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The Risks of Emergencies in Public Procurement

Abstract – Natural disasters, catastrophes or other exceptional events normally require a prompt response. Unpredictable urgency permits derogations of competitive procedures for the award of public contracts according to the European Directives. Such possibility has often been interpreted extensively and has led to a wide discretion and the risk of abuses and corruption. The Italian experience in the emergency public procurement sector highlighted that the recourse to derogations involved several infringements of national and European principles. The most efficient way to react to emergency is to provide in advance the organisational and contractual instruments to define the response to emergencies situations, avoiding undue derogations. Moreover new technologies permit an effective monitoring of the quality of the interventions avoiding waste and assuring the best quality for users, taxpayers and citizens.

Keywords – Public procurement, Emergency, Urgency, Corruption, Transparency, Accountability, Integrity.

JEL classification codes – H57, K00, K23

1. – *Introduction*

Emergency situations commonly require prompt action. Natural disasters, catastrophes or other exceptional events are normally faced using extraordinary means. Unpredictable urgency permits derogations of competitive procedures for the award of public contracts according to the European Directives. Nonetheless such possibility has often been interpreted extensively and has led to a wide discretion and the risk of abuses and corruption [RACCA – YUKINS, 2014]¹. Such phenomena have been highlighted at any level of emergency interventions [SCHULTZ – SØREIDE,

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¹ EU Commission, «EU Anti-Corruption Report», 3 February 2014, 26.

2006, pp. 3-5]. The Italian case is symptomatic of the wideness of derogation of the normal award procedures, not only in cases of objective emergency, but even in case of urgency related to delays and poor organisation of 'great events' that require works, supplies and services in time for the defined event. Such derogation have led to corruption, waste of public funds and bad quality of the interventions, with a double damage for the citizens.

2. – *Procurement procedures to face the emergencies in Italy: the risks of derogations*

In Italy, emergency laws and 'emergency administrative acts' (*ordinanze in deroga*) have been adopted since the early '70s to face natural disasters (earthquakes in Friuli, Irpinia) and were later included in the law establishing the Italian 'National Service of the Civil Protection' [CAVALLO PERIN, 2005, p. 781]. The emergency administrative acts (ordinances) fall within the broader category of the 'ordinances of necessity and urgency' provided for the exercise of the powers in case of local emergency [CAVALLO PERIN, 2006, pp. 361-373]². These administrative acts are immediately enforceable and are admitted in case of 'unpredictable urgency', and for a limited period of time ('temporariness')³. 'Urgency' corresponds to a circumstance that cannot be postponed due to the inevitable danger that threatens the public interests. The derogatory effects of the adopted measure must be limited in time, in close relation with the persistence of the state of necessity. Moreover, it should be reminded that the content of the emergency ordinances is subject to the general principles of the Italian legal system. Public authorities are subject to the Constitutional principles of impartiality and efficiency⁴, in their organisation and activities in order to pursue the public interest [RACCA – CAVALLO PERIN, 2013, pp. 20-39]⁵. A commissioner for the emergency assumes all the related powers to adopt any administrative act necessary to face the emergency [CAVALLO PERIN – GAGLIARDI, 2012, pp. 189-215].

The idea that natural disasters would enable the government to derogate law provisions encounters further limits⁶. The declaration of the state of

² Law 24 February 1992, No. 225, National Service of the Civil Protection Law. Cass. S.U., 7 March 2006, No. 4813.

³ Italian Constitutional Court., 28 May 1987, No. 201; Cons. St., IV, 16 April 1998, No. 197. Italian Authority for the Supervision of Public Contracts for works, services and supplies, 30 July 2002, Determinazione No. 20.

⁴ Italian Constitution, Art. 97.

⁵ Italian public contracts code, D.lgs. 12 April 2006, No. 163, Art. 2, par. I.

⁶ Law 24 February 1992, No. 225, art. 2, par. I, c).

emergency must specify the rules that can be waived by the subsequent ordinances and must motivate such choice [GIANI, 2014, pp. 395-410]⁷. The need to justify the individual ordinance that involves the possibility to provide exceptions to the law and the existence of related requirements should be assessed on a case-by-case basis. Finally, derogations to law provisions effectively enforced through further ordinances must be reasonable and proportionate to the specific emergency to be faced⁸.

During the last years, there was an increase of emergency ordinances providing exceptions to national rules⁹, most of which were public procurement rules [GIANI, 2012, pp. 279-294.]. The adoption of emergency ordinances, indeed, was often used as a means to avoid the application of Italian and European provisions¹⁰.

