the procuring entity and the type of contract are listed in Appendix I to the GPA and the thresholds stated there are exceeded.

In addition, article 25 of Directive 2014/24/EU is exactly transposed into *Codice dei Contratti Pubblici*, and Italian contracting authorities shall accord to the works, supplies, services and economic operators of the signatories to those agreements [GPA and other binding international agreement], treatment no less favourable than the treatment accorded under the same *Codice dei Contratti Pubblici*.

## c. What are the basic underlying principles of the legal framework?

As Italian procurement law aims largely at implementing the EU Directives on public procurement, it concentrates on principles resulting from European primary law. Thus, public contracts may only be awarded on the basis of a competitive award procedure, which must be transparent and non-discriminatory and respect the principles of economic procurement and proportionality. Additionally, the promotion of small business' interests must be considered. Aspects of quality and innovation as well as social and environmental aspects have to be taken into account, too. These principles have to be observed during every step of the procurement process and are further detailed in and implemented through national provisions.

## d. Is aerospace and defense procurement treated differently from other types of procurement?

While, in principle, government procurement in the field of defense and security falls under the general EU procurement rules (Directive 2014/24/EU), these general rules do not accommodate the specificities of defense-related procurement contracts.

As a matter of law, article 15 of Directive 2014/24/EU is exactly transposed into *Codice dei Contratti Pubblici*, which does not apply to contracts falling within the scope or rather excluded from the scope of Directive 2009/91/EC (as transposed into Italian legislation through *Decreto Legislativo 15 novembre 2011, n. 208*).

*Codice dei Contratti Pubblici* is basically consistent with EU provisions also as to public contracts and design contests involving defence or security aspects.

# 2. Application of the Statutory Procurement Laws

## a. Which public agencies are covered by the laws?

*Codice dei Contratti Pubblici* applies to public contracting authorities, including means the State and government authorities (e.g., Ministries), local authorities (e.g., Regions, Municipalities, and local health authorities), non-commercial public entities (e.g., ISTAT, INAIL, INPS), bodies governed by public law (as defined under article 2.1(4) of Directive 2014/24/EU) or associations (of any kind) formed by one or more such authorities or one or more such bodies.

By way of an example, ENAC, ENAV, ANAS, universities and relevant central purchasing bodies qualify as bodies governed by public law (*organismi di diritto pubblico*).

Also *Codice dei Contratti Pubblici* partially applies also to *imprese pubbliche* (i.e., companies which are directly or indirectly influenced, or even controlled, by public contracting authorities) and certain private entities.

## b. Which private entities are covered by the laws?

Procurement provisions also apply to legal entities under private law which are established for the specific purpose of meeting non-commercial needs in the general interest if they are controlled by classic public authorities.

Furthermore, other private entities have to observe public procurement law if their activities are funded by a public authority by more than 50 percent. Covered activities are e.g. construction and operation of hospitals, construction and operation of sport facilities sports, schools, leisure facilities, universities, waste management or regional development.

Additionally, public procurement law applies to any natural or legal person which executes activities in the sectors of water, energy and transports (utility sectors) if the execution of this activity is based on special or exclusive rights granted by a competent public authority or if a public contracting entity individually or together with others may exercise a dominant influence over the private entity.

Also private entities are subject to *Codice dei Contratti Pubblici* in awarding and executing *opere di urbanizzazione* in the context of building permits and works.

## c. Are co-operations between contracting authorities exempted from public procurement law? If so, what are the conditions for the exemption?

*Codice dei Contratti Pubblici* does not apply to public-public co-operation in the hypothesis set forth under article 12 of Directive 2014/24/EU as to, by way of an example, in-house awarding and co-operation.

## d. Which types of contracts are covered?

*Codice dei Contratti Pubblici* only covers any public contracts - including concession, works, supply, and service contracts - entered into by public contracting authorities (and any other entity or body subject to public procurement legislation).

## e. How are changes to an existing contract dealt with? Do changes require a new procurement procedure?

All changes to an existing contract are to be authorized by the *Responsabile Unico del Procedimento* (i.e., the officer in charge of the contract within the public contracting authority).

Section 106 of *Codice dei Contratti Pubblici* that transposes Art. 72 of the Directive 2014/24/EU differentiates between changes which require a new procurement procedure and those which do not.

A new procurement procedure is required if the change to the contract is substantial. This is the case if new conditions are introduced under which:

different bidders could have been admitted to the procurement procedure; or

a different bid could have been accepted; or

if the new conditions could have attracted more bidders.

A new procurement procedure is further required if:

the change modifies the contractual economic balance in favour of the bidder; or

the contract is substantially extended; or

the contractor is replaced.

However, the transfer to a new contractor does not require a new procurement procedure where a new contractor replaces the one to which the contracting authority had initially awarded the contract as a consequence of:

an unequivocal review clause or option; or

succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established and it is provided that the transfer does not entail other substantial modifications to the contract; or

in the event that the contracting authority itself assumes the main contractor's obligations towards its subcontractors.

Additionally, a new procurement procedure is not required if:

the original procurement documents contain unequivocal review clauses or options which provide information regarding the conditions, the scope and the type of admissible changes and do not modify the overall economic characteristics of the contract; or

unforeseen additional supplies, works or services become necessary and the current contractor cannot be replaced for economic or technical reasons and if the costs of the original procurement are not increased by more than 50%; or

the change becomes necessary due to unforeseeable events, the overall characteristics of the contract are not modified and the costs of the original procurement are not increased by more than 50%;

A change in the existing contract does not require a new procurement procedure if the overall characteristics of the contract are not modified and the value of the contractual change:

does not equal the threshold values contained in the European Directives; and

does not exceed 10% of the original supplies and services, or – in case of works – does not exceed 15% margin.

The contracting authorities has the right to terminate the contract with immediate effect in case a contractual change has been made in violation of the above.

## f. What is the applicable regime for framework agreements?

Framework agreements are contracts designed to set out the general conditions for future procurements during a given period of time and especially the cost of those procurements. According to Section 54 of *Codice dei Contratti Pubblici*, framework agreements are subject to public procurement law. The contracting authority has to conduct a competitive award procedure to award a framework agreement. The contracting authorities that are parties to a specific framework agreement from the outset should be clearly indicated through identified the call for competition or the invitation to confirm interest. As a general rule, the length of a framework agreement is limited to four years (and eight years for utility sectors). Framework agreements with multiple suppliers are admissible. Contracts based on a framework agreement can only be awarded under the conditions laid down in the framework agreement. The contracting authority may conduct a competitive procedure for the award of single orders under the framework agreement with multiple suppliers if this possibility has been stipulated by the contracting authorities in the procurement documents for the framework agreement. The award decision should be based on objective reasons that have been set out in the procurement documents for the framework agreement.

## g. What is the applicable regime for public-private partnerships (PPPs)?

Under *Codice dei Contratti Pubblici*, PPP contract is a concession (works or services) contract for pecuniary interest concluded in writing between one or more public contracting authorities and one or more economic operators, where the economic operators assume the operating risk in realizing and exploiting the relevant works and/or services.

The duration of the PPP contract depends on the relevant amortization period or financing modalities.

The selection of the private partner for the PPP requires a tender procedure.

As a general rule, the tender documentation aimed at awarding a PPP include the final project, the draft agreement, and the business plan (*piano economico-finanziario*).

Before opting for a PPP instead of a classic public contract, public contracting authorities evaluate the supply and demand, the economic, financial and social sustainability of the PPP, and the nature and intensity of the PPP risks, and justify their preference for the PPP structure.

In case of an institutional PPP (i.e., the formation of a separate legal entity in which the contracting authority holds shares), procurement law applies on the formation of the legal entity if from an economic perspective with the formation the contracting authority simultaneously awards the procurement contract e.g. by providing the newly formed company the right to provide certain works on the property of the contracting authority. Accordingly, the award of the actual works or service contract does not require a second award procedure if the formation of the legal entity was conducted pursuant to procurement law and the scope of the contract to be awarded to this legal entity was disclosed in said procedure.

## h. How are concessions dealt with?

As anticipated, Directive 2014/23/EU on the award of concessions has been transposed into Italian legislation through *Codice dei Contratti Pubblici* as well.