An abuse of the 'emergency powers' occurred whenever the urgency was related to the public administration's behaviour¹¹. Public administrations' delays have been used to motivate emergency situations and to conceal the organizational inefficiency of public authorities. The most evident example of such praxis has been provided by the management of the so-called great events – by way of example, Olympic games, sport events, international meetings, concerts and so on. Law provisions, indeed, have provided the possibility, then repealed, to apply emergency rules also to such category of events [CAVALLO PERIN – GAGLIARDI, 2012, pp. 189-215]¹². Such events are not connected with an emergency situation in its strictest meaning, as they might normally be faced by public authorities' ordinary means¹³. In other words, the so-called great events are not generally 'unpredictable'. In such cases, indeed, an appropriate planning of the contractual activities could be sufficient to meet the public needs¹⁴.

In the Italian experience, therefore, the great events have often been traced

⁷ Law 24 February 1992, No. 225, art. 5, par. V.; Italian Authority for the Supervision of Public Contracts for works, services and supplies, 5 April 2000, Determinazione No. 21.

⁸ Cass. S.U., 7 March 2006, No. 4813; Cons. St., VI, 8 March 2006, No. 1270.

⁹ Corte Conti, Audit Section, 25 June 2009, «Relazione sul Rendiconto generale dello Stato 2008», II, 1.2, p. 159.

¹⁰ Corte dei Conti, Audit Section, 19 November 2009, Deliberazione No. 23/2009/P.

¹¹ Italian Authority for the Supervision of Public Contracts for works, services and supplies, «Relazione annuale per il 2010», 15 June 2011.

¹² Law 7 September 2001, No. 343, Art. 5, par. V. This article extended the rules provided for emergency situations (natural disasters) also to the so-called great events. This rule was repealed by the D.L. 24 January 2012, No. 1, converted in Law 24 March 2012, No. 27.

¹³ Corte dei Conti, Audit Section, 19 November 2009, Deliberazione No. 23/2009/P.

¹⁴ Italian Parliament, Comitato per la legislazione – XVI legislatura, «Il Parlamento di fronte alle procedure, alle strutture e ai poteri dell'amministrazione dell'emergenza», 23 November 2010.

back to emergency and the attribution of ‘extraordinary’ powers in the public procurement sector to the public authorities has been used to guarantee the ‘regular’ development of the relevant event.

The lack of capacity to manage the efforts required by a ‘great event’ has required emergency powers in order to assure the conclusion of the needed works in time for the fixed event [CAVALLO PERIN, 2006, pp. 361-373; DI CRISTINA, 2012, pp. 216-218].

The fixed deadline for the great event becomes the reason of urgency and for the attribution of emergency powers (with the same characteristics of the real natural, objective emergencies).

The planning deficiency involves often criticalities, such as the widespread use of negotiated procedures without contract notice, for imprecise performances that will often lead to undue modifications, extensions and, at the end, to the loss of control on public resources¹⁵.

The Italian case highlights that the possibility to provide exceptions to ordinary rules paves the way for illegality and corrupt behaviours¹⁶. The derogation of common rules, together with the related discretionary powers, has been considered a way to favour some economic operators and to assure undue advantages to the procurement officials and politicians through a huge waste of public resources and a violation of the fundamental rights of the citizens [RACCA – CAVALLO PERIN, 2014, 7-9]. In such situations, it is even more complex to assure the accountability of the public officials involved.

The data concerning the use of such extraordinary ordinances and the amount of such derogations in Italy in the recent years are significant: since 2000, 474 ordinances have been adopted for an amount of more than 20 billion euros, of which many have derogated the rules on public contracts and recently have revealed illegalities, corruption, and an unsatisfactory quality of the performances obtained¹⁷.

It is now commonly recognised that it would be appropriate to assure a

¹⁵ Italian Authority for the Supervision of Public Contracts for works, services and supplies, 6 November 2013, Determinazione n. 5, «Linee guida su programmazione, progettazione ed esecuzione del contratto nei servizi e nelle forniture».

¹⁶ Corruptive practices are often put in place through behaviours such as contacting who provides funds or illicitly provides utilities or money for the benefit of the civil servants responsible for the award procedures.