Concessions are subject to the same procurement law as to general principles, awarding procedures, selection criteria, requirements, and execution.

The duration of concessions shall be limited and shall not exceed the time that a concessionaire could reasonably be expected to take to recoup the investments made in operating the works or services together with a return on invested capital taking into account the investments required to achieve the specific contractual objectives.

## i. Are there anti-avoidance rules (including laws on bid rigging)?

The awarding of contracts is also subject to the provisions of antitrust law which prohibits agreements between competing enterprises that would effect the prevention, restriction or distortion of competition.

Paragraph 4(d) of article 57 of Directive 2014/24/EU expressly provides for the exclusion from public tenders of the economic operator *"where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition"*. Such a provision has not been expressly transposed into Section 80 of *Codice dei Contratti Pubblici*. However, according to *Linee Guida n. 6/2016* of ANAC (ANAC is the *Autorità Nazionale Anti-Corruzione*, acting as national authority supervising public contracts, and also aimed at preventing bribery) and the relevant case-law, the above circumstances are of relevance in the context of the *"professional misconduct, which renders its integrity and reliability questionable"* and triggers the exclusion of the economic operator from the tender procedure.

Consequently, bidders are (likely to be) excluded from procurement procedures who are party to anti-competitive agreements regarding bidding. Anti-competitive agreements in this context are all practices capable of restricting or distorting competition. The term anti-competitive agreement is therefore not restricted to illegal practices, but also includes any other agreements and practices which do not comply with the principles of competition.

Furthermore, bid rigging (including taking and giving bribes in the context of public procurement, unlawfully influencing the tender specifications, or agreeing on (non) participation) may also result in criminal charges according to Italian criminal laws, and may cause additional consequences from a procurement law perspective as well.

# 3. Procurement Procedures

## a. What procurement procedures can be followed?

Italian public procurement law, in line with EU Directives, offers several different ways to award a contract. Contracting authorities may employ the following procedures:

open procedure, in which all interested contractors may submit a bid;

restricted procedure (two-step-procedure), in which, first, a call for competition is published and the contracting authority selects a limited number of the interested economic operators to submit a bid subsequently;

negotiated procedure with call for competition, in which, first, a call for competition is published and the contracting authority selects a limited number of the interested economic operators to submit a first bid and subsequently negotiates the terms of the contract based on the first bids with a call for final bids when negotiations have been concluded;

competitive dialogue, in which a contract notice is published and the contracting authority conducts a dialogue with the candidates admitted to that procedure with the aim of developing one or more suitable alternatives capable of meeting its requirements and on the basis of which the chosen candidates are invited to bid;

innovation partnership, in which the procedure is structured in successive phases following the sequence of steps in the research and innovation process, which may include the manufacturing of the products, the provision of the services or the completion of the works; and

in exceptional cases: direct awards, i.e. award of a contract without publishing a contract notice and/or without conducting a formal competitive procedure (also called: negotiated procedure without call for competition)

As a general rule, the open procedure as well as the restricted procedure are always permissible. Circumstances which permit the negotiated procedure, the competitive dialogue or the innovation partnership are determined in the procurement provisions. Direct awards, as the only non-competitive option, are only admissible in very exceptional cases.

## b. What status do electronic means/procedures have?

According to section 40 of *Codice dei Contratti Pubblici*, central purchasing bodies are required to immediately use electronic means for all communications and information exchanges, while the other contracting authorities are required to use electronic means for the entire procurement procedure by 18 October 2018. Exceptions set forth under article 22 of Directive 2014/24/EU apply.

Additionally, *Codice dei Contratti Pubblici*, in line with EU Directives, lists the following electronic methods and tools for procurement procedures which are at present already available for use:

dynamic purchasing systems which are operated as a completely electronic restricted procedure and are open throughout the period of validity of the purchasing system to any economic operator that satisfies the selection criteria. They may be used by contracting authorities for commonly used purchases the characteristics of which, like being generally available on the market, meet the requirements of the contracting authorities;

electronic auctions in which contracting authorities structure the electronic auction as a repetitive electronic process, which occurs after an initial full evaluation of the bids, enabling to rank the submitted bids using automatic evaluation methods set out by contracting authorities;

electronic catalogues which allow bidders to submit bids in accordance with the technical specifications and formats established by the contracting authority. They may be used especially for framework agreements and may contain images, price information and product descriptions.