¹⁷ Italian Authority for the Supervision of Public Contracts for works, services and supplies, «Relazione annuale per il 2011», 4 July 2012, pp. 297-298, highlighting that ordinances issued in 2000 and characterised by emergency amounted to only 22. In 2009, such ordinances amounted to 49 (of which 7 containing exceptions to the rules on public procurement); in 2010 they amounted to 51 (of which 25 containing exceptions to the rules on public procurement); in 2011 they amounted to 72 (of which 15 containing exceptions to the rules on public procurement).

stricter application of the ‘state of emergency’, complementing it with tools aimed at preventing and fighting public officials’ and economic operators’ misconduct.

3. – *Emergencies and EU principles in the public procurement sector*

Even in the emergency situations, compliance with National and European principles is required¹⁸. At the European level, public procurement contracts presenting a cross-border relevance¹⁹ must guarantee free movement of goods²⁰, freedom of establishment and free movement of services²¹, as well as the respect of the principles, connected with such fundamental rules, of equal treatment, non-discrimination, mutual recognition, proportionality and transparency [RACCA – CAVALLO PERIN, 2013, pp. 20-39]²².

The Italian experience in the field of emergency public procurement highlighted that the recourse to the power of derogating law provisions has involved several infringements of National and European law principles [SALAMONE, 2008, p. 952].

The provision of generalised waivers of the public procurement rules has concerned above all provisions in the field of publicity and transparency of the award procedure [TREPTE, 2005, 16]. The lack of publication of the award notice and of the transmission of information to the Observatory for Public Contracts of Works, Services and Supplies²³, the use of the negotiated procedure without publication of the contract notice (thus exceeding the

¹⁸ Italian Authority for the Supervision of Public Contracts for works, services and supplies, «Relazione annuale per il 2007», 9 July 2008; Italian Authority for the Supervision of Public Contracts for works, services and supplies, 14 January 2004, Determinazione No. 1; Cons. St., IV, 6 August 2013, No. 4149.

¹⁹ Such principles, under certain circumstances, must be applied also to public contracts excluded from the field of application of the European rules (reference is made to public procurement contracts below the European thresholds).

²⁰ Treaty on the Functioning of the European Union – TFEU, Art. 26, par. II, and Artt. 28 et seq. See also: Treaty of the European Union – TEU, Art. 3. ECJ, III, 19 June 2008, in C-454/06, *Pressetext Nachrichtenagentur GmbH*; ECJ, III, 11 January 2005, in C-26/03, *Stadt Halle*.

²¹ Treaty on the Functioning of the European Union – TFEU, Art. 56 et seq.

²² Directive 2004/18/EC, Art. 2. In the same Directive see also the Recital No. 2.

²³ Italian public contracts code, D.lgs. 12 April 2006, No. 163, Art. 6. See: O.P.C.M. 6 April 2009, No. 3753, «Primi interventi urgenti conseguenti agli eventi sismici che hanno colpito la provincia di l’Aquila ed altri comuni della regione Abruzzo il giorno 6 aprile 2009», Art. 3. Italian Authority for the Supervision of Public Contracts for works, services and supplies, «Relazione annuale per il 2011», 4 July 2012, p. 292.

notion of ‘urgency’ provided by the European legislation)²⁴, as well as the unjustified use of direct awards (*‘affidamenti diretti’*) are the most frequent infringements. Each one of these behaviours entails the violation of the principles of non-discrimination, equal treatment and transparency²⁵, while frustrating the principle of competitive tendering [GORDON – RACCA, 2013, p. 12]²⁶. Moreover, those behaviours result particularly inappropriate as they are not connected to a real situation of ‘emergency’. In such cases, the infringement might violate European principles, too. Indeed, according to EU rules, the exception to public procurement rules must be justified by «reasons of extreme urgency brought about by events unforeseeable by the contracting authorities»²⁷. The ‘urgency’ feature of the emergency interventions assures compliance with those EU rules that provide the possibility to derogate publicity obligations required within the ordinary award procedures and to award public contracts through a negotiated procedure without publication of a contract notice.

The usual absence of a situation of extreme urgency, of the unpredictability of the event and of the circumstance for which the event is not attributable to the contracting authority – all elements that would have justified the recourse to procedures derogating to European rules – encouraged the Italian President of the Council of Ministers to issue a directive aimed at limiting the adoption of emergency ordinances, while highlighting the need to respect the limits deriving from the European rules [GNES, 2005, pp. 641 et ff.]²⁸.