In any case, the use of electronic means cannot result in a violation of the general principles inspiring public procurement legislation, including equal treatment and competition principles.

For public procurements below the threshold values, the use of electronic means is also mandatory for many public authorities (e.g., through the *MEPA - Mercato Elettronico della Pubblica Amministrazione*).

## c. Where are contract notices, i.e. calls for bid, published?

Prior information, contract, and contract award notices are published on the website Bids Electronic Daily (TED):

<http://ted.europa.eu/>

TED is the online version of the Supplement to the Official Journal of the EU, dedicated to European public procurement.

In addition, procurement procedures are published on the webpage of the relevant contracting authority and through the online platform of ANAC.

## c. Can certain prospective bidders be excluded from the competition?

The exclusion of certain prospective bidders is regulated in section 80 of *Codice dei Contratti Pubblici* implementing article 57 of Directive 2014/24/EU on the Exclusion grounds.

According to these provisions, bidders who have been convicted of any of the offences listed therein have to be excluded from the competition. The relevant offences include, e.g., forming criminal organizations, money laundering, fraud, bribery and other crimes against public authorities and public interests.

The contracting authority may furthermore exclude a bidder in cases of bankruptcy or upcoming insolvency, a negative contracting track-record, a grave professional misconduct (including, at certain conditions, anti-competitive behaviours), a conflict of interest, a prior involvement in the preparation of the bid which grants the respective bidder a competitive advantage which cannot be balanced otherwise, or supplying misleading information during the procurement procedure. The exclusion has to be proportionate.

# 4. Bidder Selection

## a. Are there any rules on the selection criteria?

Contracts are awarded to economic operators that satisfy the criteria of (a) suitability to pursue the professional activity; (b) economic and financial standing; and (c) technical and professional ability. Such criteria are identified on a case-by-case basis in light of the subject-matter of the contract.

With regard to (a) suitability to pursue the professional activity, contracting authorities may require economic operators to be enrolled in a professional or trade register (if any).

With regard to (b) economic and financial standing, contracting authorities may impose requirements ensuring that economic operators possess the necessary economic and financial capacity to perform the contract, including a certain minimum yearly turnover, information on annual accounts showing the ratios, for instance, between assets and liabilities, and an appropriate level of professional risk indemnity insurance.

With regard to (c) technical and professional ability, contracting authorities may impose requirements ensuring that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard.

## b. Is prequalification an option? If so, what are the requirements? What is the procedure?

Prequalification is an option according to section 90 of *Codice dei Contratti Pubblici* for the procurement of supplies, services and works. In order to prequalify, the applicant has to provide proof that he possesses general technical knowledge, efficiency and reliability for a certain type of contract/performance through enrolment at official registers and/or possession of adequate certification released by accredited bodies.

If the provided information withstands the authority's examination, a prequalification certificate containing a certificate number is issued to the company. The economic operator is then listed in the prequalification database of the competent authority and can be tracked via the certificate number. The company can apply for a public procurement by simply providing the certificate number to the contracting authority, unless a request of a new and specific qualification is advances by the same contracting authority (even upon request of a competitor).

Also, a national database (*Banca dati nazionale degli operatori economici*) should be formed with reference to the capabilities of the bidders and to prove that general selection criteria are satisfied.

## d. Do “blacklists” for bidders exist? If so, what are the conditions for unlisting?

Bidders are enlisted in the *Casellario* of ANAC if they submitted false information or documentation within a tender procedure. Contracting authorities are required to report the event to ANAC, which assesses whether the negligent or fraudulent conduct deserves the enlisting in the *Casellario* and the consequent exclusion from tender for a period until two years.

Also, the abovementioned *Banca dati nazionale degli operatori economici* should include reference to the possession (or the lack) of the general selection criteria.

Operators may take self-cleaning measures to be admitted notwithstanding the presence of any exclusion grounds. In this perspective, evidence has to be provided that:

the bidder has compensated all damages caused by the law infringement or has engaged itself to do so; and

the bidder has taken adequate technical, organisational and personnel-wise measures to prevent future law infringements; and

in case of decree of imprisonment, the conviction does not exceed 18 months or has considered the mitigating circumstance of collaboration to solve the committed offence.

## e. Does the involvement of a company in the set-up of a procurement procedure exclude the company from said procedure due to conflict of interest?

In order to prevent conflicts of interest, a company that was involved in the set-up of a procurement procedure (i.e. drafting of or advising on the specifications within the preliminary market consultations under section 66 of *Codice dei Contratti Pubblici* and article 40 of Directive 2014/24/EU) can be excluded from said procedure pursuant to paragraph 5 let. e of section 80 *Codice dei Contratti Pubblici* if the involvement of the company in the set-up has led to a competitive distortion that cannot be remediated by other, less incisive measures (e.g. longer deadlines to submit a bid).

## f. Can bidders combine to submit a bid (bidder consortia)? What limitations apply?

As a general rule, bidders may combine to submit a bid and form a bidder consortium. Under national procurement law a bidder consortium is basically treated as one individual bidder.

Under *Codice dei Contratti Pubblici*, economic operators may form an ordinary consortium or even a temporary consortium (*raggruppamento temporaneo di imprese - RTI*).

Economic operators form an RTI only and precisely to participate in a tender procedure. Indeed, the RTI is mainly intended to allow the joint participation of operators which would not be able to participated individually. Unlike a consortium, an RTI does not create any structure separated from the companies involved, being only a contractual agreement aimed to carry on public contracts jointly. The members have to appoint, through an (almost) irrevocable mandate, a leader (*impresa mandataria*) which will act as representative of the RTI vis-à-vis the contracting authority. As general rule, RTI members are jointly and severally liable towards the contracting authority, provided that the internal allocation of liabilities is possible and effective *inter partes* only.

Specific provisions apply as to the possession of the requirements either by the consortium/RTI or each member.

The participation in a tender procedure through a consortium/RTI prevents from participating individually or as a member of a further consortium/RTI.

After the award of the contract, the contracting authority may require that the consortium/RTI assumes a specific legal form if this is required for the proper execution of the contract.

In principle, companies which are not competitors on the same market, or would not be qualified to participate in the relevant procedure on an individual-basis, may form a bidder consortium/RTI without raising the general suspicion of a competitive distortion. On the contrary, bidder consortium/RTI may be excluded from the tender procedure if the formation of the bidder consortium/RTI is considered anti-competitive and thus could potentially distort free competition. Such an exclusion should be the result of a specific assessment.

## g. Can members of a bidder consortium be changed during a procurement procedure?

As general rule, consortium/RTI composition cannot be modified. Exceptions are admitted in case of bankruptcy or other insolvency or winding-up proceedings, and in case of withdrawal of a member provided that such a withdrawal is due to organizational needs and is not intended to evade the lack of any requirement.

## h. Do limitations apply for participation of related bidders in the same procurement procedure with competitive bids?

Under paragraph 5, let. m of section 80 of *Codice dei Contratti Pubblici*, the contracting authority excludes the bidder that is, with respect to another bidder within the same tender procedure, in a situation of control, or in another relationship, also *de facto*, if the situation of control or the relationship entails that the offers are referable to a single decision-making centre.

## i. Is there a special regulation or a special requirement for a foreign company to participate in a procurement procedure?

Companies established under the law of an EU Member State participate in national procurement procedures at the same conditions of the Italian operators, and in accordance with mutual recognition and non-discrimination principles.

Non-EU companies are entitled to participate in national procurement procedures and receive a treatment no less favourably than the treatment accorded under the *Codice dei Contratti Pubblici* if they are established in any state part of GPA and other binding international agreement.

Of course, all bidders are requested to produce the documentation in the language indicated in the tender notice, and consequently translation into Italian of certain documents (or preparation of affidavits in Italian, or bilingual version) is generally necessary.