Further infringements regarded the elusion of the monitoring provided in Italy for public contracts. The extension of the emergency legislation also to the so-called great events²⁹ was indeed combined with a reduction of audits³⁰ internal to the public sector, such as audits conducted by the

²⁴ Directive 2004/18/CE, Art. 31, par. 1 (c). See also: Directive 2014/24/EU, Art. 32, par. 2 (c).

²⁵ Italian public contracts code, D.Lgs. 12 April 2006, No. 163, Art. 57, par. VI.

²⁶ OPCM 26 September 2006, No. 3543, which appointed the Mayor of Rome as the Commissioner for traffic and mobility emergency.

²⁷ Directive 2004/18/CE, Art. 31, par. 1 (c). See also: Directive 2014/24/EU, Art. 32, par. 2 (c).

²⁸ Italian President of the Council of Ministers, Direttiva, 22 October 2004, Art. 2, par. I and Art. 3, par. I.

²⁹ D.L. 7 September 2001, No. 343, Art. 5*bis*, par. V, converted in Law 9 November 2011, No. 201. This article extended the rules provided for emergencies situations (natural disasters) also to the ‘grandi eventi’. This rule was repealed by the D.L. 24 January 2012, No. 1, converted in Law 24 March 2012, No. 27.

³⁰ D.L. 23 May 2008, No. 90, Art. 14, converted in Law 14 July 2008, No. 123. The exclusion from the preventive control of the Court of Auditors has followed the request by the Court to the Italian President of the Council of Ministers requiring the transmission of the emergency ordinances.

Authority for the Supervision of Public Contracts³¹ and the preventive supervision of legality conducted by the Italian Court of Auditors (*Corte dei Conti*)³². The same Court, in order to limit the absence of audits and the indiscriminate use of waivers, declared as falling within the competence of the National Service of the Civil Protection³³ only those events that, although other than natural calamities and catastrophes, cause serious risks for life, goods and the environment³⁴. Therefore in order to fall within the competence of the Civil Protection, also the ‘great events’ should entail serious risks.

In such cases the emergency ordinances’ powers should not exclude the enforcement the monitoring powers on public contracts, as there would be a lack of instrumentality between the need of immediate intervention and the derogation of the audit activities.

In Italy, the frequent and generalised use of waivers caused the disappearance of a close relation between the ‘event characterized by emergency’ and the ‘extraordinary means and powers’. Nonetheless, the recourse to ‘emergency ordinances’ did not decrease. In the most recent years, cases of asserted ‘emergency’ continued to be used as a way to derogate the national rules implementing the EU Directives on public procurement³⁵. The Expo 2015 case is emblematic. The repeal of the provision that equalised ‘great events’ to ‘emergency situations’, identified in Expo 2015 the exception to such rule³⁶. This choice, connected with the evident delays of the works

³¹ Italian public contracts code, D.lgs. 12 April 2006, No. 163, Art. 6. See: O.P.C.M. 6 April 2009, No. 3753, «Primi interventi urgenti conseguenti agli eventi sismici che hanno colpito la provincia di l’Aquila ed altri comuni della regione Abruzzo il giorno 6 aprile 2009», Art. 3.

³² Law 14 January 1994, No. 20, Art. 3.

³³ D.L. 7 September 2001, No. 343, Art. 5, par. 1 e 5, converted in Law 9 November 2011, No. 201

³⁴ Corte Conti, Audit Section, 18 March 2010, Deliberazione No. 5/2010/P.

³⁵ OCDPC, 13 June 2014, No. 170, «Primi interventi urgenti per il maltempo in Veneto tra il 30 gennaio e il 18 febbraio 2014», Art. 4; OCDPC, 31 March 2014, No. 162, «Interventi urgenti di protezione civile per il disinnesco di un ordigno bellico inesplosivo nel comune di Vicenza», Art. 2; OCDPC 5 March 2014, No. 157, «Primi interventi urgenti per gli eventi alluvionali in Toscana dal 1° gennaio all’11 febbraio 2014», Art. 3; OCDPC, 21 February 2014, No. 149, «Primi interventi urgenti di protezione civile per gli eccezionali eventi meteorologici di dicembre 2013 e gennaio 2014 nella regione Liguria», Art. 3; OCDPC, 21 February 2014, No. 150, «Primi interventi urgenti di protezione civile in per gli eccezionali eventi meteorologici di novembre e dicembre 2013 nella regione Abruzzo», Art. 3; OCDPC, 8 February 2014, No. 145, «Primi interventi urgenti per gli eccezionali eventi meteorologici di ottobre 2013 nei comuni di Bernalda, Montescaglioso, Pisticci e Scanzano Jonico in provincia di Matera», Art. 3.