# 5. Specifications

## a. Are there any rules on the specifications?

Under section 68 of *Codice dei Contratti Pubblici* transposing article 42 of Directive 2014/24/EU, technical specifications *"are linked to the subject-matter of the contract and proportionate to its value and its objectives"* and *"shall afford equal access of economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition"*.

Also, reference *"to a specific make or source, or a particular process which characterises the products or services provided by a specific economic operator, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products"* is permitted on an exceptional basis, and shall be accompanied by the words *"or equivalent"*.

## b. Are bidders allowed to change the specifications or submit their own standard terms of business?

Unless allowed by the tender notice and with exclusion of the submission of "equivalent" specifications, bidders are not allowed to change the specifications. In case of violation, the contracting authority has to exclude them from the procedure. Against that background, the submission of own standard terms of business results in exclusion from the procurement procedure because it is considered a change of the specifications.

## c. Is the protection of Small and Medium Enterprises addressed in procurement legislation? If so, how?

In line with the objectives of the Directive 2014/24/EU and the Italian context, *Codice dei Contratti Pubblici* also provides that the interests of Small and Medium Enterprises (SMEs) shall be considered in procurement procedures. As a main consequence of this requirement, the contracting authority shall divide all contracts into lots in order to guarantee an award chance for SMEs. However, the contracting authority may reserve the possibility to award several lots to one bidder, and this has to be reflected in the tender notice. Also, the division into lots cannot be aimed at evading the application of *Codice dei Contratti Pubblici* to the tender procedure (e.g., either moving under the thresholds, or improperly aggregating several and unrelated lots).

# 6. Contract Award

## a. Are there any rules on the award of contracts?

As general rule, the contract is awarded to the most economically advantageous tender, as identified on the basis of the best price-quality ratio, or the price or cost using a cost-effectiveness approach. The award criteria and their weighting have to be set out in the tender notice or in the procurement documents.

The lowest price criterion may be used only in the cases listed in paragraph 4 of section 95 of *Codice dei Contratti Pubblici*.

## b. Are there any limitations regarding the offered bid price?

The contracting authority has to request clarification from a bidder if his bid appears to be abnormally low. If this clarification does not lead to a satisfactory result, i.e. an economic explanation for the offered low price, the contracting authority can exclude the bid, following section 97 of *Codice dei Contratti Pubblici*.

## c. Are there any rules on alternative bids?

As general rule, alternative bids are not admissible. The submission of an alternative bid triggers the exclusion from the procurement procedure.

# 7. Exemptions to Competitive Bidding

## a. Are there any exemptions to competitive bidding, i.e. under what conditions is a direct award/single sourcing permissible?

As mentioned above, Italian public procurement regulations permits direct awards, i.e. negotiated procedure without call for competition. This procedure differs from all other awards procedure as it generally does not provide for any competition. The use of this procedure is limited to certain determined cases which are enlisted in section 63 of *Codice dei Contratti Pubblici* following article 32 of the Directive 2014/24/EU. Accordingly, direct awards are permissible:

where no bids or no suitable bids or no applications have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of contract are not substantially altered and on condition that a report is sent to the Commission if it so requests.

where the products involved are manufactured purely for the purpose of research, experimentation, study or development; this provision does not extend to quantity production to establish commercial viability or to recover research and development costs.

where, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator.

insofar as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities in question, the time limit for the open, restricted or negotiated procedures with publication of a contract notice cannot be complied with. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority.

for additional deliveries by the original supplier which are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance; the length of such contracts as well as that of recurrent contracts may not, as a general rule, exceed three years.

for additional works or services not included in the project initially considered or in the original contract but which have, through unforeseen circumstances, become necessary for the performance of the works or services described therein, on condition that the award is made to the economic operator performing such works or services, when such additional works or services cannot be technically or economically separated from the original contract without major inconvenience to the contracting authorities or when such works or services, although separable from the performance of the original contract, are strictly necessary for its completion.

for new works or services consisting in the repetition of similar works or services entrusted to the economic operator to whom the same contracting authorities awarded an original contract, provided that such works or services are in conformity with a basic project for which the original contract was awarded according to the open or restricted procedure. As soon as the first project is put up for bid, the possible use of this procedure shall be disclosed. This procedure may be used only during the three years following the conclusion of the original contract.

for public service contracts, when the contract concerned follows a design contest and must, under the applicable rules, be awarded to the successful candidate or to one of the successful candidates, in the latter case, all successful candidates must be invited to participate in the negotiations.

for supplies quoted and purchased on a commodity market.

for the purchase of supplies or services on particularly advantageous terms, from either a supplier which is definitively winding up its business activities, or the receivers or liquidators of a bankruptcy, an arrangement with creditors, or a similar procedure under national laws or regulations.

## b. What are the consequences for violation of the competitive bidding requirement?

Public contracts which are awarded in violation of the procedures set forth under *Codice dei Contratti Pubblici* are, in principle, deemed ineffective. However, this ineffectiveness is to be either declared by the competent administrative court upon timely petition of a competitor, or acknowledged by the same contracting authority through an internal review procedure (*autotutela*) aimed at verifying the lawfulness of decisions and actions previously taken.

# 8. Remedies and Enforcement

## a. Are there any remedies and enforcement mechanisms in the procurement legislation?

There are different remedies and enforcement mechanisms.

*Codice dei Contratti Pubblici* provides for both judicial and non-judicial procedures to be followed for claiming a violation of the provisions on public procurement procedures.

ANAC has been empowered with ADR powers and specific procedures are established by section 211 of *Codice dei Contratti Pubblici*.

Under *Codice dei Contratti Pubblici*, further ADR procedures are available with reference to the contract performance phase (i.e., *accordo bonario*, *collegio consultivo tecnico*, *transazione*, and *arbitrato*).

Judicial remedies are of course available and are subject to specific and tight deadlines. In this regard and in order to guarantee an effective remedies system, the contracting authorities are obliged to notify all participants of a procurement procedure on their decisions (including their intention to award the contract) and a stand-still period (such a period is extended in case of petition filed against the award and claiming interim measures) is established as general rule, in conformity to EU directives on remedies in the filed of public procurements.

## b. Are remedies available outside the scope of procurement legislation, e.g. civil law damage claims?

Generally speaking, as to non-judicial remedies, a bidder may ask the relevant contracting authority to start an internal review procedure (*autotutela*) aimed at verifying the lawfulness of decisions and actions previously taken.

Also, ordinary judicial remedies may be available depending on the actual circumstances and goals (e.g., for claiming damages, challenging a resolution adopted by the contracting authority and, according to a certain line of jurisprudence, even to have the contract declared null and void for violation of public norms).

## c. Is there a specific forum before which procurement disputes are heard?

All the disputes relating to public procurement procedures, including those relating to compensation and the annulment of contracts, fall, in principle, within the competence of administrative courts.

On the contrary, disputes regarding the performance of the subject matter of the contract are heard before civil or, at certain conditions, arbitration courts.

## d. Are there any timing requirements for the review?

Specific and tight deadlines are established for filing the judicial petitions or claims.

Such deadlines depend on the legal actions undertaken.

By way of an example, (i) the petition for judicial review to annul the decision to exclude from the procurement procedure or to award a contract is to be filed by 30 days from the receipt, the publication or the cognizance of the relevant decision, while (ii) the petition for judicial review regarding the voidance of a contract has to be filed by 180 days.

## e. What are the main preconditions for review?

Besides filing an objection with the contracting authority as detailed above, a bidder only has standing to file a petition for review if he can claim 1) an interest to receive the award, 2) a violation of his individual rights/interests resulting from public procurement law provisions and 3) demonstrate that as a consequence of such violation he suffered damages.

## f. What are admissible grounds for starting a review proceeding?

A review proceeding can be started if a bidder claims that its rights/legitimate interests have been violated by non-compliance with the public law provisions governing the awarding of public contracts. Inadmissible direct awards are the most drastic violations of procedural rules and are therefor an admissible ground for initiating review proceedings.

## g. Does a review proceeding affect an ongoing procurement procedure or an awarded contract respectively?

A petition for judicial review actually suspends the award procedure, i.e. award of the contract is banned as soon as the petition for judicial review has been served on the contracting authority and at least until 20 days after the notice (stand still period). The procedure restarts (and the contract can be awarded or executed) whether the competent court does not issue any interim measure or ruling in favour of the petitioner within such 20 days.