³⁶ D.L. 26 April 2013, No. 43, Art. 5, par. 1(c), converted in law 24 June 2013, N. 71. See also: D.L. 28 March 2014, No. 47, Art. 13 converted in law 23 May 2014, No. 80.

required for the development of the event, has come along with several news reports highlighting that the use of powers to derogate represented solely an instrument to avoid the use of 'ordinary' powers, thus undermining the correctness and integrity of the public administrations' behaviour.

4. – *Contractual instruments to organise in advance emergencies response*

The peculiarities of emergency situations can be effectively faced without derogations of the rules on public procurement³⁷. The unpredictability of emergency situations requires a particular reaction to them; yet, in many cases it would allow the use of 'ordinary' tools.

The risks connected to an emergency context and to the recourse to 'extraordinary means and powers' can be avoided (or at least reduced) through preventive instruments prepared to face emergencies. It is commonly recognized that emergencies will arrive; the uncertainty concerns just the exact moment when they will occur. Nonetheless, even in the procurement sector is possible to define in advance the correct procedures and means to better face the emergencies.

It is possible, as a way of example, to define in advance framework agreements maybe with more economic operators [RACCA – ALBANO, 2013, 179-213] in order to get, whenever needed, the goods and services whose use is normally required during emergencies.

Some experiences are evolving in this direction in order to avoid the common risks of waste and corruption during the emergency and above all the promptness and the quality of the interventions for the people involved³⁸.

The recognised risk of corruption in emergency procurement has been highlighted at any level [SCHULTZ – SØREIDE, 2006, 9-14] and the need of new organizational structures, action plans and contractual tools is evident. Toolkits and phone applications with the main set of contracts available might become a new standard to face emergencies and get goods and services in the more efficient and transparent way³⁹.

Some recent experiences demonstrate that it is possible to prevent emergencies through the use of contractual techniques and practices aimed

³⁷ United Nations Office on Drug and Crime (UNODC), «Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption», cit., 33.

³⁸ Expo 2015, «Rapporto di sostenibilità Expo Milano 2015», 2013, available at <http://www.expo2015.org/it/amministrazione-trasparente/sostenibilita>.

³⁹ Office of Management and Budget – Office of Federal Procurement Policy, Memorandum for Chief Acquisition Officers Senior Procurement Executives – D. I. Gordon, «Emergency Acquisitions», January 2011.

at guaranteeing the promptness of intervention. In the United States, «agencies are encouraged to seek out pre-positioned contractors to facilitate a timely emergency response», some of such contractors being already inserted in lists available at government sites⁴⁰.

One of the main problems arising in this context concerns the unavailability of funds in advance of an emergency. For such reason, specific contractual arrangements may be used for emergency purchasing. The ‘Indefinite Delivery, Indefinite Quantity’ contracts (IDIQ) provide for an indefinite quantity of services for a fixed time [YUKINS, 2008, 546-548]. They are used when GSA can’t determine, above a specified minimum, the precise quantities of supplies or services that the government will require during the contract period. IDIQs help streamline the contract process and speed service delivery⁴¹.

Two of the contractual tools for emergencies are basic ordering agreements (BOAs)⁴² and blanket purchasing agreements (BPAs)⁴³, which allow to get additional procurement professional support from the private sector. Such support personnel may be of help for activities such as market research, contract documentation, and contract closeout, while agency officials would keep themselves responsible for all inherently governmental activities, including the award and modification of contracts⁴⁴ and, however, oversight on the whole process. In addition, public officials (buyers) should also «consider establishing service-for-fee agreements with the Defense Contract Management Agency (DCMA) or the General Services Administration (GSA) Assisted Acquisition program to evaluate contractor capabilities and support contract administration», as well as with the «Defense Contract Audit Agency (DCAA) to evaluate cost reasonableness and conduct contract audits»⁴⁵.

⁴⁰ These lists are: GSA Disaster Relief and Emergency Preparedness Aisle, available at https://www.gsaadvantage.gov/advantage/main/start_page.do?BV_SessionID=@@@@1098471824.1288644885@@@@&BV_EngineID=ccdbadellffmdikcflgcefmdgfbdgjn.0&cat=ADV.DR; GSA Wildland Fire and Equipment Aisle, available at https://www.gsaadvantage.gov/advantage/main/start_page.do?BV_SessionID=@@@@0266677814.1288645062@@@@&BV_EngineID=ccddadell dmlddkcfkgcefmdgfbdfgl.0&cat=ADV.FIRE; Interagency Contract Resource List, available at <https://contractdirectory.gov/contractdirectory/>.

⁴¹ IDIQ contracts are most often used for service contracts and architect-engineering services. Awards are usually for base years and option years. The government places delivery orders (for supplies) or task orders (for services) against a basic contract for individual requirements. Minimum and maximum quantity limits are specified in the basic contract as either number of units (for supplies) or dollar values (for services).

⁴² FAR 16.703 (a).

⁴³ FAR 13.303-1.

⁴⁴ FAR 7.503(c)(12).

⁴⁵ Office of Management and Budget – Office of Federal Procurement Policy, Memorandum for Chief Acquisition Officers Senior Procurement Executives – D. I. Gordon, «Emergency Acquisitions», cit., 4.

Further contractual instruments used within the US legal system are the Fixed-Price Contracts and the Time-And-Materials (T&M) Contracts⁴⁶. In the first case, «the government assumes less risk by entering into some variation of a fixed-price contract. Fixed-price contracts place the maximum risk and full responsibility for profit or loss on the contractor. These contract types tie payment to tangible results – for example, a completed and delivered product – and their use is required when acquiring commercial items». The Time-And-Materials (T&M) Contracts⁴⁷ can be used for commercial services under specified conditions. A T&M contract may be appropriate if it is not possible, when placing the contract or order, to estimate the extent or duration of the work or to anticipate costs with any reasonable degree of certainty. These circumstances must be established and should not be assumed simply because an emergency exists. These contractual models are useful to identify a small number of capable contractors, whenever an agency needs to establish a new contract to meet a repetitive requirement to bestow multiple award task and delivery order contracts⁴⁸.

During emergency situations, the US legal system allows forms of coordination among different agencies through ‘interagency acquisitions’, which include the Federal Supply Schedules operated by GSA⁴⁹, multiagency BPAs established under a Multiple Award Schedule⁵⁰, government-wide acquisition contracts⁵¹ and multiagency contracts⁵²; purchases on interagency contracts, including the Federal Supply Schedules, may be made through ‘direct acquisition’ where the requesting agency places an order directly against another agency’s contract⁵³.

The state of emergency may allow to confer greater discretion to the ‘contracting officer’⁵⁴. In such cases the greater powers recognised to public

⁴⁶ FAR 16.601.

⁴⁷ FAR 16.601.

⁴⁸ See FAR 16.504.

⁴⁹ See FAR 8.4. The National Response Framework documents are located at <http://www.fema.gov/emergency/nrf/>.

⁵⁰ See FAR 8.405-3(a)(4).

⁵¹ Section 5112(e) of the Clinger-Cohen Act.

⁵² Established pursuant to the Economy Act; see FAR 16.505(a)(7).

⁵³ A number of agencies also offer acquisition assistance to place orders on another agency’s behalf. See Office of Management and Budget – Office of Federal Procurement Policy, Memorandum for Chief Acquisition Officers Senior Procurement Executives – D. I. Gordon, «Emergency Acquisitions».

⁵⁴ Office of Management and Budget – Office of Federal Procurement Policy, Memorandum for Chief Acquisition Officers Senior Procurement Executives – D. I. Gordon, «Emergency Acquisitions», cit., p. 16. See: FAR 16.603.

officials⁵⁵ are counterbalanced by transparency and audits⁵⁶. These latter include also forms of evaluation of the activities carried out by the agency that managed the emergency⁵⁷. At the European level, the management of emergencies is commonly assigned to single authorities or agencies, according to the respective areas of competence. Within this framework, the European Food Safety Authority (EFSA) provides for scientific advice and communication on risks associated with the food chain, including during emergencies related to the security of food and animal feed, also by cooperating with the relevant national authorities, while the European Medicines Agency (EMA) deals with emergencies connected with the need of specific medicines or with the trade in medicines lacking the required certifications.

These organisations, directly or through the relevant national authorities, carry out also the procurement activities related to those situations of emergency that they have to manage. Then, a form of cooperation at the European level could be prospected, for the purpose of coordinating the procurement activities in order to face emergencies.