In case of awarded or executed contract, the court could declare the invalidity of such a contract, unless there is general public interest to maintain in force the contract. In such a case, pecuniary sanctions are imposed against the contracting authority and the petitioner would receive a damages compensation.

## h. What are the consequences of a successful review proceeding for the affected procurement procedure or awarded contract respectively?

The competent administrative court will annul the resolutions adopted by the contracting authority in breach of the applicable laws or regulations. Depending on the scope of such resolutions, the court would also indicate the adequate measure to be taken in order to eliminate the violation and satisfy the interest of the appellant (e.g., renovation of the tender, re-admission in the procedure, replacement of the contractor, execution of a new contract).

## i. How long does a judicial proceeding for review take?

First instance of judicial proceedings relating to public procurement matter use to take few weeks/months. As a matter of law, in case of interim measures are requested, the hearing is to be held as soon as possible. In any case, hearing relating to public procurement issue should be held by 30 days.

## j. Must unsuccessful bidders be notified before the award? If so, when?

Yes, in order to enable frustrated bidders to seek legal protection within the applicable time limits, bidders must be promptly notified before the award. The procurement contract can only be concluded 35 days after the notification has been issued.

## k. Are review proceedings common?

Yes.

## l. Are damage claims in relation with procurement procedures common?

They are quite common, but rarely successful.

## m. What are the leading court decisions involving procurement disputes?

Due to the recent implementation of the *Codice dei Contratti Pubblici*, no national rulings can be regarded as a "leading decisions" so far. Generally speaking, the decision of the grand chamber of the Council of State are perceived as leading cases.

# 9. Other Relevant Rules of Law

## a. Are there any related bodies of law of relevance to procurement by public agencies?

Public agencies are generally subject to public and administrative laws and regulations, as related to internal competences and procedures, budgets and payments.

## b. Does a specific contract law apply for public contracts?

General civil law principles and provisions apply with respect to the performance of the subject matter of the contract. However, specific peculiarities apply to a public contract (in particular, in relation to public works), such as those regarding assignability of the contract, withdrawal right in favour of the contacting authority, issuance of a performance guarantee, penalties for default, compensation claims. These peculiarities are set forth either by the *Codice dei Contratti Pubblici* or general public and administrative laws.

# 10. Industry sectors of special importance or with a specific procurement regime

## a. Are there any specific laws or practices that apply in the technology sector?

Along with the *Codice dei Contratti Pubblici*, *Decreto Legislativo 7 marzo 2005, n. 82* (*"Codice dell'Amministrazione Digitale"* - e-Government Code) would apply through specific rules and requirements for technology sector.

## b. Are there any specific laws or practices that apply in the defense sector?

As said above, article 15 of Directive 2014/24/EU is exactly transposed into *Codice dei Contratti Pubblici*, which does not apply to contracts falling within the scope or rather excluded from the scope of Directive 2009/91/EC (as transposed into Italian legislation through *Decreto Legislativo 15 novembre 2011, n. 208*). Indeed, in such cases, *Decreto Legislativo 15 novembre 2011, n. 208* applies.

## c. Are there any specific laws or practices that apply in the health care sector?

Without prejudice of the *Codice dei Contratti Pubblici* principles and procedures, pharma companies could be subject to mandatory minimum rebates in the context of public procurement. Indeed, the tender starting price will be equal to the unitary prices net of mandatory minimum rebates, to which bidders may apply additional discounts.

## d. Are there any specific laws or practices that apply to any other particular industry sector?

Generally speaking, the *Codice dei Contratti Pubblici* applies to public procurement procedures, while specific provisions may apply with reference to industry requirements or technical aspects.

# 11. Looking Ahead

## a. Are there any proposals to change the law in the future?

The *Codice dei Contratti Pubblici* is subject to periodical checks-up, and reviewed and amended accordingly. Also, ANAC is empowered and due to adopt (several) resolutions to implement certain general provisions of the *Codice dei Contratti Pubblici*.

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