The EU Directives on public procurement adopted in 2004 already provided contractual tools (framework agreements) appropriate for anticipating situations of emergency deriving from natural catastrophes, as well as organisational models (central purchasing bodies – CPBs) equipped with high professional skills and with means apt to manage co-ordinately such events [RACCA – ALBANO, 2013, 179-213]⁵⁸. The European policies and the new public procurement Directive⁵⁹ expressly incentivise public administrations to cooperate at the European level to pursue their own institutional purposes, both through the use of agreements and through the establishment of autonomous legal entities [RACCA, 2014, 455-492].

⁵⁵ Office of Management and Budget – Office of Federal Procurement Policy, Memorandum for Chief Acquisition Officers Senior Procurement Executives – D. I. Gordon, «Emergency Acquisitions», cit., pp. 15-17.

⁵⁶ Inspections and audits: during an emergency, appropriate surveillance is of utmost importance to ensure timely and satisfactory contract performance. An instruments to do this may be the establishment of an agreement with personnel from another agency in the area where delivery is to occur to conduct inspections. Both the General Services Administration (GSA) and the Defense Contract Management Agency (DCMA) offer contract administration services; in addition, the Defense Contract Audit Agency (DCAA) performs contract audits.

⁵⁷ Office of Management and Budget – Office of Federal Procurement Policy, Memorandum for Chief Acquisition Officers Senior Procurement Executives – D. I. Gordon, «Emergency Acquisitions», cit., pp. 12-13.

⁵⁸ Directive 2004/18/CE, Art. 11 on central purchasing body and Art. 32, on framework agreement. See also: Directive 2014/24/EU, Art. 33 on framework agreement and Artt. 37-39 on joint procurement.

⁵⁹ Directive 2014/24/EU, Recitals 32-33 and 73, Artt. 37-39.

In Italy, local entities can arrange for prevention programs in order to identify the priorities of intervention and the action plans for implementing Civil Protection's actions, to face the dangerousness of events and vulnerability of the relevant geographic area⁶⁰. On the basis of such programs, 'plans of emergency' are defined, considering all the operative procedures of intervention in order to face whatever expected calamity in a certain area. The contractual activity in such situations is commonly carried out by the authority in charge of managing the emergency.

The criticalities previously recalled have induced to define coordinated forms of procurement through the national central purchasing body (Consip S.p.A.) and the use of framework agreements, therefore anticipating the state of emergency. This is the case of the emergency housing solutions. This category of supply allows the development of a preventive definition of the contractual clauses through the use of 'ordinary' procedures⁶¹. The definition of certain goods and services commonly required during emergencies pushed the Italian central purchasing body to publish a contract notice for a framework agreement aimed at procuring emergency housing solutions to be used during the next four years in case of emergency⁶².

Contractual instruments, such as framework agreements, can guarantee the flexibility and promptness of the interventions required in emergency contexts. The framework agreements allow to identify in the master contract one or more economic operators and to award the subsequent contracts whenever needed. Such economic operators are able to directly intervene when a natural calamity occurs, on the basis of the terms and conditions defined into the framework agreement.

Another possibility is to provide a new competitive tendering (through a simplified procedure, a so-called mini competition) that allow to adapt some contractual conditions to the needs deriving from the calamitous event.

Framework agreements may allow to 'prevent' the instruments to face the state of emergency avoiding that recourse derogations often aimed at eluding law provisions.

The reorganization of the departments managing the contractual activities could bring further benefits in terms of efficiency and effectiveness both of the award and of the execution of the emergency public contracts. The

⁶⁰ Law 12 July 2012, No. 100. See also: National Service of the Civil Protection, «Map of municipal emergency planning», available at http://www.protezionecivile.gov.it/jcms/en/piani_di_emergenza_comuna.wp?request_locale=en.

⁶¹ Italian Authority for the Supervision of Public Contracts for works, services and supplies, 18 July 2013, opinion AG 24/13.

⁶² Consip S.p.A., framework agreement for emergency housing solutions, available at http://www.consip.it/gare/bandi/storico_gare/2013/gara_0002/index.html.

coordination of the procurement procedures may allow to define a preventive scheduling (of the most common needs) reducing waste of public resources. Highly trained and skilled public officials may guarantee transparency also through the use of technological tools allowing the creation of an 'institutional memory' in the emergency public procurement sector. The availability of and access to information, benchmarking and institutional memory reduce the risks of incompetence and corruption through a deep monitoring and an accurate accountability system⁶³.

The monitoring activity on economic operators and the provision of ethics and compliance systems [BUFFINGTON – FLYNN, 2006, pp. 321 et. seq.; CARTER – JENNINGS, 2004, pp. 145 et seq.; KAPLAN, 2008; MURPHY, 2010]⁶⁴ is essential too. It allows to gather information on past performance and to impose sanctions such as suspension, debarment, blacklisting, or to provide incentives for them. Such instruments can avoid the adoption of extraordinary measures aimed at exploiting the emergency in order to elude law provisions, while guaranteeing transparency and accountability, where extraordinary power are required by circumstances.

⁶³ United Nations Office on Drug and Crime (UNODC), «Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption», cit., 33.

⁶⁴ The US legal Framework provide a committee for drafting federal guide-lines on how to state on corporate sentences (see: *Sentencing Reform Act*, Pub. L. No. 98-473, 98. Stat. 1873,1987, 18 U.S.C.A. §§ 3351-3742; 28 U.S.C.A. §§ 991-998) and a guidelines system for establishing and maintaining within the corporates specific internal controls to detect and prevent improper conduct (*United States Federal Sentencing Guidelines*, 1st November 1991, 18 U.S.C. §§ 1365 (f), 1801; 42 U.S.C. §§ 1129(a), 14133; 49 U.S.C. § 31310). About the case-law *United States v. Johnson & Johnson*, 37, Cr-99 (DDC 2011); *United States v. Caputo*, 456 F. Supp. 2d 970 (N.D. Ill 2006); *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004); *Fanfan v. United States*, 2004 WL 1723114 (D. Me. 2004); *Hollis v. City of Buffalo*, 28 F. Supp. 2d 812, 821 (W.D. N.Y. 1998); *United States v. Exxon Corp.*, No. A90-015 CR (U.S. Supreme Court 1990); *Hoffman – LaRoche Ltd. et Rhone Paulenc*, Plead Agreement, 1999; *Caremark Intern. Inc.* Derivate Litigation, 698 A.2d 959 (Del. Ch. 1996); *United States v. Daiwa Bank* (SDNY 1995 Cr 947); *United States v. C.R. Bard, Inc.*, 848 F. Supp. 287 (D. Mass. 1994); *United States v. NME Psychiatric Hospital*, 94 Cr. 0268 (D.D.C. 1994). On compliance and ethics programs in the public procurement sector see: *United States v. Metcalf & Eddy, Inc.*, CA No. 99CV-12566-NG (D. Mass. 1999); *United States v. Depuy, Inc.*, 34 (DDC 1999); *United States v. Lucas Aerospace Communications & Electronics, Inc., Wholly Owned Subsidiary of Lucas Industries, Inc.* (1994 Cr 493 E.D. N.Y.); *United States v. Hernandez*, 952 F.2d 1110 (9th Cir. 1991). On the relevance of compliance and ethics programs for the contracting authorities see *United States Federal Acquisition Regulation*, Vol. 73, §§ 67064 – 67091-92, Rev. 12 November 2008 about the requirements for a federal contractor code of business ethics and conduct, an internal control system, and disclosure to the Government of certain violations of criminal law, violations of the civil False Claims Act, or significant overpayments. See OECD, 2010, «Good practice Guidance on Internal Control, Ethics and Compliance».

5. – Conclusions

Natural disasters, catastrophes or other exceptional events have traditionally led to the admission of extraordinary powers to promptly face the situation. The latest experiences prove that the most efficient way to react to emergency is not the derogation of normal rules, at least in the procurement sector. An efficient organization can provide in advance the contractual instruments to define the response to emergency situations. *A fortiori*, it is necessary to avoid undue derogations whenever there is not an objective urgency, and the solution to subjective urgency, due to inefficiency of public administrations, is to better organize the interventions for ‘great events’ in advance.

The use of negotiated procedures without prior publication of a contract notice implies a direct award, without any competition, and is admitted only in case of unforeseeable events. The extreme urgency shall not in any event be attributable to the contracting authority⁶⁵.

Moreover, as highlighted, such derogations do not assure a prompt and efficient reaction to the real emergency. The lack of capacity and the corruption of public officials, indeed, do not assure the best value for the victims of the natural disaster [SCHULTZ – SØREIDE, 2006, 7], neither in the immediate interventions, nor in the long-term reconstruction. The double damage is even worse as it strikes human beings and violates human rights.

The new technologies sometimes permit to foresee disasters, but can also permit the monitoring of the quality of the interventions, avoiding waste and assuring the best quality for users, taxpayers and citizens.

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⁶⁵ Directive 2014/24/EU, Art. 32, par. 2 (c).

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